HB 135-16
HC 1281-16

KAS FOODS (PVT) LTD
versus
GLADYS MOYO
and
ACTING PROVINCIAL MINING DIRECTOR – MIDLANDS

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 26 MAY 2016 AND 2 JUNE 2016

Urgent Chamber Application

V. Masvaya for the applicant
J. Magodora for the 1st respondent
Ms *R. Hove* for the 2nd respondent

MATHONSI J: The applicant is the holder of 4 gireef mining claims known as Unit 2 Mine, registration number 22287 in Kwekwe originally registered on 5 January 1998 but transferred to the applicant by Certificate of Registration After Transfer number 20928 of 14 January 2001. Since then it has been extracting gold deposits from those claims and has also installed a stamp mill on the block which processes gold ore obtained from the mine and from another mining claim known as Naitwch 12180 located elsewhere.

The first respondent is said to be a former part time employee of the applicant who turned round in 2012 and pegged a block adjacent to that of the applicant namely number 28895 from where she has made forays onto the applicant's claims causing havoc and generally constituting a perennial irritant.

According to Lovemore Kasipo, a director of the applicant who deposed to the founding affidavit in support of this application, when the first respondent encroached onto the applicant's claims in 2012, sunk a mining shaft and commenced mining activities on those claims, the matter was referred to the Mining Commissioner for adjudication. The latter resolved the dispute in favour of the applicant by letter to the parties dated 4 June 2012 to wit;

> "REF: PEGGING DISPUTE KAS FOODS VS G. MOYO 22287 UNIT 2 AND 28895 UNIT

> The above refers. Addresses be advised that according to this office observation as extrapolated from the coordinates taken on 24 April 2012, the shaft where Gladys Moyo's employees were working falls within 22287 Unit 2. In terms of the Mines and Minerals Act [Chapter 21:05] section 117 Kas Foods has priority of mining rights over G. Moyo as Kas Foods P/L were the prior pegger and Moyo the subsequent pegger. G. Moyo should therefore stop working the shaft and not to interfere with Kas Foods operations. OIC CID Minerals is advised by a copy of this letter of the above decision.
>
> W. M. Dube
> Mining Commissioner."

Following that determination the first respondent is said to have capitulated. She closed her offending mine shaft with rubble and ceased operations. That must have been a tactical retreat because the applicant complains that she returned in March 2016 with added vigor. With employees on tow, the first respondent is said to have re-opened the closed shaft and resumed mining operations.

A letter of complaint addressed by the applicant's legal practitioners on 15 March 2016 to the second respondent and copied to her may have assisted in bringing her to her senses again because she apparently responded by cessation of operations. Again this was a pyrrhic victory for the applicant because the first respondent returned on 15 May 2016 in a mean mood and determined to be a law unto herself. With a fifteen men strong squad she is said to have invaded the applicant's mining claim armed to the teeth with axes and machetes. They chased away the applicant's employees and closed the applicant's mining shafts with rubble burying tools and equipment underground. Five tonnes of gold ore in those shafts was not spared either.

Ironically and perhaps intending to cover up the unlawful conduct, the first respondent allegedly proceeded to lay charges of violence against the applicant's employees resulting in some of them being arrested. Since then she has been bragging that she has connections in the police force and that any of the applicant's employees who tries to stand in her way will be arrested.

That way the first respondent has succeeded not only to cow down the applicant's employees and instill fear in them, she has also adversely affected mining operations to the prejudice of the applicant as production levels have plummeted. An approach to the police has yielded negativity while a report to the second respondent has only attracted a snail's pace.

Distraught and devoid of any other sense of solution, the applicant has made this application seeking to interdict the first respondent from carrying out mining operations on its claim, from interfering with its lawful mining operations and to desist from acts of unbridled violence they have unleashed at the site.

Mr Magodora for the first respondent submitted that the matter is not urgent because the dispute between the parties started in 2012 and was resolved in favour of the first respondent by the Mining Commissioner. As such the applicant has no business coming to court now. I do not agree.

The applicant has made it clear that what has prompted this application are the events which unfolded on 15 May 2016. Prior to that the applicant had enjoyed peaceful occupation and undisturbed mining activity at his claims. On that date, the first respondent allegedly brought fifteen men who were armed to the teeth and closed the applicant's mining shafts with rubble. From what the applicant says the resolution of the dispute in 2012 resulted in tranquility and nothing untoward happened between the parties until March 2016. There is therefore no merit in *Mr Magodora*'s challenge to the application on the basis of lack of urgency. The need to act only arose on 15 May 2016. I will therefore entertain the application on an urgent basis.

Mr Magodora submitted, on the merits, that the applicant has misled the court by relying on the letter of the Mining Commissioner dated 4 June 2012 which I have reproduced above when that letter does not contain the final determination of the Mining Commissioner. Instead the latter's final determination is contained in a letter addressed to the Mining Commissioner of 2 July 2012 by the Regional Mine Engineer which reads in part:

"RESULTS

1. Unit mine Registration 28895 belongs to Ms G. Moyo and has three shafts named 1 to 3 all go underground but use Number 2 shaft to go underground.
2. Unit 2 mine registration 22287 belongs to Mr Kasipo has two shafts named 1 and 2 all go underground.
3. The old Unit mine i.e. underground workings starts in Unit 2 mine registration 22287 and extended into the present Unit mine registration 28895 to 8 level owned by Ms G. Moyo.

4. If one was to produce line C – F of Unit mine 2 registration 22287 to meet line B –A of Unit registration 28895 one gets where Beacon B should be giving the required size and rectangle shape of Unit 2 (co-ordinates Unit 2B- 077984OE, 7902750N)
5. The survey carried out established that the underground workings in dispute falls *(sic)* under Unit Registration number 28895 claim owned by Ms G. Moyo not in Unit 2 Registration number 22287 owned by Mr Kasipo.

T. N T Paskwavaviri
REGIONAL MINE ENGINEER."

It is not clear who commissioned a survey and for what purpose. I agree with Mr *Masvaya* for the applicant that what the Regional Mine Engineer was dealing with was underground workings of the parties and their interpolation as opposed to the offending surface shaft sunk by the first respondent on the applicant's site which she was ordered to close by the Mining Commissioner.

Even if I am wrong in drawing that conclusion, I would still not agree with Mr *Magodora* that the letter of 2 July 2012 is a determination by the Mining Commissioner which is binding on the parties. For a start, the letter appears to be an internal correspondence between the engineer and the commissioner which was not meant for the parties. In fact, none of the parties claimed receipt of that document at the time suggesting that if at all the Mining Commissioner had elected to adopt the findings of the engineer in resolving a dispute between the parties, he did not communicate that decision to the parties. They cannot therefore be bound by what was stored in the mind of that official.

More importantly, the Mining Commissioner had already made a decision on the dispute between the parties which he communicated to them by letter of 4 June 2012. He specifically ordered the first respondent to close her shaft. What business had he therefore on 3 July 2012 to request the parties to come for another determination? I ask the rhetorical question because Mr *Magodora* produced a letter dated 3 July 2012 written by the Mining Commissioner requesting the parties to come to his office on 9 July 2012 for a determination. It turns out that the letter in

question was not served on the parties and none of them attended that meeting, again affirming the assertion that only the determination of 4 June 2012 was communicated to the parties.

In terms of s345(1) of the Mines and Minerals Act [Chapter 21:05] where both the complainant and the defendant have agreed in writing that a dispute be investigated and resolved by the Mining Commissioner in the first instance, the latter shall do so notwithstanding the original jurisdiction of the High Court. Section 346 confers upon the Mining Commissioner judicial power to hold a court in any part of the mining district to which he is appointed in order to determine a dispute in the simplest, speediest and cheapest manner possible (section 353). See *Rock Chemical Fillers (Pvt) Ltd* v *Bridge Resources (Pvt) Ltd and Others* HH 339/14.

What is significant about those provisions is that in resolving a mining dispute and determining whether there has been any encroachment, the Mining Commissioner exercises judicial power. To that extent, he is subject to the usual trappings on the exercise of such power including the rules of natural justice. In that regard, once the Mining Commissioner has pronounced himself on a matter, whether he has commissioned a survey or not, he becomes *functus officio* and cannot revisit the same dispute in order to review his own decision.

In the present case, he investigated the complaint and came up with a decision which he handed down on 4 June 2012. It was therefore no longer within his power to come up with another decision on 2 July 2012, he having been *functus officio*. So even if that decision was his, which it was not it being that of the Regional Mine Engineer, it would be invalid for that reason. I conclude therefore that the decision binding on the parties was that of the Mining Commissioner communicated to them by letter of 4 June 2012.

Ms Hove who appeared for the second respondent submitted that they had come to indicate that the second respondent was not opposed to the order being sought. She however found herself in a quandary when Mr *Magodora* produced correspondence emanating from the second respondent's office which appeared contradictory. In light of what I have said above she need not have been worried at all. There could only be one binding decision of the Mining Commissioner and it is the first one made on 4 June 2012.

In an application of this nature the applicant is required to establish the essentials of a temporary interdict, namely;

1. a *prima facie* right, even though it may be open to some doubt.

2. a well-grounded apprehension of harm or injury;

3. the absence of any other ordinary remedy; and

4. a balance of convenience favouring the grant of an interdict.

See *Charuma Blasting and Earthmoving Services (Pvt) Ltd* v *Njainjai and Others* 2000 (1) ZLR 85 (S) 89 D- G; *Eriksen Motors (Welkom) Ltd* v *Proten Motors, Warrenton and Another* 1973 (3) SA 685 (A) 691 C-G; *Bozimo Trade and Development Co (Pvt) Ltd* v *First Merchant Bank of Zimbabwe Ltd and Others* 2000 (1) ZLR ! (H) (F –G.

The applicant has exhibited proof of lawful registration of the mining claims and also proof that the mining dispute was investigated by the Mining Commissioner who made findings that the first respondent was working on a shaft located on pre-existing claims of the applicant. She was ordered to stop but has allegedly resumed illegal activity. Therefore a *prima facie* right has been established.

According to the evidence that has been presented not only is the first respondent extracting gold on someone else's claim, itself an exhaustible resource, she is also interfering with the applicant's operations in the most despicable and primitive way. She has proceeded to fill up the applicant's shafts and bury its equipment underground. That conduct is unlawful and amounts to self-help but even more significant is the harm and injury being caused to the applicant.

While the Mining Commissioner has jurisdiction to resolve a mining dispute, it occurs to me that in the circumstances of this matter, that cannot be regarded as a suitable course of action. For a start, the Commissioner has already ruled on the matter which ruling has been disregarded by the first respondent with impunity. More importantly, the exigency of the matter calls for urgent action which the Commissioner appears incapable of.

In any event, the balance of convenient would seem to favour the grant of the interdict. The first respondent has been banished previously from the site. She complied and therefore her unlawful return this time around cannot be said to tilt the scales in her favour. It is the applicant that has been on site all along. If the first respondent has suddenly found a basis for taking over,

she has to follow lawful means of dislodging the applicant instead of resorting to self-help which has created a dangerous situation on the ground.

I am therefore satisfied that the applicant has made out a case for the relief that it seeks.

Accordingly the provisional order is granted in terms of the draft order.

Chitsa & Masvaya law Chambers, C/o Dube-Tachiona & Tsvangirai, applicant's legal practitioners
Magodora & Partners, 1st respondent's legal practitioners
Attorney General's Office, 2nd respondent's legal practitioners