J & S SYNDICATE
versus
LOVEMORE MUTUNHIRE
and
WASHINGTON CHIKASWAPA
and
TINASHE MADYIRA
and
PROVINCIAL MINING DIRECTOR N.O.

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE; 16 May 2025 & 29 May 2025

Urgent application

K. Tundu for the applicant
R. T. Benza for the 1st and 2nd respondents

DUBE-BANDA J:

[1] This is an opposed chamber application brought on a certificate of urgency, in terms of which the applicant seeks a provisional order in the following terms:

Terms of the final order sought

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

i. That the first - third respondent shall not engage in any mining activities on the applicant's claim registration number 40381 also referred to as Long Trial in Pfungwe, approximately 2.7 km South of Jaji Mountain, 2.5 South North of spot height 2288 pending the resolution of the matter by the provincial Mining Director.

ii. That the respondents shall pay costs of suit on a legal practitioner and client scale.

Terms of the interim relief granted

Pending the confirmation or discharge of the provisional order, the applicant is granted the following relief:

iii. That the first – third respondents be and are hereby interdicted from interfering with the applicant's mining activities and from preventing applicant from accessing its mining claim.

iv. That costs shall be in the cause.

Service of the provisional order

This order may be served by the Sheriff or applicant's legal practitioners

Facts

[2] In summary, the applicant's case is that it is the registered owner of a gold claim in Pfungwe, also referred to as Long trial ("the mine"), which it started to mine in 2008. It is alleged that in 2013 the first respondent took occupation of the mine next to that of the applicant. It is further averred that in March 2025 the second and third respondents encroached into the applicant's claim and started some mining activities, claiming title through the first respondent. It is said the second respondent is the former registered holder of a block consisting of 10 Gold Reef named Chiwere number 42823, he has encroached into the applicant's mining area and had sold gold ore worth over USD$80 000.00. The gold ore is said to have been milled at the second and third respondents' milling machines. The applicant is alleged to have made a report to the fourth respondent, who wrote to the police to stop illegal mining at the mine. It is averred that on 7 May 2025, the illegal miners were removed from the mine by the police. It is alleged that on 8 May 2025 the first, second and third respondents deployed security guards to put a barricade on the encroached portion of the applicant's claim. It is alleged that the applicant no longer has access to that portion of the mine which is rich in gold. It is on these alleged facts that the applicant launched this application seeking the order stated above.

[3] In summary, the first respondent, the deponent to the opposing affidavit, avers that he owns, in the Pfungwe area, mining blocks, number 44168 registered in March 2010, and number ME76 registered in June 2024. It is alleged that these are current blocks and have valid inspection certificates. In the vicinity, there are mining blocks owned by third parties, including number 40381G owned by the applicant. The first respondent avers that he lodged a complaint with the fourth respondent against the applicant, and a hearing was held. It is alleged that on the date of the hearing, the hearing committee noted that the issue was an encroachment or boundary dispute, which could be resolved by the fourth respondent; and that pending the resolution of the matter, he was to

continue his mining operations in the disputed shaft. It is alleged that due to the violence caused by those claiming to be applicant's members, on 1 May 2025 the first respondent deployed armed guards at the mine. The first respondent sought that the application be dismissed.

Preliminary points

[4] The first and second respondents took several points *in limine, viz* that the matter is not urgent; that the matter is not properly before the court, alternatively that there is no applicant before the court; that the matter is *lis pendens*; that the applicant has adopted a wrong procedure; that the deponent to the founding affidavit has no authority to depose to such affidavit; and that the relief sought is incompetent.

[5] At the commencement of the hearing, Mr *Benza* counsel for the respondents abandoned the objection on urgency. No further reference shall be made to the issue of urgency in this judgment.

[6] I now turn to the point *in limine* that the matter is not properly before the court, alternatively that there is no applicant before the court. This objection is premised on the contention that the deponent to the founding affidavit Felix Elijah Shamuyarira is not a member of the J & S Syndicate, the applicant. This objection may be put off the way without much ado, in that there is a resolution of the Board of the Syndicate appointing Shamuyarira to represent it in all matters in connection with the mining claim. In addition, the respondents are not members of the Syndicate, and as outsiders cannot challenge its composition. Furthermore, the supporting affidavit of Alexio Chibanda takes the respondents' case no further, I say so because if the respondents are not lawful members of the Syndicate, he should have taken a positive move to have them removed from the Syndicate or to stop representing it. He cannot sit back, allow them to conduct themselves as members of the Syndicate, only to emerge in this application to say they are not members. I take the view that on the papers before court, I accept that the application is authorized, and the deponent to the opposing affidavit has authority to depose the affidavits before court. In the circumstances, this preliminary objection is refused.

[7] The respondent raised the objection of *lis pendens.* It is trite that a party raising such an objection must allege and prove the following: pending litigation between the same parties or their privies; based on the same cause of action; and in respect of the same subject matter. The dispute pending before the Provincial Mining Director is about

encroachment, while in this case the applicant is seeking an interdict pending the resolution of the main matter. The objection of *lis pendens* does not apply to this case. It is refused.

[8] The objection of adoption of wrong procedure is anchored on the allegation that the applicant should have applied for an injunction in terms of s 354 of the Mines and Minerals Act [*Chapter 21:05*]. This is not a technical objection dispositive of the matter without dealing with the merits. It is an issue of the merits of the case. This point *in limine* is therefore refused.

[9] The respondents argued, *in limine* that the relief sought is incompetent, in that applicant is seeking a final interdict disguised as interim. I accept that a draft order is the heart of the application, however, I do not think this issue can be resolved *in limine*. I say so because a point *in limine* is a technical legal point dispositive of matter without a consideration of the merits. The questions whether the draft order answers to the averments in the founding affidavit, or it is final in nature requires a consideration of the merits. In any event, the case of *Diamond Bird Services [Private] Limited and Another* v *Massbreed Investments [Private] Limited and Another* HH 413/21 is pertinent in this regard. MAFUSIRE J stated therein, that:

> "A draft order is merely the mould into which the actual order of court will be cast, if "the application is granted. An order of court must be efficacious. If an applicant succeeds, simple variations to the draft order, which do no violence to the substance of the remedy sought, or cause any injustice to the respondents, can be effected in terms of r 240[1] of the old Rules."

[10] I agree with the above observations.

[11] Rule 59 (27) of the High Court Rules, 2021 provides that the court may grant the order applied for, or any variation of the order. Therefore, the issue of the alleged incompetence of the draft order, is not an issue that should detain this court *in limine*. It does not qualify to be elevated to a point *in limine*, it is dispositive of the matter without consideration of the merits.

[12] I now turn to the merits of the matter.

Merits

[13] The applicant is seeking an interim interdict. An interim interdict is a court order preserving or restoring the *status quo* pending the final determination of the rights of the parties. It is an extraordinary remedy within the discretion of the court. The well-known requirements for the grant of an interim interdict are that an applicant must

establish (a) a *prima facie* right, even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the applicant must have no other remedy. The respondents argued that, for a moment, accepting the applicant's version, the application be dismissed on the grounds that the objective of an interdict could not be achieved since the interdict sought would no longer serve the purpose of preventing the alleged wrong complained of by the applicant. According to the applicant's version, the respondents have taken occupation of the contested shaft and put its armed security guards to guard it. It is trite that the primary objective of interdictory relief is to prevent or prohibit future unlawful conduct. The courts have long recognized that an interdict is not an appropriate remedy for the past violation of rights but is aimed at preventing future unlawful conduct. In *National Council of Societies for the Prevention of Cruelty to Animals* v *Openshaw* 2008 5 SA 339 (SCA) 346 H para 20 it was held that an interdict is not a remedy for the past invasion of rights but is concerned with present or future infringements. It is appropriate only where future injury is feared, and where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated. The court noted that an interdict is meant to prevent future unlawful conduct. An interdict seeks preventive rather than retributive justice.

[14] In *casu*, each party accepts that it has its own mining claim. The dispute turns on an alleged encroachment. According to the applicant's version, the respondents have taken occupation of the contested shaft and put its armed security guards to guard it. The deed has occurred. There is nothing to prevent anymore, the contested area is now in the possession of the respondent. The applicant seeks that the respondents be interdicted from interfering with its mining activities and from preventing it from accessing its mining claim. Granting such an interim relief would result in two parties working on the contested shaft. Such is unattainable. Metaphorically, the horse has bolted, and an interim interdict sought by the applicant would serve no useful purpose. Generally, this should mark the end of the inquiry, however, for the purposes of completeness, I deal with the requirements of interlocutory interdict.

[15] The applicant contends that it has established a *prima facie* right, in that it is the registered owner of the contested shaft, it attaches a certificate of registration for its

mine, a map, and an Inspection Certificate, and an affidavit by the person who allegedly pegged its mine. *Per contra*, the first respondent contend that it has been occupying the mining block 44168 since March 2013 and ME76 since June 2024. It is alleged that the armed guards were deployed on 1 May 2025 in answer to acts of violence caused by the applicant's members. The first respondent attached a certificate of registration and an inspection certificate. It is disputed that the applicant is the holder of the shaft in dispute.

[16] Both parties have valid documentation for their respective claims. The dispute is about encroachment; the applicant contends that the respondents are encroaching on its claim. This is a factual dispute, which turns on whether the respondents are encroaching on applicant's claim or not. The first respondent disputes that it is mining on the applicant's blocks, and disputes that there is any interference with applicant's mining activities. Both parties have presented, *prima facie* valid documentary evidence to show ownership of the disputed shaft. In such a case, the seat of the *onus* becomes decisive, i.e., the party with the *onus* would not have discharged it as required by the law. The applicant bears the burden of proof and in such a case cannot be said to have discharged such burden. In the circumstances, the applicant has not established *prima facie* right, even one subject to doubt. The absence of a *prima facie* case must signal the end of the matter. However, for completeness, I proceed to deal with the issue that the applicant has an alternative satisfactory remedy.

[17] The applicant is seeking an interim interdict pending the resolution of the matter by the provincial Mining Director. Section 354 of the Mines and Minerals Act [*Chapter 21:05*] provides the applicant with an alternative remedy. In that he can seek an injunction pending the resolution of the matter by the fourth respondent. In addition, the Provincial Mining Director is best suited to deal with this dispute in terms of s 354, in that the main matter is before him. He has heard argument and what is outstanding is the determination. In addition, he is well placed to deal with issues which arise from allegations disputes of encroachment etc. He has technical teams and experts who can go to mining locations in dispute, investigate and carry out surveys and make expert findings. Although s 354(8) says "Nothing in this section contained shall be deemed to divest the High Court of the power of granting injunctions in any matter arising under this Act." However, I take the view that a party seeking an interim interdict arising from a mining dispute, particularly where the main matter is pending before Provincial

Mining Director, must in the first instance seek an injunction in terms of s 354. Unless of course there are good reasons to side-step the s 354 process. It is for these reasons that I take the view that, in the context of this application, the applicant has a satisfactory alternative remedy. See *Layedza Mines & Construction (Pvt) Ltd* v *DGL Investments No 19 (Pvt) Ltd and Ors* HB-71-23. Because of the decision I have made, there would be no useful purpose of considering the remaining requirements of an interlocutory interdict.

[18] On the facts of this case, this court cannot exercise its discretion in favour of an interim interdict sought by the applicants. It is for the above reasons that this application for an interim interdict cannot succeed. It must fail.

[19] The question of costs remains remaining to be considered. No good grounds exist for a departure from the general rule that costs follow the event. The respondents is clearly entitled to his costs. However, the respondents sought costs on a legal practitioner and client scale. I take the view that no case has been made for such costs. Costs on a party and party scale would meet the justice of this case.

In the result, it is ordered as follows:

The application be and is hereby dismissed with costs.

DUBE BANDA J: …….

Tundu Law Chambers, applicant's legal practitioners
Matizanadzo Attorneys, 1st and 2nd respondents' legal practitioners