FALCON MINE ZIMBABWE LIMITED
versus
WENDALL ROBERT PARSONS
and
FASANI MOYO
and
LUCK HEATHER (PRIVATE) LIMITED
and
THE PROVINCIAL MINING DIRECTOR,
MATABELELAND SOUTH MINING DISTRICT N.O.
and
MEMBER IN CHARGE MAPISA POLICE
MAPISA POLICE STATION, ZRP MAPISA,
MATABELELAND SOUTH, N.O.
and
THE OFFICER IN CHARGE KEZI POLICE STATION,
GWANDA MATABELELAND SOUTH, N.O.

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE 24 September 2021, 1 October 2021 and 10 November 2021

Application for an interim interdict

Mr B Mataruka, for the applicants
Mr G Nyandoro, for the 1st respondent
Mr S Kachere, for the 2nd and 3rd respondents
Mr D Jaricha, for the 4th to 6th respondents

CHINAMORA J:

Introduction:

This is an application for an interdict wherein the applicant principally seeks in the interim an order barring the 1st to 3rd respondents from removing any gold dump, material or ore from within the applicant's mining claim. The applicant's mining claim is described as Site 672,

Antelope East, Antelope East Extension and Antelope East Extension 2. As against the 2nd and 3rd respondents, the applicant wants them interdicted from in any way dealing with the gold dump, material or ore. The applicant, as against the 5th and 6th respondent seeks an order for the arrest of any persons found to be removing any gold dump, material or ore from the boundaries of the applicant's mining claims at the aforesaid site. The matter came before me on 24 September 2021 and the parties agreed to be heard on 30 September 2021. I granted an order in the following terms:

> "IT IS ORDERED THAT:
>
> Pending determination of this matter on Thursday, 30 September 2021 at 9:30 hours, the applicant is granted the following interim order:
>
> 1. The 1st to 3rd respondents be and are hereby interdicted removing any gold dump, material or ore from within the applicant's mining claim, being site 672, Antelope East, Antelope East Extension and Antelope East Extension 2.
> 2. The 2nd and 3rd respondents be and are hereby interdicted from in any way dealing with the gold dump, material or ore in question.
> 3. The 5th and 6th respondent be and are hereby ordered to arrest any person found to be removing any gold dump, material or ore from the boundaries of the applicant's mining claims, being site 672, Antelope East, Antelope East Extension and Antelope East Extension 2.
> 4. The Sheriff of the High Court situate in Bulawayo be and is hereby ordered to serve and execute this order on the 1st to 3rd respondents, with the assistance of the 4th to 6th respondents.
> 5. Costs shall be in the cause".

I must explain that the above order was motivated by section 176 of the Constitution. That provision allows this court to regulate its own processes in the interest of justice. As the relief sought to interdict the removal of gold damp, material or ore from the applicant's mining claim, I considered it desirable to issue an order prohibiting any removal until my determination after the matter had been fully argued. I did not want my eventual order to be a *brutum fulmen* if no interim protection was afforded. All concerned parties were advised that this was not my final order, but was an interim protective order.

The matter was heard on 1 October 2021 instead of 30 September 2021. My previous order was varied to remove paragraph 3, after the 1st to 3rd respondent queried the competency of the court ordering the police to arrest a suspected offender. The offending paragraph was removed, to make the new order read as follows:

"IT IS ORDERED THAT:

Pending determination of this matter before this Honourable Court and in order to protect the efficacy of the said proceedings, the following interim protective order be and is hereby issued:

1. The 1st to 3rd respondents be and are hereby interdicted removing any gold dump, material or ore from within the applicant's mining claim, being site 672, Antelope East, Antelope East Extension and Antelope East Extension 2.

2. The 2nd and 3rd respondents be and are hereby interdicted from in any way dealing with the gold dump, material or ore in question.

3. The Sheriff of the High Court situate in Bulawayo be and is hereby ordered to serve and execute this order on the 1st to 3rd respondents, with the assistance of the 4th to 6th respondents, if need be".

Background facts and arguments of the parties

The applicant alleges that he owns a mining claim at Site 672, Antelope East, Antelope East Extension and Antelope East Extension 2, in Maphisa Kezi, Matabeleland South. He alleges that sometime in 2020, the 2nd and 3rd respondents with some accomplices invaded the said mining claim as they sought to execute an order granted by the High Court in Bulawayo in HCB 1249/20. Consequently, the applicant applied for rescission of that order at the same court. This application was then filed for the relief referred to in the introductory part of this judgment. It was submitted that the matter was urgent, because of the alleged collection of gold dump on 18 September 2021, which led the applicant to approach the police. Not having got assistance from the police, the applicant avers that it filed the present application. The application was supported by a certificate of urgency.

In addition the applicant stated that it had a *prima facie* right to the relief sought since the damp is located on its site, and that their claims are not disputed. The applicant also submitted that there is no other available remedy, except the order that has been sought. It was further argued that the balance of convenience favoured the granting of the order asked for, as the ore which was being removed was in excess of 30,000 tonnes which the applicant had piled over a number of years. The applicant's contention continued that the dump was worth a substantial amount.

The application was opposed on the merits by the 1st to 3rd respondents, who also raised points *in limine.* These respondents argued that the matter was not urgent, and the alleged urgency was self-created. He submitted that the certificate of urgency was invalid since it does not disclose the urgency of the matter. The first respondent also contended that, at the time the applicant filed

its application for rescission of judgment, it did not seek an interdict. In light of this, the 1st respondent argued that the matter was not urgent. The 1st respondent also argued that he had been wrongly cited in his personal capacity since he had never gone to the applicant's mining location to collect any dump, sand or other mining residue. He asserted that, as far as he knew, the 2nd and 3rd respondents had been delivering to the company in which he is a director, Wendall Parsons (Pvt) Ltd, residue from their processing plants and dump sites. Additionally, he averred that Wendall Parsons (Pvt) Ltd has mining claims located adjacent to the applicant's mining claim. To his opposing papers, he attached the company's certificate of incorporation. He stated that the 2nd and 3rd respondents had confirmed that they had a court order which allowed them to conduct mining activities in the same area where the dump site was located.

Additionally, the 1st respondent argued that the relief being sought was incompetent. The basis for this contention was that the order which the applicant wanted was final and not interim. He further submitted that the deponent to the applicant's affidavit lacked *locus standi* to represent the applicant as he had no personal knowledge of the averments in the affidavit.

Finally, the 1st respondent argued that there was a material dispute of fact which could not be resolved on the papers without hearing *viva voce* evidence, and that it should be dismissed because of that. The 2nd and 3rd respondents weighed in on this aspect by submitting that the 4th respondent would need to ascertain the actual coordinates which demarcate Stella City A and Stella City B (registration numbers 1036BM and 103227BM) from the applicant's mining site. In addition, the 2nd and 3rd respondents raised *lis pendens* as a point *in limine.* Their argument was that the application for an interdict granted under HCB 1249/20 (which is extant) is similar to the present application under HC 4922/21.

On the merits, it was contended that the applicant failed to establish a *prima facie* right. The 1st respondent submitted that the applicant has not established that it owns or is in control of the area that it alleges the 1st to 3rd respondents are removing the gold dump. In this respect, he contended that the inspection certificates, which were attached to the applicant's papers, do not relate to Site 672, and that rental invoices are not proof of ownership. At any rate, the 1st respondent argued that such documents as tendered by the applicant cannot override the court order issued in their favour. He concluded by saying that the applicant had not demonstrated irreparable harm and that the balance of convenience resided in his favour.

The 6th respondent filed an affidavit I which it also raised preliminary points of lack of urgency and incompetency of the order sought. Regarding the merits, the Member-in-Charge Mapisa Police Station, deposed in paragraph 14 of his Opposing Affidavit as follows:

> "After I received the report from the applicant, I assigned Sgt Godyo and Const Ndebele to attend the scene, which they did as part of the investigation. They went to the scene to establish the following:
>
> (1) Intercept vehicles carrying mine dump from mining blocks around Falcon Mine, Maphisa or other places to Navada Mine.
>
> (2) Request to see requisite paperwork expected to be in possession of such vehicles.
>
> (3) Get information as to who contracted them to do so or who authorized them.
>
> The following were the findings: a tipper truck registration number AFJ 5168 was being driven by Bvutai Moyo Philip NR 25-042575-P47, a male adult aged 47 years was intercepted. He indicated that he is employed by Mc Galf Investments of No 4629 Tynwald, Harare. He was asked to produce any papers allowing him to transport mine dump from where he was getting it and referred the team to Nevada Mine Offices". [**My own emphasis]**

The affidavit, in the same paragraph proceeded to state:

> "When the team tried to establish where the mine dump was coming from, they could not identify the exact boundaries or demarcation of the two mines except engaging the responsible stakeholders". **[My own emphasis]**

As a result, the 6th respondent prayed for the dismissal of the application, describing it as an abuse of court process. I will now deal with the preliminary points before I go on to examine the merits of the matter should that become necessary.

Points *in limine*

The issue of urgency in this case

It was contended by the 1st to 6th respondents that the application was not urgent and, consequently, the applicant should not be allowed to jump the queue. The 1st respondent went an extent further to argue that there was no valid certificate of urgency before the court. The submission was the legal practitioner who certified the matter to be urgent did not apply his mind to the facts which informed his decision to issue the certificate. My attention was drawn to an allegation in the certificate which said that HCB 686/21 and HCB 1249/20 are pending between the applicant and the 2nd and 3rd respondent. Counsel for the 1st respondent, therefore, submitted

that to the extent that an order was granted in HCB 1249/20, that matter is not pending. Additionally, the 1st respondent said the, the certifying legal practitioner referred to items not mentioned in the founding affidavit. For example, the certificate mentions front-end loader which is not referred to in the applicant's affidavit. I addition, the 1st respondent attacked the certificate for not disclosing reasons for urgency. It was further argued that a period of three (3) months had lapsed since the time it was alleged that the applicant's mine dump was being removed. On the basis of the alleged inaction by the applicant and defect in the certificate of urgency, the 1st respondent argued that matter should not be treated as urgent. Put differently, the contention was two-fold. Firstly, the submission was that if the certificate of urgency was defective, then there was no certificate which would have been the basis for the application to be filed urgently. In this regard, Rule 60 (6) provides that, where a chamber application is accompanied by a certificate of urgency by a legal practitioner certifying a matter to be urgent giving reasons for his conclusion, such a matter would immediately be placed before a judge for consideration. Secondly, if the applicant waited for three months from the time removal of dump started, it means that he did not act when the need to act arose as required by the case of *Kuvarega v Registrar General & Anor* 1988 (1) ZLR 188 (H) at 193 F-G.

Having looked at the certificate of urgency and the averments in the founding affidavit, I have observed the following. The certificate, in my view, is not supposed to be a regurgitation of the entirety of the averments in an applicant's founding affidavit. It is a certificate and must in summary form give a basis for perceiving the matter as urgent, and conclude by certifying it as urgent. Paragraphs 1 to 6 of the certificate outline the reasons why the legal practitioner considered the matter as deserving urgent treatment. He relates to the removal of dump from Site 672, the reporting of the matter to the police, the applicant's view that the police had not assisted it and the filing of the application in *casu*. I do not agree that the certificate is deficient of a minimum of detail that justify treatment of the matter on an urgent basis. Further, my overall view of the certificate and the founding affidavit leads me to the conclusion that the matter required urgent treatment. I was also satisfied that on a consideration of the second aspect of urgency, namely, the consequences of failure to swiftly act, the application was rightly brought as an urgent one. *(Northen Farming (Pvt) Ltd v Vegra Merchants (Pvt) Ltd* HH 328-13). In the result, I find no merit in the point *in limine* raised and dismiss it.

Incompetency of the relief sought

The 1st respondent, as did the other respondents, argued that the relief sought by the applicant was incompetent. They argued that it was not interim but final in effect. Since the order was amended to exclude the part asking the court to order the arrest of offenders, the draft order cannot be attacked for being unconstitutional. At any rate, a draft order remains a proposal until the application is granted and the draft crystallises into an actual order of court. The rules of this court permit the granting of an order as prayed for or as varied. (See *Chiswa v Maxess Markerting (Pvt) Ltd & Ors* HH 116-20). I have looked at the cases cited by the 1st respondent, namely, *David Whitehead Textiles Lt v Chimanye* HH 449-19 and *Velah & Ors v Minister of Primary & Secondary Education & Anor* HH 124-18. However, I have found the logic of KWENDA J in *Chiswa v Maxess Marketing supra* more compelling. Because of this, I do not believe that this preliminary point has merit and, accordingly, dismiss it.

Material dispute of fact

The 1st respondent has also sought to persuade me that there is a material dispute of fact which renders this application incapable of resolution without calling oral evidence. I do not consider the facts set out by the 1st respondent as sufficient to raise a material dispute of fact. The issue has not been pleaded in a manner that makes me conclude that such a dispute exists, let alone a material one which cannot be resolved on the papers. In this context, I share the wisdom of MATHONSI J in *The Railways Enterprises t/a Paroun Trucking* v *Dowood and David Bruno Luwo* HB 53-16, where the learned judge said:

> "a party does not create a real dispute of facts by merely denying the allegations made by the applicant in its founding affidavit. That party must present a story in its defence which would lead the court to the conclusion that indeed a dispute of facts exists that cannot be resolved on the papers"

In this jurisdiction, in *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H), MAKARAU J (as she then was) provides an interesting guidance on how to identify whether or not a material dispute of facts exists. She appositely said:

> *"*A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

Let me state the obvious. The elucidation given by Justice Makarau is inspired by common sense. Even if it is accepted that the facts alluded to by the 1st respondent create an apparent conflict, in my view, no oral evidence is required to settle those issues, if consideration is also given to *Douglas Muzanenhamo* v *Officer in Charge CID Law & Order and Ors* CCZ 3/13. The Constitutional Court urged courts to take a robust and common sense approach with the endeavour to achieve justice. Therefore, if the approach urged in both *Supa Plant Investments supra* and *Douglas Muzanenhamo supra* is deployed, it is apparent that this application raises no material dispute of fact which can only be resolved upon calling of viva voce evidence. Accordingly, I dismiss this point *in limine* for lack of merit.

Locus standi of deponent to applicant's affidavit

This point, although raised by the 1st respondent, was not seriously pursued in argument when it became apparent that his affidavit could be attacked on the same basis. Even if I do not treat the point as having been abandoned, I have not lost sight that in affidavits supporting applications, an amount of hearsay is permissible. (*Hiltunen v Hiltunen* [2008] ZWHHC 99). For this reason, I again dismiss the point *in limine*.

As I have dismissed all the preliminary points raised by the respondents I will now examine the matter on the merits. This requires me to determine whether or not the applicant has established the requirements for the relief that it seeks.

Whether or not the requirements for an interim interdict have been satisfied.

For an interim interdict to succeed, the following pre-requisite have to be satisfied. *(Airfield Investment Limited v The Minister of Lands, Agriculture & Rural Resettlement & Ors* SC 36-04):

1. That the right which the applicant seeks to protect is clear or if not clear is *prima facie* established though open to some doubt.
2. If the right is only a *prima facie* one, that there is a well-grounded fear of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds.
3. That the balance of convenience favours the granting of interim relief;

4. That the applicant has no other satisfactory remedy.

I will look at each of the above requirements and apply them to the facts of this matter in turn. In this respect, I mention that the applicant is asking for interim relief on proof of a *prima facie* right, and I propose that to be my starting point.

***Prima facie* right**

The question I pose is that: against the trite principles appearing above, has the applicant managed it establish a *prima facie* right against the respondents? Put differently, the examination is whether or not the facts justify the granting of the order sought? My answer is in the negative, and I proceed to give my reasons. The applicant has positively asserted that the 1st to 3rd respondents were unlawfully removing gold ore from his mining claim, being Site 672, Antelope East, Antelope East Extension and Antelope East Extension 2. It is not in dispute that, on its own affidavit, what prompted the applicant to approach this court that it was brought to its attention that trucks had been seen removing gold dump from its mining location. (See paragraph 18 of the applicant's affidavit). In this connection, it is relevant to have a look at paragraph 14 of the 6th respondent's affidavit. I have already referred to it earlier in this judgment.

What emerges from paragraph 14 aforesaid, is that police investigations did not establish, firstly, that the 1st to 3rd respondents were involved in removing any gold or mining dump from the applicant's site. On the contrary, the driver intercepted by the police with a quantity of dump was one Bvutai Moyo Philip, who said that his employer was Mc Gal Investments. Secondly, the investigation did not establish that the said dump came from the applicant's mining claim. The affidavit of the 6th respondent is clear that the police *"could not identify the exact boundaries or demarcation of the two mines".* Indeed, Counsel for the applicant, did not say that there was evidence showing that the dump which had been intercepted by the police had come from the applicant's mining location. The test is objective, and the allegations of the conduct complained of must be substantiated. Moreover, proof that the dump sought to be protected came from the applicant's site is critical to the first part of the test.

In view of the above, it is evident that I am being asked to grant interim relief in the absence of demonstration of a *prima facie* right. I have to take into account that the 1st respondent has said

in his affidavit that he mines on a claim adjacent to the applicant's site. Thus the right claimed by the applicant should not be viewed in the abstract. Given the closeness in proximity of the two mining claims, I cannot ignore the competing rights enjoyed by the 1st to 3rd respondents. Therefore, I cannot grant an order which effectively negates the rights of the said respondents to conduct mining operations on their claim, in circumstances where the applicant has not established a *prima facie* right to the relief sought. For the avoidance of doubt, there was no evidence placed before the court to show that the 1st to 3rd respondents acted in the manner alleged, or that there was any mining dump which was removed from the applicant's claim. (See *Natural Stone Export Co (Pvt) Ltd & Anor v Dir, National Parks & Ors* 1997 (2) 215 (H)).

Having come to the conclusion that there is no evidence to establish a *prima facie* case, I find no reason to deal with the other requirements for grant of an interim interdict. This approach has precedence in this court. In this respect, in *Nyabunze v University of Zimbabwe* HH 304-17, ZHOU J said:

> "As the applicant has not established any right to be protected by the interdict sought, it is not necessary for the court to consider the other two requirements".

I find the above approach self-commending and, therefore, dismiss this urgent chamber application. Costs are in the discretion of the court and invariably follow the result. Consequently, I will order that the applicant pays the costs of the respondents on the ordinary scale. I have already pronounced myself on the preliminary points.

Disposition

Accordingly, I make the following order:

1. The points *in limine* are hereby dismissed.
2. The application is hereby dismissed.
3. The interim protective order granted in this matter is hereby discharged
4. The applicant to pay respondents' costs of suit.

Gill Godlonton & Gerrans, applicant's legal practitioners
Hamunakwadi & Nyandoro Law Chambers, 1st respondent's legal practitioners
Mathonsi Ncube Legal Practitioners, 2nd and 3rd respondent's legal practitioners
Civil Division of Attorney General's Office, 4th to 6th respondents' legal practitioners