CHAUKE MBANGE NDANGARIRO

Versus

MARBLE MPOFU

And

MINISTER OF MINES & MINING DEVELOPMENT (N.O)

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 26 JULY 2021 & 2 AUGUST 2021

Urgent chamber application

V. Matatu, with A. Matatu, for the applicant
A. Chinamatira, with B. Chifambo, for the 1st respondent

DUBE-BANDA J: Before me is an urgent chamber application. This application was launched in this court on 22 July 2021. It is opposed by the 1st respondent. The 2nd is cited in his official capacity because the implementation of the order sought by the applicant, if granted may require his services. The applicant seeks the following relief:

Final relief sought

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

a. That the provisional order set out herein be and is hereby confirmed.
b. That the 1st respondent be and is hereby permanently interdicted from interfering with the mining operations of the applicant at the stated mining claims.
c. The 1st respondent be and is hereby ordered to pay costs on attorney and client scale.

Interim relief sought

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

a. That the 1st respondent, her employees, agents or assignees be and are hereby interdicted from mining, moving gold and gold dump, or processing gold ore on Tortoise 14 mine registration number 26130, Tortoise 16 registration number 26132, Tortoise 17 mine registration number 26133, Tortoise 18 mine registration number 26134 and Aurora 31 mine registration number 26131.
b. That the 1st respondent and her employees, agents or assignees be and hereby interdicted from putting any equipment, machinery or working tools at the mining claims referred in *paragraph* (a) above.
c. That the 1st respondent be and is hereby interdicted from interfering with the mining operations of the applicant in whatever manner at the mining claims.

Service of the provisional order

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

Factual background

This application will be better understood against the background that follows. There is a massive conflict of fact between the applicant's account of relevant events and that of the 1st respondent. In fact the factual correctness of applicant's contentions are disputed by the 1st respondent. However, the following facts are either common cause or not seriously disputed: Applicant is the registered owner of the mining claims known as Tortoise 14, registration number 26130; Aurora 31, registration number 26131; Tortoise 16, registration number 26132; Tortoise 17, registration 26133; and Tortoise 18, registration number 26134. Rangani Chauke (Chauke), the deponent to the founding affidavit in this application, is a director of the applicant. He was related to the late Reason Chauke. The late Reason Chauke was married to the 1st respondent. Applicant had sometime in 2007, sold Tortoise 14 and Aurora 31 to Reason Chauke, though applicant avers that the agreement of sale with the late Reason Chauke was cancelled. The late Reason Chauke had built a homestead at Tortoise 14, where he was residing with his family. 1st respondent still resides at a homestead at Tortoise 14. After the death of Reason Chauke, applicant tried, either through the police or through Chauke to evict 1st respondent from the mines. 1st respondent resisted attempts to evict her and her family from Tortoise 14 and Aurora 31. This application is culmination of a sequence of events to evict 1st

respondent and her family from Tortoise 14 and Arora 31. It is against this background that applicant has launched this application seeking the relief mentioned above.

Preliminary points and evaluation

Other than resisting the relief sought on the merits, 1st respondent took a number preliminary points which were also a subject of argument in this matter. 1st respondent raised the following preliminary points, *viz,* that this application not urgent; the alleged non-joinder of the executor of the estate of the late Reason Chauke; alleged non-disclosure of material facts; presence of other remedies at law; material disputes of facts; alleged abuse of process; and that requirements of an interdict have not been met. 1st respondent urged this court to dismiss this application on the preliminary points without a consideration of the merits.

I hold the view that a preliminary point or *in limine* is point of law which if successfully raised is dispositive of the matter without a consideration of the merits of the dispute. Quite frankly this is an issue that is taken for granted by counsel with the result that this court is bedevilled with the so-called points *in limine* which do not qualify to be points *in limine*. The points in relation to the presence of other remedies at law; alleged abuse of process; and that requirements of an interdict have not been met do not qualify to be points *in limine*. They are not points of law which are dispositive of the matter without a consideration of the merits.

I now consider the proper preliminary points taken by the 1st respondent.

Ad urgency

1st respondent contends that this application is not urgent. The entitlement of litigants to approach a court on an urgent basis is provided for in the High Court Rules, 1971[1], and is now trite. This court enjoys a discretion in urgent applications to authorise a departure from the ordinary procedures that are prescribed by its rules. It 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. See: *Kuvarega* v *Registrar General and Another* 1998 (1) ZLR 188; *Triple*

[11] Rule 244.

C Pigs and Another v Commissioner-General 2007ZLR (1) 27. *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27. 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: *Kuvarega* v *Registrar General and Another*1998 (1) ZLR 188; *Triple C Pigs and Another v Commissioner-General* 2007ZLR (1) 27.

The leading case within this jurisdiction in relation to urgency is *Kuvarega v Registrar General & Anor* (*supra*), a judgment by CHATIKOBO J. The learned judge had the following to state at p 193F-G.

> What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated rules. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.

In assessing whether an application is urgent, the courts have in the past considered various factors, including, among others: the consequence of the relief not being granted whether the relief would become irrelevant if it is not immediately granted; and whether the urgency was self-created. See: *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27. Further 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 & Ors* v *Zimbank* 1998 (2) ZLR 301; *Document support Centre (Pvt) Ltd* v *Mapuvire* 2006 (1) ZLR 240 (H); *Dextiprint Investments (Pvt) Ltd* v *Ace Property Investment company* HH 120/2002; *Madzivanzira & Ors* v *Dexprint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H).

This application is accompanied certificate of urgency signed by a legal practitioner of this court.[2] In his oral submissions Mr *Matatu*, counsel for the applicant argued that the trigger point for the urgency is what is contained in *paragraphs* 2(b) and 2 (c) of the certificate of urgency. In *paragraph* 2 (b) it is averred that:

[2] Certificate of urgency

I, the undersigned Brian Muzenda, do hereby make oath and state as follows:

1. I am a registered legal practitioner and as such an officer of this Honourable Court practising in the firm of Hore & Partners, Kwekwe.
2. I have read the founding affidavit of Rangani Chauke herein and confirm that this matter is clearly urgent particularly in that:
    a. The applicant is the duly registered owner of mining claims known as Tortoise 14 mine registration number 26130, Aurora 31 mine registration number 26132, Tortoise 17 mine registration number 26133 and Tortoise 18 mine registration number 26134, KweKwe. These mining claims are adjacent to each other.
    b. On the 17th June 2021, the applicant discovered that the 1st respondent was carrying out illegal mining operations on Tortoise 14 mine, Tortoise 16 mine, Tortoise 17 mine, Tortoise 18 mine and aurora 31 mine. The applicant reported the matter to the Zimbabwe Republic Police, Kwekwe Central and the report was recorded under DR 17/06/21. The 1st respondent was stopped from further carrying out illegal mining by the police.
    c. On the 17 July 2021, the applicant discovered that the 1st respondent was now removing gold ore and gold dump from Tortoise 14 mine, Tortoise 16 mine, Tortoise 17 mine, Tortoise 18 mine and aurora 31 mine with it to Tortoise 14 where there is a hammer mill for processing. The matter was reported to the police under DR 17/07/21.
    d. On the 20th July 2021, the applicant made a follow up on the matter. The police indicated that they cannot charge the 1st respondent with theft of gold ore until the content of gold ore has been ascertained. When applicant realised that no assistance could be obtained from the Zimbabwe Republic Police it then approached its legal practitioners to prepare the present application. The applicant acted when the need to act arose.
    e. There is no doubt that the illegal mining operations by the 1st respondent are financially prejudicing the applicant.
    f. The matter is urgent and should be allowed to jump the queue in that if 1st respondent is not interdicted, the applicant will suffer irreparable harm because gold is a finite resource which gets exhausted. The 1st respondent is illegally mining at Tortoise 14 mine, Tortoise 16 mine and Aurora 31 mine.
    g. The applicant being registered owner of the mining claims in question has an interest over the same which interest must be protected by the law. The applicant has a real right over the mines which must be protected by the law. The 1st respondent has no right whatsoever to carry out mining activities on the mining claims in question. The Zimbabwe Republic Police has already indicated that it cannot take action against the 1st respondent until the gold content of the gold ore is ascertained. It is therefore clear that if the matter is not dealt with as a matter of urgency the applicant will suffer irreparable financial loss.
    h. The applicant has no other remedy available to it except to approach this Honourable Court seeking an interdict. Considering the fact that 1st respondent is operating illegally hence there is no accountability in the process. The quantity of gold that the 1st respondent would have obtained after processing will not be known to the applicant. That being the case, the remedy of damages is not available. The Zimbabwe Republic Police has already indicated that they can only act after the content of the gold from the gold ore has been ascertained. (My emphasis).

On the 17th June 2021, the applicant discovered that the 1st respondent was carrying out illegal mining operations on Tortoise 14 mine, Tortoise 16 mine, Tortoise 17 mine, Tortoise 18 mine and aurora 31 mine. The applicant reported the matter to the Zimbabwe Republic Police, Kwekwe Central and the report was recorded under DR 17/06/21. The 1st respondent was stopped from further carrying out illegal mining by the police.

In *paragraph* 2 (c) it is contended that:

On the 17 July 2021, the applicant discovered that the 1st respondent was now removing gold ore and gold dump from Tortoise 14 mine, Tortoise 16 mine, Tortoise 17 mine, Tortoise 18 mine and aurora 31 mine with it to Tortoise 14 where there is a hammer mill for processing. The matter was reported to the police under Dr 17/07/21.

Mr *Matatu* further submitted that should this court decline to accede to the interim relief sought by the applicant, there would be violence and blood bath at the mine.

Mr *Chinamatira*, counsel for the 1st respondent argued that this matter is not urgent and thus it should not be treated as urgent. It is averred it is incorrect that applicant discovered the alleged illegal mining on the 17 June 2021 and 17 July 2021. This is so because in 2013, a director of the applicant, who is the deponent to the founding affidavit in this application, Mr Rangani Chauke (Chauke) once complained of the same alleged illegal mining activities by the 1st respondent. In 2013, Mr Chauke defended an application whose dispute turned on the same mining claims.

It is further contended that what is alleged in the certificate of urgency is misleading and boarders on perjury, in that if ever there was a discovery of illegal mining activities, it must have been in 2013, and not June and July 2021. It is argued that 1st respondent was carrying on mining activities at Tortoise 14 and Aurora 31 by 2013. It is contended that it is a falsehood that applicant discovered the alleged illegal mining activities in June and July 2021. It is averred that, if ever there was need to act, such need to act arose in 2013.

It is averred that 1st respondent has no interests and has nothing to do with Tortoise 16; Tortoise 17; and Tortoise 18 mines. Her interest is with Tortoise 14 and Aurora 31. 1st respondent attached to her notice of opposition an application which she and one Gladys Mpofu

filed against Chauke at the Kwekwe Magistrate's Court, case number 713/13. In the founding affidavit 1st respondent avers *inter alia* that:

> 2nd applicant and I were married to Reason Chauke customarily. Our husband is now late. During the lifetime of our husband, he purchased Tortoise Mine. 2nd applicant and I have resided at the mining compound since 1999. We continued staying at the mine compound after the death of our husband. Respondent (Rangan Chauke) who is the brother to our late husband has started disturbing the peace at the mining compound. He approached 2nd applicant and I demanding that we marry him or else he takes over the mine. Respondent brought several people to the mine threatening to harm us and evict us from the mine. As a result of respondent's interference, we have stopped milling, causing hardships on our families since this is our source of income. My family and I live in constant fear of the respondent. We fear that we will be harmed and evicted unlawfully. Respondent has also on several occasions misrepresented facts to the officers at Zimbabwe Republic Police who then come to interrogate us concerning our stay at the mine. I stand to suffer irreparable prejudice if this order is not granted on an urgent basis because respondent has barred us barred us from milling and is threatening to evict my family and I from the compound any day unlawfully. Respondent's behaviour is unlawful and may this order be granted to avoid further violent behaviour from the respondent.

In his notice of opposition in the Kwekwe Magistrate's Court case, Chauke averred *inter alia* that:

> The truth of the matter is that applicants have no mining rights over Tortoise Mine since the agreement of sale between Chauke Mbabge and Ndangariro (Pvt) Ltd and my late brother was dully cancelled in 2011. The whole of Tortoise Mine belongs to Chauke Mbabge and Ndangariro (Pvt) Ltd and the latter has exclusive rights to mine on block 14 by virtue of being the registered owner as shown by the certificate of registration issued to them.
>
> I ordered applicants to stop mining activities at Tortoise Mine and consequently stop taking gold ore mined therefrom for milling.
>
> In the circumstances I cannot be said to have disturbed applicant's peace when they are conducting illegal mining activities on a mine owned Chauke Mbange & Ndangariro (Pvt) Ltd to which I am a director.
>
> In operation of the interim relief granted by this Honourable Court and the subsequent confirmation of same, as applicants would want, has the effect of promoting applicants illegal gold mining activities at Tortoise Mine, to which Chauke Mbange & Ndangariro (Pvt) Ltd has exclusive rights.
>
> There is no reason for me to be interdicted from having anything to do with a mine owned by a company to which I am a one of the directors. Such an interdict would have the effect of silencing me whilst allowing applicants to pursue their illegal mining activities on the mine in question, something which the law does not allow.

It is clear that the dispute about the 1st respondent's right to mine at Tortoise 14 and Aurora has a long history. The matter was before the Magistrates Court, Kwekwe in 2013. According to the applicant in the Magistrate's Court case, Chauke was litigating in his personal capacity. It was not the company (applicant) that was litigating. The mines are registered in the name of the company. It is also argued that in the Magistrates Court, the issue before court was a peace order and interdict. Before this court applicant seeks an interdict to protect its interests in the mines. In 2013, Chauke averred that "there is no reason for me to be interdicted from having anything to do with a mine owned by a company to which I am a one of the directors." In her founding affidavit, 1st respondent averred that "Chauke brought several people to the mine threatening to harm us and evict us from the mine. As a result of respondent's interference, we have stopped milling, causing hardships on our families since this is our source of income." Chauke averred that "I ordered applicants to stop mining activities at Tortoise Mine and consequently stop taking gold ore mined therefrom for milling. In the circumstances I cannot be said to have disturbed applicant's peace when they are conducting illegal mining activities on a mine owned Chauke Mbange & Ndangariro (Pvt) Ltd to which I am a director."

This is the same dispute that applicant brings to this court by way of an urgent application, approximately nine years later. The argument about Chauke litigating in 2013, in his personal capacity; and that in this application it is the company that is litigating, is just a distinction without a difference. It is a clear attempt to pull wool over the eyes of the court. It is a disingenuous attempt to hoodwink this court. In 2013 the dispute was about the 1st respondent's right to mine at Tortoise 14 and Aurora 3. In this application the dispute is about 1st respondent's rights at Tortoise 14 and Aurora 31. No amount of spin will change this position. In 2013, Chauke was litigating in his capacity as a director of applicant. He cannot when it suits him, and when it is convenient to him separate himself from the company.

Again, to demonstrate that this matter is not urgent, 1st respondent attached to her notice of opposition an affidavit deposed to by Chauke on the 28 September 2017. In the affidavit, he states that he sold Tortoise 14 to 1st respondent. He confirms that he has been paid the balance of the purchase price in the sum of $2 240.00.[3] Mr *Matatu* in his oral submissions admitted that

[3] It states that:

indeed this affidavit was deposed to by Chauke. His spin to it is that, the mines in dispute are registered in the name of the company not in the name of Chauke. Chauke had no company resolution authorising him to enter into such an agreement with 1st respondent. Again this disingenuous attempt to hoodwink and misled this court. Chauke is one of the directors of applicant, the company that is the registered owner of the mines. Again, he cannot when it is convenient to him plead that he acted without company authority. In 2017, he accepts payment for the mine. In 2021, he runs to this court screaming urgency. This is unattainable. It is unacceptable. It is wrong. This is not the type of urgency anticipated by the rules of court.

I consider Mr *Matatu's* threats of violence and bloodshed as an attempt to employ improper pressure on this court to accede to the order sought by the applicant. It is an improper pressure that, if permitted will undermine the rule of law. This court will ignore and not factor into the equation such improper pressure. Again, applicant seeks through the back-door, as it where to evict the 1st respondent and her family from the mining compound. The 1st respondent and her family have been residing at the mining compound from 1999. They cannot be evicted in 2021, by way of an urgent application. This is not what the urgent application procedure was put in the rules of court for.

For a litigant to successfully motivate the court to hear its matter on an urgent basis, it must show that its matter is out of the ordinary. This court must be on the guard of litigants who may try to take advantage and abuse the urgency procedure in order to get a procedural advantage over other litigants that have to wait in the queue for their matters to he heard. There must be an emergency. The need to act arose in 2013. A litigant cannot relax, and when it is convenient to it, create a false emergency by screaming urgency. A dispute that arose in 2013, cannot be urgent in 2021. This is not the type of urgency anticipated by the rules of court. This typical text-book case of an abuse of the urgency procedure.

I Rangani Chauke ID number 29-014346E-03
Residing at Plot No. 14 Gredene Tiger Reef Kwe
Do hereby solemnly swear / declare the following:
I sold Tortoise 14 Mine to Mable Mpofu. She has paid the mine in full and has paid the last balance of the two thousand two hundred and forty dollars.

……
Signed

I must point out that there was a delay in approaching this court on an urgent basis. There is now a prevalence and often times abuse of the urgency rules in this court. The applicant has failed to prove urgency. He acted unreasonably in bringing this urgent application based on self-created urgency. The urgent roll was created specifically for matters of litigants who seek urgent relief, not matters based on self-created urgency. I hope a time shall come when litigants and their legal practitioners start taking this court serious. There must be a stop in filing these so-called urgent applications. There is no reason why this matter should be heard in the urgent roll and not in the ordinary roll. There is no emergency in this case. This matter is not urgent and it cannot be afforded a hearing in the roll of urgent matters. It falls to be removed from the roll with an appropriate order of costs.

Having found that this matter is not urgent, it is not necessary for me to consider the remaining points *in limine* taken by the 1st respondent, *vis;* alleged non-joinder of the executor of the estate of the late Reason Chauke; alleged non-disclosure of material facts; and the alleged material disputes of facts.

What remains to be considered is the question of costs. 1st respondents seek costs on the scale of legal practitioner and client. Such costs are not merely for the asking. A litigant who desires his opponent to be mulct with punitive costs must make a proper motivation for such costs. To merely aver in the opposing affidavit that the application must be dismissed with costs on a legal practitioner and client scale is inadequate. 1st respondent did not motivate this court to mulct applicant with punitive costs. Although costs are in the discretion of the court, sometimes a motivation is required. I take the view that this is not a case where applicant should be penalised with costs on a legal practitioner and client scale, though its threat of violence and bloodshed is reprehensible.

Disposition

In the result, I make the following order:

1. The point *in limine* on urgency is upheld.

2. This application is not urgent and is removed from the roll of urgent matters with costs of suit.

Matatu & Partners, applicant's legal practitioners
Masawi & Partners, 1st respondent's legal practitioners