SUNDEW GREEN (PRIVATE) LIMITED
versus
GOLIATH KAGONA
and
PROVINCIAL MINING DIRECTOR

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 28 September & 17 November, 2021

Opposed Application

T J Chivanga, for the applicant
Muguwe, for the 1st respondent
C Chitekuteku, for the 2nd respondent

MUZOFA J: The applicant was granted a provisional order interdicting the first respondent from mining within the prohibited distance from its permanent structures in terms of s 31 of the Mines and Minerals Act [*Chapter 21:05*] "the Act". The applicant seeks the confirmation of the said order.

The applicant is the registered owner of a property known as Flaxton Estate held under deed of transfer 1106/92. The first respondent owns mining claims registered in terms of the Act as 4567 to 4574.The claims are within the applicant's property.

According to the applicant the first respondent has always been carrying out mining activities at the farm. On the 10th of December 2016 he received a report that the first respondent's mining activities encroached within the prohibited distance from the applicant's permanent structures which include the homestead, employees' houses, shades, fowl runs, dip tank, spray race and a borehole which is the only source of clean water in violation of s 31 of the Mines and Minerals Act. More specifically the first respondent was carrying out mining activities within 450 metres of its homestead, 39 metres from its dip tanks, 73.6 metres from its spray race and 5 metres away from its borehole'

No consent was obtained from the applicant for mining as contemplated by the Act. The structures are currently in use.

The applicant reported the matter at Kadoma Police Station, the District Environmental Management Agency and the Mines Promotions Officer in Kadoma. The first respondent was

engaged by authorities, but he insisted on his mining activities. The mining activities are posing a danger to both human and animal life including the buildings on the property due to the chemicals used by the first respondents.

Although in its founding affidavit the applicant raised allegations discrediting the first respondent's title, the answering affidavit is a complete climb down. In para 6.2 of the answering affidavit the applicant avers that it is not contesting the respondent's title but that his mining activities are being conducted within the prohibited distances.

The first respondent opposed the confirmation. The mining activities are not disputed. However, he avers that he registered the mining claims in 2001. By then the alleged permanent structures were dilapidated, abandoned and out of use. The alleged homestead was actually a cattle kraal with damaged window frames and roof. The cattle spray race was abandoned and dilapidated. The borehole was not there. In short, the first respondent said when he commenced mining activities there was no presence or activity or use of the said permanent structures. He attached photographs depicting the dilapidated structures. The applicant has been aware of the mining activities since 2001. The first respondent attached a tribute agreement dated 2013 as proof of such prior mining activity. The applicant refurbished the structures in 2015 and he lodged a report. The applicant was advised to cease such activities. According to the first respondent his mining activities must not be stopped since he was first in place.

As to the alleged events of the 10th of December 2016, the first respondent skirts around them. He only referred to the alleged report to the Mines Promotion Officer that he was in attendance. The Officer heard the parties' concerns and undertook to advise them on the outcome. He subsequently wrote a letter to the second respondent advising of all the challenges at the mining claims. Surprisingly the letter did not refer to the alleged appearance before the officer.

On that basis the first respondent urged the court to dismiss the application with costs in that the applicant failed to show a clear right, that he has suffered actual or has a reasonable apprehension of injury and that there is no other remedy.

The first respondent also raised issues that the court must decline its jurisdiction, the matter should be dealt with before the Administrative Court in terms of s 32 of the Act. I do not think a proper considering of s 32 leads to that conclusion. The dispute between the parties is not on whether the land is open for prospecting but it is the activities by the miner that are under scrutiny. The prospecting licence was issued sometime back and it is not an issue in this case.

The second issue is that there are material disputes of facts that this matter cannot be resolved on the papers. The dispute being the description of the structures. They were dilapidated when the first respondent commenced mining activities. Evidence would be necessary. There might appear to be dispute but it is my considered view that it can be resolved on paper without recourse to evidence. I will revert to the issue in the analysis of the facts and the law.

A point was taken also that the applicant is misleading the court by alleging that the old mill is a homestead. It is not registered in terms of s 31 of the Act. Section 31 (2) refers to registration of an intended principal homestead. The applicant does not rely on this section for the relief sought. The applicant's claim is based on what is in existence not some future plan. Therefore there was no need for registration.

The second respondent filed a notice of opposition which addressed the legality of the first respondent's registration. Otherwise in the main, the second respondent is not opposed to the application.

The requirements of a final interdict are now trite. Both parties set out the applicable law. The requirements are aptly set out in the leading case in the matter of *Setlogelo v Setlogelo* 1914 AD 221.The applicant must show that:

I. a clear right exists established in law
II. either actual injury has been suffered or a reasonable apprehension of injury
III. no other ordinary remedy exists by which the applicant can be protected in the same way as by an interdict.

This matter resolves itself from the first respondent's submissions and the law. Section 31 of the Act is meant to curtail the proximity of mining activities for obvious reasons. The mining activities may affect the wellbeing of both the people and animals. In addition the buildings may also be affected. The owner of the property is given the option to give its consent thus taking a risk by allowing mining activities within the otherwise prohibited distances.

As a starting point, a miner is prohibited from exercising his rights within the distances set out in the section. The structures referred to under in s 31 (1) must be in existence at the time the miner exercises his mining rights under a prospecting licence. The only exception is under subpara (ii) which deals with a site of an intended principal homestead. For such a site to be recognised under the subparagraph, it must have been registered with the mining commissioner by the land owner. It cannot be envisaged that the legislature intended to protect

structures that did not exist at the time the miner commenced exercising its rights under a prospecting licence. Where a landowner intends to build structures it has to comply with the limitations provided in the Act otherwise it has no recourse.

There are contradictory averments as to who was first on the ground. The documents filed of record provide the answer. It is not in dispute that the applicant purchased the property in 1991. The agreement of sale set out the improvements on the property as a 3 bedroomed farm house 5 boreholes with pumps, 15 paddocks, cattle handling facilities, 6 small stock claims and a dip tank. These are the permanent structures on the property. In terms of the law prospecting activities within a certain distance of such is prohibited. Even if the court would accept that these were dilapidated buildings as advanced ,the first respondent still required the applicant's consent in terms of s 31 (1) (a) (iv) of the Act. The law protects any other buildings. These do not necessarily have to be the homestead. I do not believe that they must be strictly in use. The act is silent as to whether the building must be in use or not. In my view as long as it is a building and has some value of more than five hundred dollars, it must be protected. By his own admission the first respondent conceded that there were some buildings. It does not matter that he considered them of insignificant value. He needed the applicant's consent to conduct his mining activities within the prohibited distances. The applicant's title preceded his title.

The first respondent's founding affidavit also gives away his case. The averment that the applicant refurbished the buildings in 2015 is not supported by the documents filed. He said he filed a complaint of such activity that it interfered with his mining activity. The letter attached as evidence of the complaint bears salient features that do not confirm the first respondent's version. The letter of complaint at p 85 received on 15 April 2015 by the second respondent complained of the construction of a power line only. One wonders why, the first respondent did not complain about the rest of the structures. The answer is that there was no such refurbishment as alleged in 2015. The powerline is not part of the structures that form the basis of the complaint.

The first respondent also alleged that the fourth respondent ordered the applicant to cease using the borehole and the powerline. A letter dated 16 July 2015 was attached as proof of the averments. It is unclear if the letter was in response to the first respondent's complaint about the construction of the powerline. I say unclear because the fourth respondent referred to a borehole that the first respondent did not complaint about. That as it maybe the bottom line is that the borehole was in existence. The first respondent was required at law to obtain the

applicant's consent before conducting his mining activities within the prohibited distances of the applicant's permanent structures.

The applicant's right is clearly established in that it is the owner of the property and the structures sought to be protected have been shown to be in existence. Section 31 of the Act requires that the miner must obtain the consent of the owner where mining activities are conducted within the prohibited distances from permanent structures. No consent was obtained from the applicant.

In respect of the harm, the first respondent denied that his activities have caused any injury. In conducting his mining activities, he engages professionals to do the blasting and they not use poisonous substances.

The applicant did not set out the actual injury suffered. The issue is the apprehension of injury in the form of contamination of the source of water and the effects of the chemicals on people and animals on the property.

In *Mount Grace Farm (Pvt) (Ltd) v Jumua Metals &Minerals (Pvt) (Ltd)* HH 844/19 the court cited *Ex parte Lipschitx* 1913 CPD 737 as authority that the test of apprehension of injury is objective. Reasonable apprehension is one 'which a reasonable man might entertain on being faced with a certain fact'.

In this case, the first respondent did not seek and obtain the applicant's consent to conduct mining activities. In the absence of such consent there is reason for the applicant to entertain a reasonable apprehension of injury. The section exists to protect the owner of the property against the devastating effects of mining activities.

There is no other remedy that can protect the applicant's interest. I have already addressed the inapplicability of s 32 of the Act to the applicant's circumstances.

From the foregoing the applicant has discharged the onus on it .The order is set in broad terms. The court can vary the order to reflect what the applicant has proved.

The applicant requested for costs on a higher scale. I was not persuaded by the reasons advanced for such a scale. Costs on an ordinary scale would meet the justice of this case.

From the foregoing the following order is made.

1. The Provisional Order of this court dated 9 January 2017 be and is hereby confirmed.
2. The respondent, together with all and any persons acting or purporting to act on his behalf and/or his name, be and is hereby interdicted from carrying out mining activities within
    a. Four hundred and fifty metres of the applicant's homestead.

b. Ninety metres of the applicant's cattle dip and spray race, shades employees' houses and fowl runs.

3. The first respondent to pays costs of suit.

Scalen and Holderness, applicant's legal practitioners
Muronda, Malinga Legal Practice, respondent's legal practitioners