NIXRIS INVESTMENTS PRIVATE LIMITED
versus
CHINHOYI UNIVERSITY OF TECHNOLOGY
and
DAVID JAMBGA SIMBI (N.O)

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 18 December 2015 & 8 January 2016

Urgent Chamber Application

K. Kachambwa, for the applicant
S. Mushonga, for the respondents

CHIGUMBA J: This is an urgent chamber application in which the applicant seeks an interim interdict against the first respondent and all its functionaries, that they be barred from interfering, interrupting, disturbing or hindering its activities, at Hunyani 30 Mine Hunyani Farm Mashonaland West. The final order sought is the confirmation of the interim interdict.

The founding affidavit was deposed to by a Mr John Mandere, a director and shareholder in the applicant, a company duly registered in accordance with the laws of Zimbabwe. The first respondent is a body corporate in terms of s 3 of the *Chinhoyi University of Technology Act* [*Chapter 25:23*]. The second respondent is the Vice Chancellor of the first respondent who is cited in that nominal capacity. The background to this matter is that he the applicant was incorporated by the Mandere-Mathonsi Mining Syndicate to carry out gold mining activities at a place called Hunyani 30 in Mashonaland West. The syndicate, in terms of certificate of registration number 48498 dated 14 February 2014, was allocated a block of ten gold reef claims, in terms of the *Mines and Minerals Act* [*Chapter 21:05*]. The syndicate was issued with a licence number 00610K by the Mining Commissioner. In a bid to comply with the indigenization laws which prevailed at the material time the syndicate caused the applicant to be incorporated for the

purpose of carrying out gold mining and milling activities. The Zimbabwe Investment Authority issued the applicant with investment licence number 002154 on 1 April 2014. The investment licence is valid until 31 March 2016.

The applicant avers that it caused an environmental impact assessment to be carried out, and that, after diligent inspection and verification, the Environmental Management Agency issued it with certificate number 002100 in terms of the *Environmental Management Act* [*Chapter 20:27],* on 20 March 2015. The certificate was issued to the deponent to the founding affidavit, and it stipulated EIA acceptance to operate gold milling on Hunyani 30 mine. On 14 February 2014 Zvimba Rural District Council confirmed that it had no objection to the setting up of a gold mill by the syndicate. On 6 May 2014 the Ministry of State Security, Lands, Land Reform and Resettlement Mashonaland West advised the Mining Commissioner that the Mandere-Mathonsi syndicate could set up its gold mill, that its office had gone on a ground visit and consulted the locals who had no objections to the setting up of the mill. The applicant avers that it has injected capital of 1.3 million dollars in the setting up of the mill, to date.

The certificate of urgency was prepared and signed by Mr Sylvester Hashiti, who certified that on 2 December 2015, the respondents summarily entered the confines of Hunyani 30 Mine and proceeded to cause havoc and destruction of the applicant's property which is listed. He stipulates that the applicant took a week to investigate and find out the identity of the perpetrator of this violence against its employees and its property. He confirmed that the applicant's apprehension of further harm was reasonable and that the balance of convenience favours the granting of the interim interdict. The applicant's papers contain an averment that applicant is in possession of evidence that the first respondent seeks its unlawful eviction. The applicant reiterates that it is apprehensive that the respondents will resort to violence again in pursuit of their objective of illegally evicting the applicants.

The respondent's opposing affidavit was deposed to by Acting Vice-Chancellor Mr Francis Themba Mugabe who raise various points *in limine* no doubt on the advice of his erstwhile counsel Mr *Mushonga*. While it is certainly part of the discharge of the duty of a legal practitioner to the court to assist it to protect its dignity by guarding against abuse of its processes, a worrying trend has reared its ugly head where legal practitioners, more often than not, submit that urgent matters are not urgent. Legal practitioners are urged to strive to discharge

their duty to the court without fear, favour, or bias to their client's cause. I am unable to agree with *Mr Mushonga* for the respondents that this matter is not urgent because of the time taken by the applicant to seek redress before the court. The requirements of urgency are not just premised on the question of time taken to seek redress. The court must consider the circumstances of the case holistically, and not in a piecemeal fashion. What constitutes urgency in one set of circumstances may not necessarily constitute urgency in another set of circumstances.

The question of what constitutes urgency is settled;-

It has been held that:

> "Applications are frequently made for urgent relief. 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 by the rules". See [1].

The applicant explained to the court that on 2 December 2015 when the acts complained of took place, it had no idea who the perpetrators were and that it took up to a week of investigations for it to gather evidence that the perpetrators were acting on the respondents' instructions. Can it then be said in these circumstances that the need to act arose on 2 December, or that the filing of this application for relief by 17 December falls within the ambit of the test set out by the phrase 'at the time the need to act arises, the matter cannot wait'. Can it be said that the applicant is guilty of deliberate or careless abstention from action in light of the explanation given for time lapse between the 2nd and the 17th of December 2015?

It has also been held that:

> "For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the applicant did on his own part treat the matter as urgent. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…" See [2] And[3], [4]

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[1] *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 189
[2] *Mathias Madzivanzira & @ Ors* v *Dexprint Investments Private Limited & Anor* HH145-2002
[3] *Church of the Province of Central Africa* v *Diocesan Trustees, Diocese of Harare* 2010 (1) ZLR 364(H)
[4] *Williams* v *Kroutz Investments Pvt Ltd & Ors* HB 25-06, *Lucas Mafu & Ors* v *Solusi University* HB 53-07

In my view, which I have expressed before in order for a matter to be deemed urgent, the following criteria, which have been established in terms of case-law, must be met: A matter will be deemed urgent if:

(a) The matter cannot wait at the time when the need to act arises.
(b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.
(c) There is *prima facie* evidence that the applicant treated the matter as urgent.
(d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action.
(e) There is no satisfactory alternative remedy. See *Denenga* v *Ecobank*[5].

The court is satisfied that this matter cannot wait. It could not wait on 2 December 2015 when the acts complained of took place. The explanation given by the applicant for the time lapse between 2nd and 17th December (a period of 12 days) is reasonable. The applicant needed to investigate the identity of the perpetrator in order to establish who to seek relief against. If applicant had rushed to court to seek relief against the whole world on 2 December 2015, it would not have succeeded. To hold otherwise would lead to an absurdity where the court holds litigants to an impossibly high standard of the time within which to approach the court for relief. We must leave room for manouvre, and consider whether if there is a delay in action, the explanation given for such delay is rational, reasonable, and satisfactory. I find that in these circumstances before me bringing an application for relief within 12 days cannot be said to a 'delay' within the meaning alluded to by the test of urgency. I found the submissions by counsel for the respondents unhelpful, and unrealistic, when he alluded to modern means of communication such as skype and teleconferencing. What was the applicant supposed to skype or teleconference about, before he knew the identity of the perpetrator? If the respondents had placed *prima facie* evidence before the court, that the applicant had knowledge of the identity of the perpetrator but deliberately failed to act timeously, I might have been persuaded to treat the matter as not urgent. As it is, I find the matter to be urgent.

[5] HH 177/14

I am satisfied that, the *prima facie* evidence provided by the certificate of urgency, and the averments in the founding affidavit and attachments, show that irreparable prejudice will result if this matter is not dealt with straight away without delay. I also do not see any other suitable alternative remedy which be adequate in giving the applicant the relief that it seeks. The other points *in limine*, on *locus standi*, misjoinder, dirty hands and disputes of fact, are unfortunately entirely devoid of merit in my view. These points *in limine* are red herrings meant to confound the court and to hamstring it en route to a consideration of the merits of the matter. I will not be detained by these points. The applicant's, response to these points in its answering affidavit is instructive. It forms part of the record, so I will merely approve of the applicant's response on pp 2-6 of the answering affidavit.

Turning to the merits of the matter it is my view that setting out the requirements of an interdict, will assist the court in separating the wheat from the chaff, and in arriving at the correct conclusion. The requirements for a final interdict are well known and were set out by Barltlet J in *Umb Zimbabwe Limited* v *The Zimbabwe Independent & Anor*[6] they are:

(a) A clear right

(b) Irreparable injury actually committed or reasonably apprehended; and

(c) The absence of similar protection by any other remedy.

See *Setlego* v *Setlego*[7] which appears to be the primary source relied on by the court in determining the requisites of a right to claim an interdict. See also *Sanchez Private Limited* v *Farmers Agricore (Pty) Ltd*[8] In *UMB Zimbabwe supra*, the applicant bank had sought an interim interdict to prevent the publication of an article in the respondent newspaper, which article the applicant alleged would be damaging to it. It was held that the order would only be granted if the bank satisfied the court on a balance of probabilities that the article contained fundamental serious inaccuracies, that the consequences it feared were substantially likely and that there was no satisfactory alternative remedy available. The court in that case analyzed the difference in the requirements of an interim interdict and a final interdict. In my view the most fundamental difference is in the standard of proof required. Proof on a balance of probabilities as opposed to *prima facie* evidence.

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[6] 2000 (1) ZLR 234 (h) @ 239
[7] 1914 AD 221 @227
[8] 1995 (2) SA 781 (A) @ 789B

It is now trite that the clear right must be established on a balance of probabilities. See *Econet Private Limited* v *Minister of Information, Posts and Telecommunication*[9] and *Aussenken Terms (Pty) Ltd* v *Walvis Bay Municipality*[10]. In this case, the court also re-stated the requirements of an interim interdict, and followed the case of *Eriksen Motors (Intelkon) Limited* v *Protea Motors & Anor*[11]where those requirements were set out as follows;

(a) A *prima facie* right
(b) A well grounded apprehension of irreparable harm if the relief is not granted;
(c) The balance of convenience favors the granting of an interim interdict
(d) The applicant has no other remedy
(e) The remedy is discretionary and the court has a wide discretion. See also *Hix Networking Technologies* v *System Publishers (Pty) Ltd & Anor*[12], *Flame Lily Investments Company Private Limited* v *Zimbabwe Salvage Private Limited & Another*[13]

In *Boadi* v *Boadi & Anor*[14] it was emphasized that, for a final interdict it is not sufficient to establish merely a *prima facie* right unless there is a likelihood of irreparable harm if relief is not granted. The court also reiterated that there is discretion to grant the extraordinary remedy of an interim interdict, and that, in deciding whether to grant this remedy, the court will balance the prejudice to the applicant if the interdict is withheld against the prejudice to the respondent if it is granted. See also *Durma Private Limited* v *Siziba*[15]**,** in which *Boadi* v *Boadi* was cited with approval, and in which the Supreme Court reiterated that an interdict is an extraordinary remedy which is always within the discretion of the court, and that, in exercising its discretion the court must always weigh the prejudice to the applicant if the interdict is withheld, and the prejudice to the respondent if it is granted. See also *Watson* v *Gikson Enterprises Private Limited & Ors* [16].

The applicant averred that the respondents caused the wholesale destruction of its perimeter fence, guardroom infrastructure, and gold room infrastructure under construction, a 37 000 litre water reservoir, a retaining wall slab pit and wooden cabins used by its employees for

[9] 1997 (1) ZLR 342(H)
[1010] 1996 (1) SA 180 (C) @ 188
[11] 1973 (3) SA 685 (A) @ 691
[12] 1997 (1) SA 391 (A) @ 3981-399(A)
[13] 1980 ZLR 378
[14] 1992 (2) ZLR (H) @ 24
[15] 1996 (2) ZLR 636 (S) @ 641
[16] 1997 (2) ZLR 318 (H) @ 331

accommodation. The respondent did not dispute that the applicant's property was damaged or destroyed, only that the perpetrators were not affiliated to the respondents, or their agents. The respondents did not deny that force was used, or that the applicant's employees were threatened with physical harm to their persons. It is common cause that Hunyani 30 Mine is situated in Hunyani Farm which was allocated to the first respondent in 2005 in terms of the land reform programme, for agricultural use. It is common cause that the ten gold claims allocated to the syndicate permit the syndicate to utilize the land allocated to it within Hunyani Farm, for mining activities.

The syndicate has a *prima facie* right to conduct mining activities within the boundaries of its ten gold claims. The respondents did not refute the evidence of the applicant, on a *prima facie* basis, that the property which was damaged at their mine is valued at USD$300 000-00, or that an excavator was used as the instrument of destruction, giving credence to the applicant's apprehension of future harm. It is common cause that the applicant still has valuable equipment situated at the mine which must be protected from marauders. The prejudice to the applicant if more property was to be damaged is greater than any potential prejudice to the first respondent caused by the presence of the applicant on Hunyani Farm. The letter dated 4 November 2015, from the Environmental Management Agency clearly states that first respondent was not consulted when the applicant was authorized to set up a gold mine and a gold mill within the farm. It is my view that an order from EMA that the applicants cease all mining activities pending the relevant consultations does not affect the applicant's *prima facie* right to the ten mining claims which were allocated to it. The mining certificate is still valid and has not been revoked by the Mining Commissioner. The balance of convenience favours the granting of the interim relief order.

The applicant has a *prima facie* right to possession of the area within the boundaries of ten mining claims, applicant is within reason to fear the return of the perpetrators of violence after suffering huge losses when its property was destroyed. The evidence of the applicant that its investigations revealed that the perpetrators of the violence were employees of the first respondent makes sense when regard is had to the dispute between the parties which makes it clear that the first respondent has no intention of co-existing with the applicant. It is not difficult to believe the applicant's *prima facie* evidence that the respondent intends to drive it off the

farm, by violence and intimidation and wanton destruction of valuable property, through its agents. If the first respondents' agents acted without its tacit or express authorization, such evidence should be brought to the attention of the court on the return date, and the interim interdict will not be confirmed because the standard of proof required at that stage will not be met. The order sought by the applicants is for an interdict against destruction of their property. It is not an order that they continue with mining operations despite the EMA ban.

The submission made on behalf of the respondents, that the applicant is not properly before the court because in terms of the Mines and Minerals Act the syndicate was not permitted to transfer the ten gold claims to the applicant, is not buttressed by the Mines and Minerals Act, in my view. The Mines and Minerals Act expressly forbids the sale of prospecting licences and is silent on their transfer to a third party duly registered companies in which the original holder has an interest. The Mines and Minerals Act permits the appointment of a representative by the original holder of any licence, and I see no reason why the syndicate should be penalized for appointing the applicant as its representative. The requirements of an interim interdict are met. The applicants have no suitable alternative remedy which is adequate in protecting it from the wanton destruction of its property pending the inquiry by the EMA.

In the result, it is ordered that;-

1. The 1st respondent and all those claiming occupation through it, be and are hereby barred from interfering, interrupting, disturbing or hindering the use and possession by the applicant, of Hunyani 30 Mine Hunyani Farm Mashonaland West, pending the return date.
2. The return date shall be a date not more than ninety days from the date of this order. If neither party sets the interim order down for its confirmation, it shall automatically lapse by effluxion of time, when the ninety day period expires.
3. The respondents shall pay costs.

Dube, Manikai & Hwacha, applicant's legal practitioners
Mushonga, Mutsvairo & Associates, 1st respondent's legal practitioners