

DISTRIBUTABLE (12)

SIPHIWE DUBE

v

(1) TURFWALL MINING (PRIVATE) LIMITED t/a BEENSET INVESTMENTS (2) PROVINCIAL MINING DIRECTOR MATABELELAND SOUTH (NO) (3) THE ZIMBABWE REPUBLIC POLICE OFFICER COMMANDING MATABELELAND SOUTH (NO) (4) THE COORDINATOR, MINERALS AND BORDER CONTROL UNIT MATABELELAND SOUTH PROVINCE (NO) (5) OFFICER IN CHARGE - ZIMBABWE REPUBLIC POLICE GWANDA (NO) (6) THE MINISTER OF MINES AND MINING DEVELOPMENT (NO)

**SUPREME COURT OF ZIMBABWE
GARWE JA, MAVANGIRA JA & BHUNU JA
HARARE: NOVEMBER 27, 2017, & FEBRUARY 19, 2019**

V. Majoko, for the appellant

V. Chikomo, for the respondent

BHUNU JA: This is an appeal against the High Court’s judgment sitting at Bulawayo. The judgment granted the first respondent a provisional order interdicting the appellant and all her employees from conducting all forms of mining on the five disputed claims pending confirmation of the provisional order. The order dated 27 April 2017 is couched in the following terms:

“Interim relief granted

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

that all forms of mining activities by the first respondent (appellant) and anyone in her employ on the five disputed claims be and are hereby suspended.”

The disputed 5 claims are:

1. Legion C under claim no. 10224BM
2. Legion D under claim No. 10225BM.
3. Legion F under claim no. 10226 BM.
4. Legion 13 under claim no.33216PM.
5. Legion 14 under claim no. 33217PM.

All the 5 mining claims commonly known as Legion Mine are situated in the District of Gwanda. It is common cause that the first respondent is the registered owner of all the 5 claims having obtained transfer of the claims from Falcon Gold Private Limited sometime in 2012. On 20 December 2012 the parties concluded a tribute agreement in which the respondent granted a tribute to the appellant subject to agreed terms and conditions.

The tribute agreement was to endure for a period of 3 years from the first day of 20 December 2012 to 31 December 2015 subject to renewal on stipulated terms. Clause 1(b) provided for renewal and cancellation of the tribute agreement as follows:

“Renewal The tributor shall have the right to extend this period of the tribute for a further period of THREE years after the expiry of the above period providing he has 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 31 December 2015 (termination of the first period) the Tribute shall give written Notice to the Grantor stating whether he wishes to relinquish his Tribute at the end of the first period or to exercise his right to Extend the Tribute Agreement for the further period stated.

Cancellation of Agreement by Grantor It is expressly agreed that, if at any time during the initial period or any subsequent renewal of this agreement, the Grantor desires to commence prospecting or mining over the mining claims, he may cancel this agreement by written notice to the Tributor of not less than Six months”.

Clause 10 of the Agreement provided for breach of contract as follows:

“Should the Tributor commit any breach of the conditions of this agreement, the Grantor may make immediate demand upon the Tributor to rectify any such breach within seven days from the date of demand and should the tributor fail to rectify such breach of agreement, then and in such case the grantor shall have the right to terminate this agreement by giving one month’s notice to that effect to the Tributor subject to such determination not in any way affecting any claim for damages sustained by the Grantor in respect of such breach”.

The appellant did not exercise her option to renew the Tribute in terms of clause 1(b) of the agreement despite a written offer to renew the Tribute by 31 December 2015. That date came and passed without the appellant accepting the offer. Notwithstanding the non-renewal, the appellant continued to mine the claims illegally without contract. The appellant’s continued unlawful conduct in this respect prompted the respondent to write to her on 6 October 2016 demanding vacant possession of the mining claims. The letter reads:

“Mrs Sipiwe Dube

NOTICE OF TERMINATION OF OPERATIONS AT LEGION MINE

We have been in discussion with you for several times with regards to you signing the tribute agreement and in respect of same without success. The Board has finally decided to part ways with you. And pursue their own operations. We hereby request you to move out of our mining locations and wind up all operations within the next seven days. On 14 October 2016 our resident manager Mr Siziba will be there for a complete inspection of your withdrawal.

Thank you for the time you have been with us”.

The respondent’s letter provoked a rather surprising and unexpected response from the appellant through her legal practitioners *Majoko and Majoko* Legal Practitioners. In that letter dated 1 December 2016 she now claimed to have occupied and worked the claims under the auspices of Falcon Gold whom she claimed to be the rightful owners of the mining claims. She disputed the respondent’s ownership of the claims and averred that she had been promised change of ownership into her name by Falcon Gold. For that reason she refused to vacate the

mining claims until she had received contrary information from the Ministry of Mines and Falcon Gold. The letter written by her legal practitioners reads:

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

Discussion 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 claims would be registered in our client’s names and our client has, 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 name.

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.

At no time was our client advised, as she would have been entitled to, of any change of 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 vacates the claims, until she has received formal communication from the Ministry of Mines and Falcon Gold, that what was agreed upon regarding the claims has been changed”(sic)

Despite that spirited resistance to eviction, the appellant neither called upon Falcon Gold and the Ministry to vindicate her rights of occupation nor as witnesses to support her story. Falcon Gold has however laid no claim to ownership of the mining claims as alleged by the appellant or at all. Thus in the absence of any evidence or support from Falcon Gold and the Ministry, the appellant’s claim to lawful entitlement to the mining claims in question through Falcon Gold sounds hollow and unbelievable.

In a clear about turn the appellant wrote to the respondent on 12 January 2017 offering to pay royalties in return for permission to continue mining on the claims. The letter reads in part at page 57 of the record of proceedings:

“Our client, her legitimate expectations notwithstanding, is not averse to paying royalties and (in) this respect repeats her tender of the agreed royalty of 5 percent. In the event that

your client wish(es) to engage ours in negotiating a variation of the royalty they are free to do so and our client will in good faith negotiate any variation your client may wish “.

The appellant’s offer to pay royalties to the respondent without recourse to Falcon Gold and the Ministry of Mines undoubtedly amounts to an unequivocal admission that the respondent is the registered owner of the disputed mining claims. It is inconceivable that a litigant represented by a competent law firm would enter into a tribute agreement with a non-owner and pay royalties for 5 years in circumstances where she claims to be the true owner of the mining claims. At the expiration of the tribute agreement she continued to mine illegally with impunity without a contract from the respondent.

When faced with eviction she initially resisted claiming to be the lawful owner or tributor through Falcon Gold. When challenged she made an about turn and offered to pay royalties to the respondent thereby recognising its claim to ownership of the disputed mining claims. The appellant’s conduct in this respect betrays a devious character bent on reaping where she did not sow. For that reason she was obviously telling a patent lie when she claimed to be the owner of the disputed mining claims or tributor granted by Falcon Gold.

For obvious reasons, courts are averse to and detest dishonest litigants bent on misleading the courts. The function of the courts is to do justice. Lies are detrimental and incompatible with the due administration of justice in that they are bound to mislead the court into the wilderness of injustice. This prompted NDOU J in *Leader Trend Zimbabwe v Smith H* – H - 1311/03 at page 7 to remark that:

“It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as if he had not given evidence at all – see *Tamahole Bereng v R* [1949] AC 253 and *South African Law of Evidence* by L H Hoffman and D T Zeffertt (3rd ed) at page 472. If a witness lies about a particular incident the court may infer that there is something about it which he wishes to hide”.

In this case the only reasonable inference to be drawn from the proven facts is that the appellant wanted to mislead the court into believing that she was lawfully mining on the disputed claims so that it would allow her to continue mining illegally to the detriment of the respondent. Having failed to pull wool over the court's eyes, it is hardly surprising that she lost the plot and the court *a quo* issued a provisional order stopping her from continuing with her illegal conduct pending the final determination of the dispute.

Having failed to attack the court *a quo*'s judgment on the merits the appellant sought to rely in vain on technicalities. It was argued on her behalf that the facts of the case did not warrant the issuing of a provisional interdict.

The requirements for a provisional interdict are however well known. These requirements were spelt out in the South African case of *Myflor Investments (Pty) Ltd v Everett NO* [2000] All SA 586 (C) and refined in the well-known domestic case of *Airfield Investments (Pvt) (Ltd) v Minister of Lands and Ors* 2004 (1) ZLR 511(S). In light of the precedent set by the two cases, the requirements of a provisional interim interdict may be summarised as follows:

1. The applicant must establish a *prima facie* right.
2. That there is a real likelihood of him suffering irreparable harm if the provisional interdict is not granted.
3. That the balance of convenience favours the granting of the provisional interdict.
4. That there is no other appropriate remedy.

A perusal of the record of proceedings and having recourse to the summation of the evidence above, shows clearly that the respondent fulfilled all the requirements for the granting of a provisional interim interdict by proving:

1. That it was the registered owner of the disputed claims as ownership was never put in issue, thereby establishing a *prima facie* right.
2. That the minerals extracted from the mining claims once disposed of by the appellant are not recoverable. The respondent would therefore, suffer irreparable loss if the provisional interdict was not granted. On the other hand the appellant would suffer no such injury if the provisional interdict was granted as the minerals would remain on site pending the final determination of the dispute for the benefit of the winning party.
3. That the balance of convenience favoured the respondent in that it stood to suffer irreparable loss if the provisional interdict was not granted, whereas, the appellant would continue to benefit from her ill-gotten gains to its loss and detriment if the provisional interdict was not granted.
4. That there was no other remedy in that if the appellant continued to mine pending the final resolution of the dispute, the respondent would suffer irretrievable loss.

It is the function of the courts to put a stop to the continuation of violation of other people's rights and interests. Thus the court *a quo* would have failed in its duty to protect the respondent's vested rights of ownership had it failed to issue the provisional interdict in this case. For that reason, no blame or error can be attributed to the court *a quo* as it commendably discharged its duties.

Turning to the question of costs, the appellant was callous and devious in her quest to continue mining illegally on the respondent's mining claims to its loss and detriment. She therefore mounted a costly, lengthy, frivolous and vexatious appeal with no prospects of success at all. Courts frown upon this dishonourable conduct which must be discouraged by costs at the punitive scale as claimed by the respondent, to deter the appellant and other like-minded litigants.

For the foregoing reasons the appeal cannot succeed.

It is accordingly ordered that the appeal be and is hereby dismissed with costs at the legal practitioner and client scale.

GARWE JA: I agree

MAVANGIRA JA: I agree

Majoko & Majoko, appellant's legal practitioners

Dube-Tachiona & Tsvangirai, first respondent's legal practitioners