TEARS MAERESERA
versus
VIPRI MINING SYNDICATE
and
THE PROVINCIAL MINING DIRECTOR FOR
MASHONALAND CENTRAL PROVINCE
and
THE MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 21 and 22 June 2022

Opposed Application

K Maeresera, for the applicant
K Hanyan Mkimbo, for the 1st respondent
L T Muradzikwa, for the 2nd and 3rd respondent

BACHI-MZAWAZI J:

INTRODUCTION

The relationship of holders of farming and mining rights is a caricature and classic example of that of a cat and mouse or cat and dog. Though meant to cohabit they cannot co-exist. It is in their DNA to fight at every encounter and at the slightest opportunity. Such is the scenario confronting this court in this opposed application wherein, the applicant seeks a declaratory order and ancillary relief against the respondents.

BRIEF FACTS

It is undisputed that the applicant is a valid offer letter holder and lawful occupier of Subdivision 8 of SPA farm, Mazowe, measuring 32.30 hectares. The first respondent is a syndicate, an association of Miners who are holders of a Special Mining Grant No. 7072 issued in terms of the Mines and Minerals Act [*Chapter 21:05*]. As it where, both parties have legally recognized rights and interests in respect of the piece of land in question. The second and third respondents are the respective authorities and Ministry responsible for the issuance of mining rights, permits and licences.

Three years down the line the applicant has approached this court seeking a declarator nullifying the first respondent's special grant as well as an interdict barring them and all their compatriots and the removal of their Mill from the farm in question.

Applicant's Argument

The applicant submits that the first respondent is conducting mining operations on ground which is not open for prospecting in contravention of s 31(a)(i) of the Mines and Minerals Act [*Chapter 21:05*]. It is the applicant's contention that he did not give a written consent allowing the first respondent to mine within 450 metres from her principal residence. She states that in terms of the violated statutory provision, prior to the obtaining of a written consent from the land occupier no person shall be entitled to exercise any of his/her rights under any prospecting licence, special grant or any exclusive prospecting order. The applicants admit that they did at one stage consent in writing to the prospecting and mining operations of the first respondent. It did not authorize or permit the applicants to carry out mining operations within 450 metres of her principal homestead. As such she wants the Special Grant No. 7072 granted to the first respondent by the second and third respondent declared null and void and the subsequent barring of the first respondent and all his assignments workers and removal of their equipment which is the mill.

First Respondent's Argument

The first respondent argues that the syndicate was borne out of a mutual agreement between the association and applicant's son. Applicant consented in writing as required by the law to their mining operations on the piece of property which they have been doing for the past three years. However, he notes that discordant brewed after he had invested a huge sum of money into the project invoking some jealous from the applicant. They state that this is not the first time the issue has come up. The dispute over the 450 metres boundary filtered to the first respondent who after having sight of the written consent from applicant dismissed the applicant's claim. The respondent further submits that the written consent was open ended and should be interpreted as all encompassing covering the 450 metres radius from the principal residence aspect.

The first respondent argues that their mining operation are legal and there is no legal basis for granting the order sought. Of the three preliminary points they had raised, the first respondent abandoned the two on non-joinder of the Ministry and the Administrative court

route and remained with one. In the remaining point of objection, they assert that the applicant raised a new issue of the breach of section 31(1)(g) in their answering affidavits of an acrage below 100 hectares which was not pleaded in the founding affidavit. That being the case they pray that the answering affidavit be expunged as there is need to finality in litigation. They will also be forced to respond to the new averments. In support of their averment they cited the case of HLATSHWAYO J (as he then was) in *Milrite Farming (Private) Limited* v *Porusingazi & Ors* HH-82-10 which states:

> "3.4 The basic rule pertaining to application procedures is that the applicant's case stands or falls on averments made in the founding affidavit and not upon subsequent pleadings. The rational for the rule is quite clear. It is to avoid the undesirable effect of litigation assuming a snowballing character, with fresh allegations being made at every turn of pleadings. Thus, the fresh allegation contained in the answering affidavit must be ignored, leaving the same cause of action and subsequently the same fact in both the first and second applications."

See *Turner & Sons (Pvt) Ltd* v *Master of the High Court & Ors* HC 9904/2011.

The Second and Third Respondent's Arguments

The representative of the second and third respondents argued that as the authorities they do not issue special grants in the absence of the written consent from the lawful occupier of the land.

He stated that the second and third respondent have already made a decision that there is a written consent from the applicants filed of record authorizing and permitting the mining operations of the first respondent. That being so, they do not see any justification for this court to interfere with the quasi-judicial decision. It cannot cancel or nullify a legitimately granted mining right granted in terms of s 31(a)(i) of the Mines and Minerals Act [*Chapter 21:05*].

Points *In Limine*

In their founding papers the applicant raised a preliminary point that the syndicate as a legal persona ought to have generated a board resolution sanctioning the deponent of the respondent's opposing affidavit to represent them. This line of argument was crushed by the respondents who correctly distinguished a company from a syndicate. I find this point lacking in merit as a syndicate is not a board corporate wherein a resolution from the board of directors is needed. Rule 11 of the High Court Rules 2021 is instructive in this regard.

The second point *in limine* was brought for the first time at the hearing that the second to third respondent's opposing affidavit was not properly commissioned. Initially counsel for the second and third respondents had conceded that a Member-in-charge of a Police Station is not a Commissioner of oath. The court asked for supplementary submissions and heads of arguments. He then reversed his position and submitted that the affidavit in issue was properly commissioned in terms of the *ex-officio* Commissioners of Oaths Designation Notice, 1983, S.I. 648 of 1983 as amended. I proceed to dismiss the second preliminary point as it in turn lacks merit.

ISSUES

Having disposed of the preliminary points the only issue for determination is, whether or not the applicant gave a written consent authorizing and or permitting the first respondent to conduct its mining operations within the 450 metre radius of her principal radius? Once it is established that the applicants did give a written consent then there is no violation of the impugned enactment. On the other hand, if it is demonstrated that there was no written consent or the written consent did not encapsulate the 450 metre radius from the residence in issue then there is an infringement of the sections of the Act in question.

ANALYSIS

As already submitted by all the parties the applicant gave the respondents a written consent through a letter dated the 28th of February 2017.

The contents of this letter are clear and unambiguous. The letter reads:

"28 February 2017

The Provincial Mining Director
Mashonaland Central Province
P O Box 1012
Bindura

Dear Sir

RE: **FARM OWNER'S CONCERNT: MINES AND MINERAL ACT [*CHAPTER 21:05*]**

Subject to the above quoted on section ……..I, Tears Maeresa Identity 63-444361-L-07, being the holder of plot number 8 within Spa Farm in Mazowe do hereby confirm that I have granted permission to Vipri Mining Syndicate, whose partners are Pride Chirombe (ID No. 63-136305-L-42) and Vitiate Vengai Shayanowako (ID No. 63-1263611-Y-43) to search and peg for minerals within the said plot. Your kind cooperation is sincerely invited.

Yours faithfully

Tears Maeresa"

The applicant argued that the written consent is vague and should be narrowly construed to oust the 450 metres radius of the principal homestead. They contended that the parties cannot agree to something that is ultra vires the law as the law specifically prohibits mining operations within the stated 450 metres of the principal residence. They relied on the case of *Funding Initiatives International (Pvt) Ltd* v *Mabaudi* HH-20-07 at p 9 which states that:

> "The established principle of our law if that anything done contrary to a direct statutory prohibition is generally void and of no legal effect. The mere prohibition operates to nullity to act, particularly where it is visited with a criminal sanction."

In rebuttal the respondent states that there is a written consent therefore there was no infringement of the law. They submit that the case of *Sundew Green (Pvt) Ltd* v *Kagona & Anor* HH-6432-21 is distinguishable as in that case, there was no written consent obtained by the defaulting party in a clear violation of s 31(a)(i).

In my view, nothing turns on the issue of the declaratory application itself. The applicant as lawful occupiers of the farm in contestation has real, direct and substantial interest in the matter. They do have an existing right to protect. However, it is in the discretion of the court to grant or not to grant a declaratory order.

See *Movement for Democratic Change* v *President of the Republic of Zimbabwe & Ors* (HC 1291/03 [2007] ZWHCH 28 of May 2007.

In the judicious exercise of my discretion I am of the view that there is need to explore the impugned statutory provision to see whether there was non-compliance or not.

Section 31 of the Mines and Minerals Act [*Chapter 21:05*] reads:

> "S 31(1) save as provided in Parts V and VII, no person shall be entitled to exercise any of his rights under an if his rights under any prospects licence or any special grant to carry out prospecting operations or any exclusive prospecting order –
>
> (a) Upon any holding of private land except with the consent in writing of the owner or if some person duly authorized thereto by the owner or, in the case of Communal Land, by the occupier of such portion, or upon any State land except with the consent in writing of the President or of some person duly authorized thereto by the President or of same person duly authorized thereto by the owner or, in the case of Communal Land, by the occupier of such portion, or upon any State land except with the consent in writing of the President or, some person duly authorized thereto by the President."

(i) Within four hundred and fifty metres of the site of on the principal homestead on such holding or such state land, whether such homestead is already eroded or ..in the cause or erection.

(j) Except with the consent in writing:

(i) Of the owner or of some person duly authorized thereto by the owner, upon any holding of land which does not exceed one hundred hectares in extent and which is told by such owner under one separate title.

DISPOSITION

I am satisfied that the letter of the 28 February 2017 is a written consent authorizing the first respondent to conduct mining operations in tandem with the requirements stipulated in s 31(1)(a)(1) of the Mines and Minerals Act [*Chapter 21:05*]. See *Sundew Green (Private) Limited* above.

The literal rule of interpretation entails that were the words are clear and unambiguous they should be given their ordinary grammatical meaning. See *Tapedza and 10 Ors* v *Zimbabwe Energy Regulatory Authority and Anor* SC 30/2020 which states that the general principle of interpretation is that the ordinary plan, literal meaning of the word or expression that is as popular understood, is to be of adopted unless that meaning is at variance with the intention of the legislature.

There is therefore no legal basis for nullifying the Special grant issued to applicants in terms of the law. On this basis alone I am not convinced that the applicants have established a case for the declaratory relief sought. The consequential relief automatically falls away. In that regard, the application is hereby dismissed with costs.

Chizenga, Maeresera & Chikumba, applicant's legal practitioners
Hongwe, Nyengedza Attorneys, first respondent's legal practitioners
Civil Division of the Attorney-General's Office, second and third respondent's legal practitioners