

TICHAONA CHINOSENGWA

Versus

BHERI MAWERE

And

GARIKAI NGOMA

And

MINISTER OF MINES & MINING DEVELOPMENT (N.O)

And

OFFICER COMMANDING, KWEKWE DISTRICT (N.O)

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 23 AND 30 JULY 2020

Urgent chamber application

K. Mahereni, for the applicants
S.T. Farai, for the respondents

DUBE-BANDA J: This is an urgent application. At the commencement of the hearing I informed the legal practitioners for the parties that I would first hear argument on the preliminary points raised by the 2nd respondent. After hearing argument on the preliminary points I reserved judgment. This is the judgment on the preliminary points raised by the 2nd respondent.

In this urgent chamber application, the applicant seeks an order drawn in the following terms:-

Terms of the final order sought

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

1. That the 1st and 2nd respondents be and are hereby permanently interdicted from interfering with the applicant's mining operations at Eva Mine, registration number 31580, Kwekwe District.
2. That the applicant's registration papers in respect of Eva Mine, Registration Number 31580, Kwekwe District be and hereby declared valid.
3. That 1st and 2nd respondents be and hereby ordered to pay costs on attorney and client scale.

Interim relief granted

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

1. The first and 2nd respondents actions be and hereby declared illegal.
2. The 1st and 2nd respondents, their employees, agents or assignees be and are hereby interdicted from entering, disturbing, carrying out any mining activities whatsoever or mining operations at Eva Mine, registration number 31580, Kwekwe District pending the finalisation of this matter.
3. The sheriff of Zimbabwe by the powers that vest in his office with the assistance of the members of the Zimbabwe Republic Police be and is hereby authorised to enforce clause (a) above in the event of non-compliance with the court order.

Service of provisional order

The provisional order together with all supporting documents shall be served on the respondents by the Sheriff or applicant's legal practitioners.

This application is opposed by the 2nd respondent.

In his opposing papers second respondent raised three preliminary points being, the alleged lack of urgency of the application; misjoinder and non-joinder; and that they are material disputes of fact which could not be resolved on the papers before court. At the hearing, I asked Ms *Mahereni* counsel for the applicant whether the interim order sought was competent. Mr *Farai* then picked and ran with this issue, making the point that the interim relief sought was incompetent in that it seeks a final relief disguised as an interim relief.

On the facts of this case the preliminary point relating with misjoinder and non-joinder has no merit. The preliminary point relating to the material dispute of facts is allied with the

issue of urgency, I will therefore not deal with it as a stand-alone point. The resolution of the issue of urgency resolves the issue in respect of the material dispute of fact.

In the certificate of urgency, signed by a legal practitioner in terms of rule 242 (2) (b) of the High Court Rules, 1971 (Rules) it is alleged that:

1. On the 25th June 2020, the applicant was issued with a Certificate of Registration in respect of Eva Mine, Registration Number 31580 situated in the district of Kwekwe. He subsequently obtained an inspection certificate in respect of the mine on the 30th June 2020.
2. On the 4th July 2020 the applicant discovered that 1st and 2nd respondents were carrying out mining operations on his mine when he had gone to the mine in a bid to prepare for the construction of a power line on the mine.
3. He tried to stop the employees of the 1st and 2nd respondents but he was restrained. He immediately sought and gathered information concerning the mining operations and he learnt that the 1st and 2nd respondents were masquerading as legitimate owners of the mine.
4. He approached the 1st respondent and showed him his registration papers but that did not move him as he stated that they were also issued with a certificate of registration in respect of the same mine by third respondent. The papers however are not in respect of Eva Mine.
5. The applicant tried to resolve the dispute amicably but the 1st and 2nd respondents threatened the applicant with violence and forbidden from visiting the mine or making any developments on the mine.
6. As a result, the applicant wrote a letter to the third respondent on the 6th July 2020 appealing for help to resolve the mine dispute. The third respondent was not forthcoming as he never responded to the applicant's letter. The 1st and 2nd respondents got word that the applicant had filed a complaint with the third respondent and since then, they have been threatening the life and the livelihood of the applicant by death threats.
7. The applicants also approached the 4th respondent for help but was dismissed on the basis that this was a civil matter which they could only act on an order from this court.

8. As a result of the 1st and 2nd respondent's interference, the applicant's plans to put infrastructure to commence the mining operations at the mine have been put on hold. He has no access to the mine. He invested a huge sum for the construction of the powerline and Zimbabwe Electricity Transmission and Distribution Company (ZETDC) works with timelines such that if applicant is delayed, he will lose financially. He had already purchased the materials needed which are lying idle and at a risk of being stolen.
9. The applicant faces irreparable harm if this court does not grant an order as set out in the draft to the application interdicting the 1st and 2nd respondents from interfering with the mining developments and operations of the applicant.
10. The applicant has exhausted the remedies available at his disposal and it appears that the only route left is that of an interdict by this court.
11. Looking at the totality of the facts presented by applicant and the papers attached, it appears that the applicant established a legitimate right to mine and also acted with haste in enlisting the present proceedings for the relief sought.
12. Further, the balance of convenience favours the granting of the order in light of the fear of attack on the applicant, theft of gold which is a finite resource, prohibition from his mine by the 1st and the 2nd respondents and the circumstances of this case are such that the matter should jump the queue.

This court enjoys a discretion in urgent applications to authorise a departure from the ordinary procedures that are prescribed by the Rules. However the court is usually hesitant to dispense with its ordinary procedures, and when it does, the matter must be so urgent that ordinary procedures would not suffice to meet the justice of the case.

In the ordinary run of things, court cases must be heard strictly on a first come first serve basis. It is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis. The *onus* of showing that the matter is indeed urgent rests with the applicant. An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue. And have its matter given preference over other pending matters. This indulgence can only be granted by a judge after considering all the relevant factors and concluding that the matter is urgent and cannot wait. See *Kuvaregav Registrar General and Another* 1998 (1) ZLR 188.

In assessing whether an application is urgent, this court may consider a number of factors, being whether the urgency was self-created; the consequence of the relief not being granted and whether the relief would become irrelevant if it is not immediately granted. To pass the urgency test, applicant must show that there is an imminent danger to existing rights and the possibility of irreparable harm. See *General Transport & Engineering (Pvt) Ltd & Orsv Zimbank* 1998 (2) ZLR 301. To pass the test, good cause must be shown for the applicant to dislodge other litigants who are in the queue.

The certificate of urgency must create a factual basis of urgency. It must show that the matter is urgent and cannot wait. In *casu*, it is alleged in the certificate that the respondents are posing an unlawful threat to the applicant and to his mining claim. Applicant have produced proof of ownership of Eva Mine by way of registration certificate. According to him he got the certificate of registration of Eva Mine on the 25 June 2020, he says on the 4th July when he arrived at the mine he was surprised to see mining operations already taking place. The people present were about forty in total, and there was a hammer mill operating which was crushing stones. He says he was advised by the people thereat that the mine belonged to first and second respondents. He says he was told that the approximately forty people were mine workers. Applicant says he contacted first respondent, who told him that he was the owner of the mine. He says first respondent produced what he considered proof of ownership of the mine, however applicant noted that the papers did not relate to Eva Mine, and the coordinates were different from those of Eva Mine.

Second respondent has produced a registration certificate of Ilamabat 6 Mine. Before court there is a copy of the registration certificate, however during the hearing second respondent's exhibited an original copy of the certificate, it shows the following: that Johnson Rex Mawere is the registered holder of a block consisting of six G/Reef claims Ilamabat 6 Mine. This mine was registered on the 23rd February 2006. Second respondent contends that they have been working on the same mine from 2006 to date. Respondents have a valid inspection certificate for the mine they are working on which expires on the 23rd February 2021.

Second respondent contends that when applicant came to their mine, he showed him (applicant) the coordinates of Ilamabat 6 Mine which are difference from the coordinates of Eva Mine, which applicant avers he owns. Applicant confirms that the coordinates are different. According to the respondents Ilamabat 6 Mine was never forfeited, to make the claim available for pegging. Respondents have produced proof, by way of a "cash payment voucher

depository copy” to show that they have always been selling gold extracted from their mine to Fidelity Printers long before applicant appeared on the scene. The cash payment voucher is dated 19 April 2018.

Respondents contend that they have been conducting mining operations at Ilamabat 6 from 23rd February 2006. There are hammer mills, stamp mills, carbon rooms, leaching tanks and a compound consisting of twelve houses which are visible for anyone to see them. The houses were erected more than ten years ago. Applicant confirms that he saw approximately forty mine workers and a hammer mill.

Applicant got his registration certificate on the 25 June 2020. His certificate relates to Eva Mine. Respondents got their registration certificate on the 23rd February 2006. Respondents have placed before court proof of payment of inspection fees shown by the inspection certificate. There is proof of sale of gold to Fidelity Printers long before applicant emerged on the scene. There is mining infrastructure, and there are approximately forty mine workers on the scene.

Applicant seeks a provisional order/ interim relief. The definition and purpose of a provisional order is diametrically different from that of a final order. C. B Prest in his book, *The Law and Practice of Interdicts* defines and explains the purpose of a provisional order as follows:

“A provisional order is a remedy by way of an interdict which is intended to prohibit all *prima facie* illegitimate activities. By its very nature it is both temporary and provisional, providing (*interim*) relief which serves to guard the applicant against irreparable harm which may befall him, her or it, should a full trial of the alleged grievance be carried out. As the name suggests, it is provisional in nature, as the parties anticipate certain relief to be made final on a certain future date upon which the applicant has to fully disclose his, her or its entitlement to a final order that the interim relief sought was ancillary to.”

The purpose of an interlocutory *injunction* is to preserve the position until the rights of the parties can be determined at the hearing of the suit. An applicant seeking an interlocutory interdict must be able to show a sufficiently arguable claim to a right to the final relief in aid of which the interlocutory relief is sought.

This interim relief sought by the applicant is designed to subvert, undermine and disrupt the *status quo*. If granted it would result in the eviction of the respondents from where they are conducting mining operations. That is not the purpose of a provisional order.

In fact, granting such an order, would be in essence granting a final order through the proverbial “back door.” Applicant would have achieved what he desires in the final relief

sought, that respondents be removed and evicted from the mining location where they are carrying out operations. If at this stage, as sought by the applicant this court declares the actions of the 1st and 2nd respondents' illegal, what will be there to decide on the return-day? An interim interdict is not designed to get a litigant an eviction. A court must refuse to be hoodwinked into granting a final order disguised as a provisional order.

On the facts of this case I take the view that either applicant has failed to read the coordinates of his mining claim correctly and ended up at a wrong location, or there is some kind of mix up somewhere, either way this does not make this matter urgent. This court cannot authorise the eviction of the respondents from a mine they allege they have been working on from 2006. Again this court cannot grant an eviction order by way of an urgent application. This application does not pass the urgency test. Applicant has failed show that there is an imminent danger to his existing rights. This is not a case which should have seen the doors of this court by way of an urgent application.

Mr *Farai* for the second respondent sought that the application be dismissed with costs. I cannot dismiss this matter at this stage for the reason that I have not considered the merits of this case. I need not bang the door completely against the applicant, I intend to leave a window open, to give him an opportunity to try to vindicate his rights, should he so wish. In doing so he must come to this court *via* some other route, but not *via* an urgent application.

This matter was heard on the 23rd July 2020. After the hearing I reserved judgment. While I was preparing this judgment I saw an answering affidavit signed and filed on the 27th July 2020. I ignored this affidavit for the following reason; the matter was heard and concluded on the 23 July, what remained outstanding was the judgment. Again applicant's counsel did not indicate at the hearing that she intended to file such an affidavit. A party cannot be permitted to file further pleading after the hearing of the matter, without warning to the court and to the opposing litigants. Second respondent did not have an opportunity to tailor his address to meet the averments contained in such an answering affidavit. To consider the averments contained in this answering affidavit would be unfair to the other litigants. There must be finality to litigation.

The applicant has failed to obtain the relief he sought from this court. There are no special reasons warranting a departure from the general rule that costs should follow the result. The second respondent is therefore entitled to his costs of suit.

Disposition

In the result, I order as follows:

That this application is not urgent is accordingly struck off the roll of urgent applications with costs.

Mutatu & Partners, applicants' legal practitioners
Farai & Associates Law Chambers, 2nd respondents' legal practitioners