

1. JOHN MAHUDU
and
CHABVONGA MINING SYNDICATE
versus
MELVIN GWISHIRI
and
PROVINCIAL MINING DIRECTOR
MASHONALAND EAST PROVINCE
and
MINISTER OF MINES AND MINING DEVELOPMENT
and
OFFICER COMMANDING ZRP CID FLORA AND FAUNA
MASHONALAND EAST PROVINCE
HC 89/21
2. MELVIN GWISHIRI
and
CHABVONDOKA MINING SYNDICATE
and
JOHN MAHUDU
and
ACTING PROVINCIAL MINING DIRECTOR
MASHONALAND EAST PROVINCE N.O
and
MINISTER OF MINES AND MINING DEVELOPMENT N.O
HC 90/21

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 8 & 17 February 2021

Urgent Chamber Application

MUZOFJA J: This judgment disposes of two matters dealing with predominantly the same parties and the dispute relates to the same piece of land.

At the centre of these two urgent chamber applications is a dispute in respect of a certain piece of land situate in the communal land of Madicheche, Pfungwe under Chief Chitsungo herein after referred to as the mining location. John Mahudu ‘Mahudu’ is the applicant in HC 89/21. He alleges that the land is part of his field and it is currently under cultivation. Mahudu discovered some gold deposits in the field. Together with some partners Mahudu constituted Chabvondoka Mining Syndicate (hereinafter referred to as the Syndicate) to process documents to lawfully extract the wealth in the land. To his chagrin Melvin Gwishiri prospected in the area and was subsequently issued with a Certificate of registration to mine gold within the precinct of the field. Eventually when Mahudu and the Syndicate submitted its application for

registration it was rejected on account of the registration already issued to Gwishiri sometime in December 2021.

Gwishiri hit the ground running he assembled equipment and the workforce and commenced mining activities on the mining location. All hell broke loose from then on. The dispute escalated to different offices until it found its way to this court. Mahudu filed a complaint with the Provincial Mining Director in Mashonaland East. It is not in dispute that on the 2nd of February 2021 a meeting was held. Both parties had two representatives in the meeting. An injunction was issued barring any form of mining at the mining location pending dispute resolution between the parties. Both parties did not file the copy of the injunction but there is no dispute about its existence. Both parties attached a letter addressed to the Officer Commanding Mashonaland East Province advising of the injunction. The police were requested to ensure compliance with the injunction.

Despite the existence of the injunction that provided an adequate remedy to the parties' interest until the dispute was resolved, the parties approached this court on an urgent basis seeking relief.

In HC 89/21 the applicant, Mahudu seeks in the interim an interdict to compel Gwishiri to comply with the injunction, to vacate the mining location pending resolution of the dispute between the parties by the Provincial Mining Director and the police to assist in the enforcement of the injunction. In the final order the applicant seeks an order to interdict Gwishiri from mining until the dispute between the parties is resolved by the Provincial Mining Director.

In HC 90/21 the applicant is Gwishiri and seeks in the interim the suspension of the injunction and to bar Mahudu and the Syndicate from interfering with his mining operations. The final order seeks the discharge of the injunction and an order barring the respondents from his mining operations.

I comment in passing on the nature of relief sought by both parties in their provisional Orders. Increasingly courts are inundated by applications under cover of urgency whose interim relief is final in nature. Where such is the case the court may as well decline to deal with the matter on an urgent basis.

In HC 89/21 the overarching relief is to enforce the injunction until the dispute is resolved. If this court grants such an order, there is no impetus to confirm the order since the interdict granted in the interim has no timeline and can operate in perpetuity. Similarly, in HC 90/21 where the applicant is legally represented the relief sought both in the interim and in the

final is to set aside the injunction for the applicant to resume or continue his mining operations. Once the interim relief is granted and the applicant resumes mining operations, he has obtained the relief he wants. Despite that observation I shall not dispose these matters on this issue since both parties did not raise it.

Both applications are opposed. I deal with urgency in both matters first before considering the issues raised by the parties.

Mahudu is a self-actor. He filed a certificate of urgency under his name certifying the matter to be urgent. He states that he is the owner of the mining location and has always used it for farming. Gwishiri commenced mining operations in December 2020 without his knowledge or consent. On 2 February 2021, an injunction was issued by the Provincial Mining Director to cease all mining operations at the mining location. Despite such an injunction, Gwishiri has continued with his mining activities. Gwishiri denies that mining operations have continued. That as it maybe, Mahudu states that the continued mining operations have degraded his fields with gullies and toxic chemicals. His crops have been destroyed. This court should issue the order sought on an urgent basis to stop this unlawful conduct.

Gwishiri believes the matter is not urgent. Firstly, on account that he started mining operations in December 2020, but the applicant did not approach the court for relief. The delay for this non action was not explained. In my view the submission is informed by a sheer misunderstanding of Mahudu's cause of action. The cause of action is that, after the Provincial Mining Director issued an injunction Gwishiri defied it and continued with mining operations and not the mere fact of Gwishiri's mining activities. This point has no merit.

I find meritorious the second issue on non-urgency raised by Gwishiri that an extant injunction exists therefore there is no urgency in the matter.

A matter is urgent where the circumstances from the cause of action and the nature of the relief sought is such that it cannot wait for ordinary set down. The court will ordinarily consider the cause of action and ask itself if the circumstances require immediate intervention of the court or it can wait. There must be evidence of irreparable harm. The relief sought should be one meant to directly avert the harm threatened or to stop the unlawful conduct and its effects¹. Courts have also declined to hear matters on an urgent basis for failure by the litigant to act when the need act arose².

¹ Solta Group (Pvt) Ltd and Another v BP Zimbabwe (Pvt) Ltd and Another HH 802/15

² Kuvarega v Registrar General and Another 1998 (1)ZLR 188 (H)

In this case in both the certificate of urgency and the founding affidavit Mahudu avers that an injunction was issued by the Provincial Mining Director ordering stoppage of mining activities at the disputed mining location. In terms of section 354 (5) of the Mines and Minerals Act³ (the Act) the Mining Commissioner has the administrative power to issue injunctions to safeguard a party's rights in any mining dispute. Mahudu filed a complaint that Gwishiri was mining in his field. Documents filed of record show that a meeting was held on the 2nd of February 2021 where the Provincial Mining Director recorded in essence that a dispute exists between a miner that is Gwishiri on the one side and Mahudu a farmer whose interests were through Syndicate on the other. The Provincial Mining Director then advised the police to ensure that no mining activities take place at the mining location. In my view there is already a mechanism to protect Mahudu's interests. Where an adequate remedy exists and the litigant fails to utilize it, urgency cease to arise. This is not the urgency contemplated at law. The fact that Gwishiri defied the order, which is actually denied does not in itself raise urgency. There is no evidence that the available mechanism has failed to provide effective protection to Mahudu's interests until the resolution of the dispute. There is no indication that the police were notified about this defiance and nothing happened. The failure by Mahudu to use the available remedy to protect his interests amounts to self-made urgency. The court cannot come to his rescue on an urgent basis.

On that basis I find no urgency in the matter.

In HC 90/21 Gwishiri, the applicant seeks the suspension of the injunction issued by the Provincial Mining Director in terms of section 354 (7) of the Act and restoration of his mining activities. According to paragraph (7) of the certificate of urgency the injunction engendered illegal mining activities. The matter is said to be urgent because the injunction issued by the Provincial Mining Director is unlawful since there is no dispute to deal with. Provincial Mining Director rejected the Syndicate's application for registration on the in the mining location.

The two grounds for urgency set out do not constitute a sufficient basis for this matter to jump the queue and be heard ahead of other matters.

The issue of illegal mining activities is already protected in terms of the injunction issued by the Provincial Mining Director. The letter to the Officer Commanding CID Mashonaland East is very clear, I relate to the relevant portion of the letter,

³ Chapter 21:05

‘... this office is hereby suspending all mining operations at the above-mentioned block pending dispute resolution.

The Provincial Mining Office is requesting your assistance by ensuring that all mining operations and developments within the above-mentioned mining claim are stopped immediately’ (*underlining for my emphasis*)

In my considered view the Police were requested to ensure not only that Gwishiri does not continue with his mining activities but that all mining activities should cease. That means Mahudu or any other illegal gold miner is not allowed to operate at this mining location. There is no indication that the remedy triggered by the injunction did not provide adequate protection to Gwishiri interests and none was alleged. There is no evidence that Gwishiri reported the issue to the police and they failed to protect his rights. In other words, the court cannot hear a matter on an urgent basis where a remedy already exists unless it is demonstrated that the remedy is not effective. For the same reasons I made out in HC 89/21 I find no merit in this issue.

The second issue is that the injunction is unlawful therefore it should be discharged. The basis of the unlawfulness is that there is no dispute for resolution since Chabvondoka’s application for registration was rejected by the Provincial Mining Director. Numerous allegations and counter allegations are made by the parties ranging from corruption, forged signatures, and failure to make full disclosure to the court. I shall not be drawn to those until I dispose of urgency first.

The certificate of urgency, the founding affidavit and the heads of argument do not show how the mere unlawfulness of the injunction raises urgency. The legal practitioner who certified this matter as urgent clearly did not address his mind fully to this issue. A matter cannot be urgent because some unlawful conduct has taken place otherwise all matters would be urgent. Courts exist to deal with matters perceived to be unlawful by litigants. There must be something more besides the unlawfulness for a matter to be classified as urgent. That is the part that is lacking in this case. The heads of argument relied in the main on the judgment by MAKONESE J⁴ a court application. It was not dealt with on an urgent basis.

I revert to the letter by the Provincial Mining Director of the 2nd of February. The suspension of Reg No 1052 held by Gwishiri a dispute between a miner and a farmer I quote in part the portion relevant to the point I make,

⁴ Mugangavari v PMD Midlands N.O & Another HB63/20

‘Following a written complaint by Chabvondoka Mining Syndicate that the mentioned miner has been issued a certificate of registration (ME 1052G) alleging that the certificate was issued on an area with a field belonging to John Mahudu’

The letter is very clear that the claim by Mahudu is not that he holds mining rights on mining location but that rights to mine were granted to Gwishiri over his field. By the powers vested in him or her the Provincial Mining Director decided to suspend mining activities pending resolution of the dispute. Clearly the basis of the urgency is misdirected. In any event the administrative body has not delayed nor neglected to deal with the dispute. That has not been alleged. Considering that the decision was made on the 2nd of February and the application was filed on bearing in mind the exigencies of the lockdown period it is just too much to ask of the administrative to have resolved the dispute. No urgency arises from these issues.

From the foregoing clearly both matters lack urgency and the following order is made.

1. HC 89/21 the matter lacks urgency and I is removed from the roll of urgent matters.
2. HC 90/21 matter removed from the roll of urgent matters for lack of urgency.

Gama and Partners, 1st Respondent’s Legal Practitioners.