

APATRON MINING PRIVATE LIMITED

AND

MATILDA MLOTSHWA

VERSUS

PATRICK HOVE

AND

MELTRIX PRIVATE LIMITED

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 21 OCTOBER AND 31 OCTOBER 2013

Mr M. Nzarayapenga for the Applicant
Advocate H Moyo for the Respondent

Urgent Chamber Application

Makonese J: The parties in this matter appeared before me on the 21st October and argued the matter. At the close of argument I granted an order in terms of the Draft Order. I indicated that the full reasons for my decision would follow. These are my reasons. On the 18th June 2012 the Applicants obtained a Provisional Order in the following terms:-

“1. **TERMS OF THE FINAL ORDER SOUGHT**

That you should show cause to this Honourable court why a final order should not be made in following terms:-

- (iii) That the 1st and 2nd Applicants be and are hereby declared to be the only entities authorized to operate at the Mining site held under transfer number 36253 on Greater Kyalami Farm approximately 3 km South West of Willow Ashe Mine in Fort Rixon.
- (iv) That Respondents pay costs of suit on an attorney - client - scale, jointly and severally the one paying the other to be absolved.

2. **INTERIM RELIEF GRANTED**

Pending argument and finalization of this application the Applicants are granted the following interim relief:

- (i) The 1st and 2nd Respondents, their agents, employees, proxies or any person(s) acting on their instructions and any other person claiming occupation or title be and are hereby forthwith interdicted from entering the 1st and 2nd Applicants Mining Site held under transfer number 36253 on Greater Kyalami Farm approximately 3 km South, South West of Willow Ashe Mine in Fort Rixon, pending finalization of this matter.
- (ii) The 1st and 2nd Respondents, their agents, employees, proxies or any person(s) acting on their instructions be and are forthwith hereby ordered to keep absolute peace towards the 1st and 2nd Applicants and their employees particularly that they do not communicate, harass, threaten or visit the operations or mining sites of the 1st and 2nd Applicants described in (i) above or do anything that may cause anxiety or fear in Applicant's employees.
- (iii) The 1st and 2nd Respondents and all those claiming occupation through them be and are hereby ordered to forthwith upon service of this order to restore vacant and undisturbed possession of the mining claim site described in (i) above to 1st and 2nd Applicants' representatives and the Deputy Sheriff Bulawayo with the assistance of the Officer in Charge Fort Rixon Police Station or his Assistants be and are hereby authorized to ensure such restoration including ejecting the Respondent and all those claiming occupation through them and this shall be their warrant.
- (iv) The Officer in Charge at Fort Rixon Police Station and his Assistants be and are hereby directed to arrest the Respondent and anyone claiming occupation through her if they visit the Site described in (i) above in violation of this order.
- (v) The 1st and 2nd Respondents, their agents, employees, proxies or any person(s) acting on their instructions be and are hereby barred from removing any equipment and or any assets, including gold ore from the Mining Site described in (i) above. In the event that they have already removed any of the assets or gold ore they be ordered to return the same forthwith to the Applicants' Mining Site described in (i) above through the Deputy Sheriff, Bulawayo and the Officer In-Charge ZRP Fort Rixon and/or

his assistants. In the event the 1st and 2nd Respondents refuse to return the removed assets or gold ore, the Deputy Sheriff, Bulawayo with the assistance of Officer In-Charge ZRP Fort Rixon and/or his assistants be and is hereby authorized to restore the gold ore or assets to the Applicants and this shall be his warrant.”

It is not in dispute that service of the Provisional Order was effected on the 20th June 2012 by the Deputy Sheriff, Bulawayo. The Deputy Sheriff’s return of service reflects that service of the Provisional Order was effected in the following manner:-

- “1. By handing a copy, together with a copy of the Urgent Chamber Application to 1st Respondent Patrick Hove PERSONALLY at Greater Kya Lami Farm, Fort Rixon.

At the same time I explained the exigencies thereof.

2. By handing a copy, together with a copy of the Urgent Chamber Application to Patrick Hove a responsible person and a Director in the employ of the 2nd Respondent Meltrix (Pvt) Ltd. found present at the address of service of the said 2nd Respondent Greater Kya Lami Farm, Fort Rixon.

At the same time I explained the exigencies thereof.

I then ejected the said 1st and 2nd Respondent and other 15 people claiming through them their goods and possessions from out and all occupation of the aforesaid property.

The Applicant’s representative Mr Gokwe was then placed in undisturbed possession of the aforesaid property.

- N.B I was accompanied by Constable *Chanetsa* and *Maphosa* from Fort Rixon Police Station.”

The Respondents are opposing confirmation of the Provisional Order. The brief background to these proceedings is that the 1st Applicant is the registered holder of certain mining claims known as Greater Kya Lami in the Fort Rixon area. The claim is situated approximately 3km SSW of Willow Ash Mine in Fort Rixon. The 2nd Applicant is a shareholder and director of the 1st Applicant and is the duly appointed agent of 1st Applicant. Prior to the Applicant’s purchasing the aforesaid mining claims from the previous owner there existed a boundary dispute between the Respondents and the previous owners of Greater Kya Lami. The Respondents are the registered holders of mining claims that are adjacent to Greater Kya Lami, and are known as Car Rhom 7, also situate in the Fort Rixon area. It is not in dispute that the 1st

Respondent, Patrick Hove is the owner of Greater Kya Lami Farm, Fort Rixon a farm he acquired through the Government's Land Reform Programme. The mining claims are situated on the said farm and the 2nd Respondent has appointed Patrick Hove to act as their agent in their mining exploits on Car Rhom 7.

The Applicants aver that when they took over the mining claims they had an arrangement wherein their workers were housed and resided at 1st Respondent's farm quarters. At that stage there seemed to be no problems between the parties. Applicants state that problems only started when they decided to move their workers out of 1st Respondent's farm compound. This, the Applicants allege did not go down well with 1st Respondent who immediately began harassing the Applicant's workers alleging they had encroached upon the Respondent's claims. This prompted the involvement of the police and eventually Ministry of mines officials from Bulawayo were brought in to resolve the dispute on the 27th of April 2012. The Mining Commissioner, Bulawayo addressed a letter to Fort Rixon Police in the following terms:

"DISPUTE BETWEEN MELTRIX (PVT) Ltd AND MRS MAHASO

The above matter refers.

Could you kindly assist by monitoring the area around Kya Lami (407 19) and Car Rhom 7 (10325 BM) to cease mining operations until the dispute is resolved.

Your usual co-operation is appreciated.

Yours faithfully

F.L. Thusi

Mining Commissioner"

The Applicants contend that following the above letter they approached the Regional Mining Engineer who came to verify the boundaries of the claims in question. The Applicants state that the Regional Mining Engineer confirmed that the Applicants were working inside their claims and that there was no encroachment. On the 11th of May 2012 the Mining Commissioner Bulawayo addressed another letter to Fort Rixon Police in the following terms:

" DISPUTE BETWEEN MELTRIX (PVT) LTD AND MRS MAHASO t/a ARPATRON(PVT) Ltd

The above matter refers.

Please note that I am withdrawing my letter of 27th April 2012. IPARTRON (PVT) Ltd should be allowed to work on the claim they purchased from Mr Juba/ Ma Sibanda,

whose claim was registered in 2001.

The inconvenience is regretted.

Yours faithfully

*F. L. Thusi
Mining Commissioner''*

The Applicants further aver that before the letter of the 11th of May 2012 was written by the Mining Commissioner the parties were called for a meeting in Filabusi by the local member of Parliament. During the meeting both parties agreed and undertook that there would be no interference with the operations of the Applicants on Greater Kya Lami.

The Applicants who contend that they have made extensive investments in terms of working capital, machinery and equipment and have installed three stamp mills on the mining sites alleged that the Respondents had entered upon their mining claims sometime in June 2012 and expelled their workers from the mining claims. The Applicants alleged that by acting in the manner they did and by taking the law into their own hands, the Respondents had despoiled them of their peaceful and undisturbed possession of the aforesaid mining claims. The Applicants, consequently approached this court on an urgent basis and sought an urgent interdict for spoliation.

It is beyond dispute that following the granting of a Provisional order by the Honourable Kamocha J on the 18TH June 2012, the Deputy Sheriff, Bulawayo, acting in accordance with the terms of the order proceeded to Fort Rixon where he restored the Applicant's fifteen employees, together with their goods and other possessions to their mining location. This Provisional Order was indeed, as a matter of record served personally upon Patrick Hove as the agent and representative of the 2nd Respondent.

The Respondents filed papers opposing the confirmation of the Provisional Order arguing, principally that the Applicants had encroached onto their mining claims. The Respondents allege that they reported the dispute to the Mining Commissioner who advised the parties to cease all mining activities on the disputed claims. The Respondents, argue that the Applicants "rushed" to court before the dispute was resolved by the Mining Commissioner. The Respondents also argued, though not forcefully, that the Mining Commissioner ought to have been cited to these proceedings as an interested party. The Applicants however maintained that the issue in court was of spoliation and involved rights between the parties and there was no need to cite the Mining Commissioner. The Respondents also alleged that the Applicant's claims had prescribed in terms of section 58 of the Mines and Minerals Act (chapter 21:05) section 58 of the Act provides as follows:

“When a mining location or a secondary reef in a mining location has been registered for a period of two years it shall not be competent for any person to dispute the title in respect of such location or reef on the ground that the pegging of such location or reef was invalid or illegal or that provisions of this Act were not complied with prior to the issue of the certificate of registration.”

The Respondents further alleged that the Applicants had not established the requirements of spoliation and that there were material disputes of fact which could not be resolved on the papers.

The Legal Position

The primary issue for determination by this court is whether the Applicants have met the requirements for an interdict. Before dwelling on the merits I must dispose of the two preliminary issues raised, namely:-

- (a) That the Applicant’s claims are prescribed by virtue of the provisions of section 53 of the Mines and Minerals Act.
- (b) That the mining commissioner ought to have been joined to these proceedings.

It is my considered view that the above preliminary issues were simply raised in this matter as red-hearings to obfuscate the issues. Firstly section 58 of the Mines and Minerals Act has no relevance whatsoever the issues. Prior to the Applicants purchase and taking over the Greater Kya Lami mining claims there was indeed a boundary dispute between the previous owners and the Respondents. That dispute was resolved and when the Applicants took occupation of the claims this was in full view of the Respondents. The Respondents allowed the Applicants to set up their mining equipment and install 3 Stamp Mills. The dispute only commenced when the Applicants decided to move out of the Respondent’s farm compound. Transfer of the mining claims was made into the names of 1st Applicant with the full knowledge of the Respondents. The issue of boundaries was clearly attended to and determined by the mining commissioner. Secondly, the issue that falls for determination is whether or not the Applicants are entitled to the relief of spoliation. The citation of the mining commissioner is therefore not critical in an issue of spoliation where the dispute is between the parties.

In this matter the court is not concerned with the ownership of the mining claims. The court is rather concerned with the issue of the interlocutory interdict granted to the Applicants on the 18th June 2012 by this court. The court ought to decide whether the Provisional Order should be confirmed or not. Further, it is now settled law that ownership or otherwise is not an issue for determination in a spoliation order . This issue was dealt with at great length in the case of *DODHILL (PVT) Ltd AND ANOTHER vs MINISTER OF LANDS AND RURAL RESETTLEMENT AND ANOTHER* HH 40/09.

The law regarding interlocutory interdicts is fairly settled in our jurisdiction. The requirements for a interlocutory interdict are:

- (a) *a prima facie right, even if it is open to doubt.*
- (b) *an infringement of such right by the respondent or well grounded apprehension of such infringement.*
- (c) *a well grounded apprehension of irreparable harm to the Applicant if the interlocutory interdict should not be granted and if he should ultimately succeed in establishing his right finally.*
- (d) *the absence of any other satisfactory remedy, and*
- (e) *the balance of convenience favours the granting of an interlocutory interdict ...”*

See the cases of: *SETLOGO v SETLOGO* 1914 AD 221; AND *BOZIMO TRADE AND DEVELOPMENT COMPANY (PVT) Ltd Vs FIRST NATIONAL BANK OF ZIMBABWE AND ORS* 2000 (1) ZLR I (1).

I am of the firm view that from the papers filed of record, it is apparent that the Applicants do have a clear right. I have not found a real dispute of fact raised in the papers. I am fortified in my position by the Deputy Sheriff's return of service executed on the 20th June 2012 which clearly shows that the Applicants were restored their possession at Greater Kya Lami on the specified date. The facts support the view that when Patrick Hove was personally served with the Provisional Order he knew and was aware that he was surrendering possession of the mining claims at Greater Kya Lami to the Applicants. The Deputy Sheriff did not concern himself with the claims at Car Rhom 7 which are registered in the names of the 2nd Respondent. The Applicants have demonstrated an infringement of their right of use and occupation of the mining claims. They have shown more than a well – grounded apprehension of harm. The Respondents have for their part chosen to avoid the real issues and deal with peripheral and irrelevant issues.

I am satisfied that the Applicants have established that there were in peaceful and undisturbed possession of the mining site and that the Respondent's activities amounted to an infringement of the Applicant's rights of occupation. The Applicants are entitled to the protection of the law. The Respondents took the law into their own hands thereby causing serious inconvenience to the Applicants.

For the foregoing reasons I confirmed the confirmed the Provisional Order as prayed.

Dube – Banda, Nzarayapenga & Partners, Applicant's Legal Practitioners
Messrs Cheda & Partners, Respondents' Legal Practitioner