

THOMAS BRIGHTON BHEBHE
versus
DAIRAI MINING SYNDICATE
and
MINISTER OF MINES AND MINING DEVELOPMENT
and
COMMISSIONER OF MINES
and
ENVIRONMENTAL MANAGEMENT AGENCY

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 19 May 2016 & 29 November 2017

Opposed Application

S. Bhebhe for the applicant
R. Zinhema for the first respondent
H. Magaduri for the second and third respondents

ZHOU J: The applicant instituted the application *in casu* seeking an order that:

- “1. It be and is hereby declared that no special grant or mining rights may be awarded to the first respondent, or anyone, by the second or third respondents or anyone acting in their stead, in respect of (the) property known as Subdivision 1 of Highway Estate in Makonde District of Mashonaland West Province, measuring approximately 65.60 hectares.
2. If any such special grant has already been granted in respect of (the) property known as Subdivision 1 of Highway Estate in Makonde District of Mashonaland West Province, measuring approximately 65.60 hectares, then it be and is hereby ordered that such special grant is null and void and of no force or effect.
3. 1st respondent and all those claiming any right through it be and are hereby interdicted from engaging in any mining activities or any activity likely to cause damage to the applicant’s property and/or livestock, namely (*sic*) Subdivision 1 of Highway Estate in Makonde District of Mashonaland West Province, measuring 65.60 hectares.
4. The 2nd respondent be and is hereby interdicted from issuing the special grant for the first respondent in relation to reserved area 1563 and in particular, in relation to (the) property known Subdivision 1 of Highway Estate in Makonde District of Mashonaland West Province, measuring approximately 65.60 hectares.

5. The 1st respondent is to pay the costs of this application.”

The applicant is the occupier of the piece of land known as Subdivision 1 of Highway in Makonde District of Mashonaland West Province measuring 65.60 hectares. The occupation is in terms of an offer letter which was issued to him in terms of the Agricultural Land Settlement Act [*Chapter 20:01*]. The letter is dated 1 March 2005. It was issued by the then Minister of Special Affairs in the President’s Office in charge of Lands, Land Reform and Resettlement. He has been in occupation and use of the piece of land from the time that he was issued with the offer letter, carrying on farming activities. He states that located on the piece of land is the principal residence or house as well as a compound comprising cottages made out of brick and mortar under asbestos. There is also a dip tank which services the whole area of Highway, as well as the neighbouring areas of Geluk, Makasha, Mesina and other nearby areas. The applicant owns some thirty cattle and 25 goats which he keeps on that piece of land. Applicant states that on 2 June 2015 persons representing the first respondent went to the farm and commenced mining operations using basic equipment, like picks and shovels. The applicant lodged a complaint with the Inspector of Mines and Explosives who issued a directive for the first respondent to immediately stop the mining activities. The applicant alleges that the first respondent continued with its mining operations notwithstanding the directive. The first respondent’s employees or agents are alleged to be digging indiscriminately on the land, including very close to the principal residence, workers’ cottages and the other structures on the farm. The applicant also alleges that some of the digging is taking place in such a way that it destroys the applicant’s crops. The applicant argues that the conduct of the first respondent contravenes s 31(1)(a) of the Mines and Minerals Act [*Chapter 21:05*] and the Environmental Management Act [*Chapter 20:27*] which requires that there be an Environmental Impact Assessment before such mining activities take place.

In opposition, the first respondent questions the authenticity of the offer letter issued on the ground that it was issued by the Minister of Special Affairs in the President’s Office In Charge of Lands, Land Reform and Resettlement, and that the copy attached does not have the stamp of the relevant Ministry. The first respondent also advised that it obtained a special grant on 23 September 2015. It, however, denies that it has carried on any mining operations on the land in question, and argues that the excavations reflected on the photographs attached to the applicant’s papers related to mining activities by a different entity and not the first respondent.

The first respondent also argues that the relief sought may not be granted as it seeks to stop a lawful process.

The second respondent in its affidavit filed under cover of a notice of opposition advised of its election to abide by the decision of the court in this matter. However, *Mr Magaduri* in his submissions on behalf of the second respondent seemed to contest the relief being sought on behalf of the applicant on the basis that the interdict sought could not be granted as the second respondent acted lawfully in granting the first respondent the special grant.

The objection to the offer letter is without merit, as the letter was issued by the Minister who was then responsible for the administration of the Act in terms of which the offer was given. Also, the fact that the letter does not bear the stamp from the relevant Ministry does not invalidate it. The validity of that letter does not depend on the affixing of the stamp upon it. After all, the letter is clearly on the letterhead of the Office of the President and Cabinet under which the Minister fell. The respondent has not placed any evidence before this court to justify questioning the authenticity of the offer letter.

Section 31(1) of the Mines and Minerals Act [*Chapter 21:05*] provides as follows:

“Save as provided in Parts V and VII, no person shall be entitled to exercise any of his rights under any prospecting licence or any special grant to carry out prospecting operations or any exclusive prospecting order –

- (a) . . .
- (i) within four hundred and fifty metres of site of the principal homestead on such holding or on such State land, whether such homestead is already erected or actually in the course of erection;
 - (ii) . . .
 - (iii) within ninety metres of any area set aside on which housing constructed of brick or concrete has been erected for occupation by farm employees, if the total value of such housing is not less than five thousand dollars.
 - (iv) within ninety metres of any other building or permanent improvement of a value of not less than five hundred dollars;
 - (v) within ninety metres of any permanent cattle dip tank or spray race;
 - (vi) upon any land under cultivation or within fifteen metres thereof;
 - (vii) within nine metres of any other permanent *bona fide* farm building except on payment to the landowner of such compensation as may be fixed by agreement or, failing, by the Administrative Court to whom the matter shall be referred for decision.”

While the first respondent has stated that he has not yet commenced mining operation, he has not disputed that the intended mining operations. The mining activities which are alleged to be taking place on the applicant’s land which the first respondent ascribes to another

entity are undeniably within the prohibited distances from the structures referred to in s 31(1) of the Act referred to above. The first respondent has not suggested that the place where it intends to exercise its rights falls outside those distances. Instead, its position is principally that it is yet to commence its mining activities and that it would be entitled to mine within those prohibited parameters as long as it has documentation from the second and third respondents. And immediately seeks to fall back upon the provision in terms of which the Minister can permit mining activities within the prohibited range if consent thereto is unreasonably withheld by the owner or occupier of the land. But the special grant on the basis of which the first respondent seeks to exercise the rights was not issued on the basis that consent had been unreasonably withheld by the applicant. There is no evidence from any of the respondents that such consent was ever sought. The provisions of s 31(1) would be rendered ineffectual if the respondents were permitted to issue a special grant that violates s 31 of the Act only to seek consent after the special grant had been issued. The consent must be sought before the special grant is issued. That is not what happened *in casu*. For that reason the court is entitled to conclude that the special grant was issued contrary to the provisions of the Act insofar as the exercise of the rights it confers violate the provisions of s 31(1) of the Act.

I am not prepared to grant the declaratory relief sought given the provisions of s 31(1) which would allow for the consent of the owner or occupier of the land to be given. As for the interdict, the requirements thereof are settled. In the case of *Bulawayo Dialogue Institute v Matyatya NO & Ors* 2003 (2) ZLR 79(H) at 86, it was held:

“In order to succeed in obtaining a final prohibitory interdict the applicant must establish, first, a clear right, second, an injury actually committed or reasonably apprehended and, third, the absence of similar protection by other ordinary remedy.”

See also *Rowland Electro Engineering (Pvt) Ltd v Zimbank* 2003 (1) ZLR 226(H); *Setlogelo v Setlogelo* 1914 AD 221.

The existence or otherwise of a right is a matter of substantive law; whether that right is clearly established is a question of evidence. In the present case the applicant has shown that he is the holder of a valid offer letter in respect of the land to which the first respondent's special grant relates. The applicant has also shown that in terms of s 31 of the Mines and Minerals Act he is entitled to protection from the exercise of the rights given by the special grant. The right is therefore clearly established *in casu*.

As for the injury, it is common cause that there has already been mining activities carried on the land in question in apparent contravention of the provisions of the Act. There is

a dispute of fact as to whether those mining activities were carried on by persons employed by or acting on behalf of the first respondent. Indeed, the first respondent denies also that the persons who held themselves as representing it were not sent by it. However, the first respondent has not suggested that it does not intend to carry on mining activities on the land in question. Instead, its case is that it is yet to pay an amount of money which is required to carry on the mining activities. But the first respondent already has the special grant relating to the land in question. The applicant's fears that the first respondent intends to carry on mining activities on the land in contravention of the provisions of s 31 of the Act cited above are therefore well-grounded. The applicant's concern to the proposed mining activities has not been sought. The respondents have not suggested that they intend to seek such consent from the applicant. The second requirement for the grant of an interdict is therefore satisfied.

There is no conceivable alternative remedy which may be available to the applicant other than the interdict to stop the intended mining activities from taking place until there has been compliance with the requirements of the law.

In the result, IT IS ORDERED THAT:

1. The first respondent and all those claiming any rights through it be and are hereby interdicted from engaging in any mining activities or any activities likely to cause damage to the applicant's property and/or livestock on Subdivision 1 of Highway Estate in Makonde District of Mashonaland West Province, measuring 65.60 hectares, save with the written consent of the applicant.
2. The first respondent shall pay the costs of suit.

Kantor & Immerman, applicant's legal practitioners
Madzivanzira & Associates, first respondent's legal practitioners
Civil Division of the Attorney-General's Office, second and third respondents' legal practitioners