

HB 102/17
HC 291/17
X REF HC 269/17

**TURFWALL MINING (PVT) LTD
t/a BEENSET INVESTMENTS**

versus

SIPHIWE DUBE

And

**PROVINCIAL MINING DIRECTOR
MATABELELAND SOUTH (NO)**

And

**THE ZIMBABWE REPUBLIC POLICE OFFICER
COMMANDING MATABELELAND SOUTH (NO)**

And

**THE COORDINATOR, MINERALS & BORDER
CONTROL UNIT MATABELELAND
SOUTH PROVINCE (NO)**

And

**OFFICER IN CHARGE – ZIMBABWE REPUBLIC POLICE
GWANDA (NO)**

And

**THE MINISTER OF MINES AND
MINING DEVELOPMENT (NO)**

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 15 FEBRUARY & 27 APRIL 2017

Urgent Chamber Application

Ms V. Chikomo & B. Masamvu for applicant

V. Majoko for the 1st respondent

L. Musika, L. Dube, P. Taruberekera & S. Lunga for 2nd to 6th respondents

TAKUVA J: This is an urgent application in which the applicant sought the following order:

“Terms of the final order sought

That you show cause to this honourable court if any, why a final order should not be made in the following terms:

1. The 1st respondent and anyone in her employ be and are hereby interdicted from carrying on any form of mining activities on the following of applicant’s claims:
 - (i) Legion C under claim number 10244BM
 - (ii) Legion D under claim number 10225BM
 - (iii) Legion F under claim number 10226 BM
 - (iv) Legion 13 under claim number 33216PM
 - (v) Legion 14 under claim number 33217PM
2. That the costs be on attorney and client scale.

Interim relief granted

Pending the confirmation of the provisional order, the applicant be and is hereby granted the following relief:

1. That pending determination of the parties matters under case number HC 2697/17 all forms of mining activities by the 1st respondent and anyone in her employ be and are hereby suspended.”

The background facts are that the applicant is the registered holder of mining claims commonly known as Legion Mine in Gwanda. These claims were transferred to the applicant from Falcon Gold Zimbabwe Ltd in 2012. At the time of acquisition of the claims, the 1st respondent had a tribute agreement with Falcon Gold. Applicant as “Grantor” entered into a tribute agreement with 1st respondent on 20 December 2012 which was to run for a three (3) year period commencing on 1 January 2013 to 31 December 2015. In terms of the agreement the “Tributor” took five claims as listed above. Also in terms of the tribute agreement clause 15 the tributor i.e. 1st respondent paid royalties to the applicant.

As regards renewal of the tribute agreement clause 1 (b) of the agreement provides that:

- “(b) The Tributor shall have the right to extend this period of the tribute for a further three years after the expiry of the above period provided he had complied with the terms of this tribute agreement and providing he gives notice of such intention to the Grantor as follows:
At least three months prior to the 31st December 2015 (determination of the first period) the tributor shall give written notice to the Grantor stating whether he wishes to relinquish his tribute at the end of the 1st period or to exercise his right to extend this tribute agreement for the further period stated.”

Before the expiry of the tribute agreement on 31 December 2015, the 1st respondent did not notify the applicant in writing 3 months prior to that date of her election in terms of clause (1) (b) *supra*. Despite this default, 1st respondent continued to mine on the claims without an agreement. Applicant offered 1st respondent a new agreement but the latter refused to sign it prompting applicant to enlist the assistance of the Zimbabwe Republic Police to no avail. Faced with this hurdle, applicant issued a written notice to vacate to the 1st respondent through her lawyers Majoko & Majoko on 6 October 2016. The 1st respondent’s lawyers responded to that notice in the following terms:

“... A brief history, we believe, will assist in the understanding of our client’s position. Our client has been mining from Legion since about 2003, having done so under tribute from Falcon Gold Zimbabwe Ltd.

Discussions involving the Ministry of Mines and Mineral Development were held with Falcon Gold and our client as a result of which it was agreed that the claim would be registered in our client’s names and our client had and there is evidence of this written understanding, from so far back as 2007, been awaiting formal transfer and registration of the claims into her names.

If there were any changes in this understanding it was not communicated to our client. She has been in occupation and working the claims on the *bona fide* understanding that the claims were to all intents and purposes hers, awaiting only formalization of ownership of the claims.

At no time was our client advised, as she would have been entitled, of any change in the ownership of the claims from Falcon Gold to yourselves. You will appreciate, in the circumstances that our client cannot, without prejudicing her rights, accede to your demand that she vacate the claims, until she has received formal communication from the Ministry of Mines and Falcon, that what was agreed upon regarding the claims has since been changed. On receiving such communication, if she will, our client will take advice and only then will she reply substantively to your demand. Until then she will remain on the locations.”

This letter is dated 1 December 2016 and appears on page 35 of the record.

The parties continued to engage each other through their legal practitioners on 12 and 13 January 2017. First respondent appeared to have accepted to negotiate terms of a new tribute agreement until 20 January 2017 when she refused the offers proffered by the applicant and insisted on her earlier position that she had a right to anticipate transfer of registration of the claims into her name. Frustrated, applicant then filed this application on 30 January 2017 praying for the relief referred to above.

Before arguing on the merits, Mr *Majoko* took a couple of points *in limine*. The 1st point was that the founding affidavit does not use the word “urgent” anywhere in its body. Ms *Chikomo* conceded that there might have been an inadvertent omission of that word and applied that the court condones this departure in terms of R 4C of the Court’s rules. In my view, the contents of the founding affidavit especially paragraphs 5.18 and 5.19 show clearly that the matter is urgent. It is not just a regurgitation of words or phrases that matter but the import. In terms of R 242 of this court’s rules it is the duty of a legal practitioner to certify that the matter is urgent, see also R 244. I am satisfied that this is one of those harmless omissions which can be condoned in terms of R 4C in the interests of justice. I therefore dismiss the 1st point *in limine*.

The second point was that the interim relief is the same as the final relief. He relied on *Dodhill v Chikafu* 2009 (1) ZLR 293 in arguing that this is a fatal defect. I disagree for the simple reason that what is sought in the interim is a suspension of mining operations, whereas the final order prays for a total and complete cessation of mining activities pending the finalisation of case number HC 269/17. I must point out however that, the applicant conceded

that there is a need to amend their terms to make them clearer. The amendment sought however does not affect the essence of the relief sought. Therefore the application cannot be dismissed solely on this ground because the respondent *in casu* has not been prejudiced by the applicant's failure to put the relief in the proper form. See R 229C of this Court's rules. In my view, the point was not well taken and it is hereby dismissed.

On the merits, Mr *Majoko* submitted that the applicant has not fulfilled the requirements of an interdict in that the applicant has an alternative remedy of damages which remedy they are pursuing in the summons. Applicant has not claimed that 1st respondent is impecunious or that her assets are being dissipated. He cited the case of *Bozimo Trade and Development Co (Pvt) Ltd v First Merchant Bank of Zimbabwe Ltd & Ors* 2000 (1) ZLR (H).

As regards the availability of a satisfactory remedy, I prefer SACHS L J's approach in *Evans Marshal & Co Ltd v Bertola SA* [1973] IALL ER 992 (CA) at 1005d – e where the learned judge who was dealing pertinently with the enquiry as to whether damages were an adequate remedy said:

“The standard question in relation to the grant of an injunction, are damages an adequate remedy? Might perhaps, in the light of the authorities of recent years, be re-written: is it just, in all the circumstances, that plaintiff should be confined to his remedy in damages?” The touchstone in every case is to ensure that justice is done. The test of the adequacy of damages is, however not conclusive in that even where an injury is capable of compensation the court will generally grant an interdict if:

- (a) the respondent is a man of straw, or
- (b) the injury is a continuing violation of the applicant's rights,
- (c) the damages will be difficult of assessment especially damages in cases of continuing contractual breaches; or
- (d) if the value of a damages award in several years' time would be of questionable adequacy because of high inflation”. See also C B Prest, *The Law & Practice of Interdicts* Juta & Co 1993 at p 46 – 47.

I would also add that the court should guard against assisting confiscation of private rights by unnecessarily confining the applicant to damages. *In casu*, it is common cause that the 1st respondent is carrying out mining operations on applicant's claims without a valid tribute

agreement. Not only that, she is harvesting gold without paying royalties to the applicant. Quite clearly, her conduct amounts to a continuing violation of applicant's rights. Such an injury, by its very nature, makes an accurate assessment of damages in lost mineral value extremely difficult.

For these reason I find that it is not just that the applicant be confined to its remedy in damages as this would be unsatisfactory.

It was also submitted on 1st respondent's behalf that applicant has not shown that it would suffer irreparable injury. Further, it was submitted that applicant repudiated the contract by letter dated 6 October 2016 and should therefore stop complaining about non-payment of royalties. First respondent insisted that she would continue to mine because she got assurance from the Ministry of Mines that the claims will be registered in her name in due course. Consequently, it was argued that a case for an interdict has not been set out in the papers and for that reason, it should be dismissed.

The requisites for the right to claim an interdict are a well-beaten path. In *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511 (S) they were put as follows:

- “Briefly these requisites are that the applicant for such temporary relief must show-
- (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear, is *prima facie* established, though open to some doubt;
 - (b) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
 - (c) that the balance of convenience favours the granting of interim relief; and
 - (d) that the applicant has no other satisfactory remedy.”

In the present case, the facts that cannot be disputed are that the applicant is the registered owner or holder of the claims in dispute. The five certificates of registration are on pages 29 – 33 of the application. Also in terms of the tribute agreement referred to earlier the applicant is the “Grantor” while the 1st respondent is the “Tributor”. For approximately three and a half

years, 1st respondent was working the same claims mining gold and other minerals there from against payment of royalties to the applicant. She stopped paying in October 2016 following a dispute over the formular to be used to calculate royalties. The parties then failed to reach an agreement and the applicant filed this application.

On the other hand, 1st respondent claims to have a right to remain on the mine, courtesy of a promise from the Ministry of Mines.

On these facts, there can be no doubt that the applicant has established the existence of a clear right. Applicant is a holder of real rights over the mine. This is in terms of the substantive law. Surely, a real right cannot be super ceded by a mere promise. C. B. Prest, *supra* at page 52 states;

“Interdicts are based on rights, rights which in terms of the substantive law are sufficient to sustain a cause of action. Such right may arise out of contract, or a delict; it may be founded in the common law or on some or other statute; it may be a real right or a personal right. The applicant for an interlocutory interdict must show a right which is being infringed or which he apprehends will be infringed and if he does not do so, the application must fail.

An applicant must establish ‘some just right’. It must not be a mere moral right it must be a strict legal right.”

In casu, the right arises out of contract and I am satisfied that the 1st requirement of an interdict has been met on the facts.

In view of my finding on the existence of a clear right, it would not be necessary to establish a well-grounded apprehension of irreparable harm. Assuming that I am wrong, I am convinced that *in casu*, there is a well grounded apprehension of irreparable harm in that it goes without saying that minerals extracted from the ground are irreplaceable. Therefore, the financial loss to the applicant is irreparable. The test for apprehension is an objective one. Essentially, the applicant must show objectively that his apprehensions are well grounded. A

reasonable man faced with facts *in casu* might entertain a reasonable apprehension of injury. In the circumstances, I find that the second requirement has been met.

The 3rd requirement is the balance of convenience. Here, the court is required to weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is. Where there is greater possible prejudice to the respondent, an interim interdict will be refused. If however, the prejudice to the respondent is less than that of the applicant, the interdict will be granted. Put differently, the essence of the balance of convenience is to assess which of the parties will be least seriously inconvenienced by being compelled to endure what may prove to be a temporary injustice until the just answer can be found at the end of the trial.

As I indicated above that the applicant's right has been clearly established, it follows that it has strong prospects of success. It is trite that the stronger the prospects of success, the less the need for such a balance to favour the applicant; the weaker the prospects of success, the greater the need for it to favour him. In the present case, the continued contractual breaches will cause greater prejudice to the applicant if the interdict is not granted than the possible prejudice to the 1st respondent if it is granted. From the totality of the circumstances in this case, there is a higher risk that injustice may result if an interdict is declined. Accordingly, I find that the balance of convenience favours the granting of the interdict.

I have already discussed the 4th requirement.

Finally, I find that the applicant has established the requisites of an interdict. Accordingly, I order as follows:

Interim relief granted

Pending the confirmation of the provisional order, the applicant be and is hereby granted the following relief:

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1. that all forms of mining activities by the 1st respondent and anyone in her employ on the five disputed claims be and are hereby suspended.

Dube-Tachiona & Tsvangirai, applicant's legal practitioners
Majoko & Majoko 1st respondent's legal practitioners
Attorney-General's Office, 2nd – 6th respondents' legal practitioners