PATSON MOYO

versus

FREDA REBECCA GOLD MINE LIMITED

and

ZHOMBE COMMUNITY DEVELOPMENT TRUST

and

WEIGHT GWESELA

and

MAKOMBE

and

CHARLES PARADZA

and

DESIRE TSHUMA

and

ALLAN (FODWILL MINE MANAGER)

and

BRAVE (TREASURER OF ZHOMBE DEVELOPMENT TRUST)

and

MINISTER OF MINES AND MINING DEVELOPMENT

and

MINISTER OF HOME AFFAIRS

and

COMMISSIONER-GENERAL OF POLICE

and

THE OFFICER COMMANDING CID BORDER CONTROL AND MINERALS UNIT, KWEKWE

HIGH COURT OF ZIMBABWE

ZHOU J

HARARE, 27 April & 11 May 2016

**Urgent Chamber Application**

*T. Moyo* for the applicant

*C. Kwirira* for the respondent

ZHOU J: On 8 April 2016 the applicant instituted the proceedings *in casu* by urgent chamber application seeking the following provisional order:

 “TERMS OF THE FINAL ORDER SOUGHT

1. It is hereby declared that the first and second respondents have no right or title over Antelope 68 Mine.
2. The first to the eighth respondents are ordered to pay costs of suit on a higher scale.

INTERIM RELIEF GRANTED

1. The first to eighth respondents are and are (*sic*) hereby provisionally ordered to vacate the applicant’s mining claims which are located at Antelope 68 Mine with immediate effect.
2. The first to the eighth respondents are interdicted from vandalising the applicant’s mine and mining equipment and to, within forty-eight hours of this order repair or cause to be repaired any and all of the applicant’s property which they vandalised.
3. The respondents are provisionally ordered to allow the applicant peaceful and undisturbed use, possession and control of its mine.
4. The tenth and eleventh respondents are ordered to facilitate/assist in ejecting/removing the first to the eighth respondents respectively from the applicant’s mining claims with immediate effect.
5. The first to the eighth respondents respectively are provisionally ordered not to visit Antelope 68 Mine or to interfere directly or indirectly with the operations of the mine.

SERVICE OF THE PROVISIONAL ORDER

This order may be served on the respondents by the applicant, applicant’s legal practitioner or any interested party to the case.”

The application is opposed by the first and second respondents. In addition to contesting the application on the merits, the two respondents in their notice of opposition objected *in limine* to the determination of the application on the merits on three grounds. The first ground of objection is that the certificate of urgency is invalid because it was executed by a legal practitioner who is employed by the firm of attorneys which represents the applicant. The second ground of objection is that on the facts alleged and disclosed the matter is not urgent and must not be entertained on an urgent basis. The third ground of objection is that the matter ought not to be entertained because the applicant did not exhaust the domestic remedies provided by the Mines and Minerals Act.

Before adverting to the above matters I need to say something about the draft provisional order as observations in relation to the terms recited above are a common feature in many urgent applications. Rule 247 (1) requires that a provisional order be in Form 29C. That form should be the starting point when preparing a draft provisional order. In the present case there is no attempt to relate to some aspects of that form with the result that other than the subheadings there is really nothing to distinguish the interim relief from the final relief which is being sought. The repeated use of the expression “provisionally ordered” would not necessarily clothe the relief sought which is otherwise final in effect with an interim status.

Turning now to the first ground of objection raised by the respondents, reliance was placed on the case of *Chafanza v Edgars Stores & Anor* 2005 (1) ZLR 301 (H). Mr *Kwirira* for the respondents conceded that the reasoning in that judgment was not followed by subsequent judgments in which the issue arose. See *Mudekunye & Ors* v *Mudekunye & Ors* HH 190 – 2010; *Route Toute BV & Ors* v *Sunspan Bananas (Pvt) Ltd & Ors* HH 27 – 2010. The rules do not preclude a legal practitioner from a law firm which represents the applicant from certifying that a matter is urgent. A certificate of urgency differs fundamentally from an affidavit. The role of a legal practitioner as commissioner of oaths is regulated by the provisions of the Justices of Peace and Commissioners of Oaths Act [*Chapter 7:*09] which does not apply to the preparation and signing of a certificate of urgency.

In any event, it seems to me that the time has come for the provisions relating to certificates of urgency to be reflected upon and, possibly, revisited in the light of the purpose for which the requirement for such certificates was provided for. Judging by the number of matters accompanied by certificates of urgency which are adjudged to be not urgent it is doubtful that the certificate still retains the value ascribed to it at the time that the requirement for it was enacted. The court can readily assess for itself by reference to the affidavits and annexures filed whether a matter is urgent without being impeded by the absence of a certificate of urgency which is essentially an opinion of the legal practitioner which is not necessarily binding upon the court. Further, it seems that in terms of the rules the certificate of urgency is required only where an applicant has not served the chamber application on the respondent. Order 32 Rule 242 (1) requires every chamber application to be served on all interested parties unless, among the other situations explicitly stated, the applicant reasonably believes one or more of the matters set out in para(s) (a) to (e) of that subrule. Subrule 2 provides the following:

“Where an applicant has not served a chamber application on another party because he reasonably believes one or more of the matters referred to in paragraphs (a) to (e) of subrule (1) –

1. He shall set out the grounds for his belief fully in his affidavit; and
2. Unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons, his belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in paragraphs (a), (b), (c), (d) or (e) of subrule (1).”

In the instant case the chamber application was served upon the respondents. This is not therefore a matter in which the absence of the certificate of urgency would have invalidated the matter or rendered it defective.

The second objection is that the matter is not urgent. In the case of *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 (H) at 193F-G, Chatikobo J said:

“What constitutes urgency is not 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 deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.”

In *Dilwin Investments (Pvt) Ltd t/a Formscaff* v *Jopa Engineering Co. (Pvt) Ltd* HH 116 – 98, at p. 1, Gillespie J (as he then was) highlighted the fact that a party who institutes proceedings by way of an urgent chamber application gains an overwhelming advantage over the other litigants whose matters are dealt with as ordinary court applications. For that reason such a party must show good cause for that preferential treatment to be availed, as dealing with an urgent matter means that a judge has to leave aside all the other matters in order to consider the urgent chamber application. Such treatment cannot be granted as a matter of course or upon the mere request for it. See also *Pickering* v *Zimbabwe Newspapers* (1980) *Ltd* 1991 (1) ZLR 71(H).

The applicant states that it owns some sixteen mining claims known as Antelope 68. In February 2016 the first to eighth respondents forcibly and without the applicant’s consent occupied the mining claims and stopped mining operations. In March 2016 the same respondents occupied the applicant’s mine again. On both occasions the respondents only vacated the mines after the intervention of the police. The instant application was filed on 8 April 2016. According to the applicant’s founding affidavit there were other invasions which followed in respect of which the police refused to assist him to eject the persons who invaded the mine. The dates of those invasions are not detailed in the affidavit. The latest invasion which triggered the present application is said to have taken place on 7 April 2016. The applicant alleges that as with the other invasions the police did not assist him in removing the invaders on the ground that the dispute was one of ownership of the mining claims.

Other than the 7th of April 2016 which is mentioned in para 16 of the founding affidavit, the applicant conspicuously omitted to mention the other dates on which the alleged invasions took place. What is clear, however, is that the dispute over the mining claims has been on-going from February 2016. The alleged invasions took place on not less than one occasion. While in the first two alleged instances the applicant alleges that he got the police to eject the invaders from the disputed claims, it is clear that after early March 2016 they continued to come. The applicants states that: “The police in Kwekwe have been asked on several occasions to assist but they have failed or denied to provide assistance. At every stage, the respondents have returned . . .” The applicant has clearly not accounted for his failure to seek relief on an urgent basis at the very latest soon after the early March invasion when the respondents continued to go to the mine. The need to act certainly arose after the February 2016 invasions. If it be accepted that the assistance of the police constitutes “an explanation of the non-timeous action”, the applicant has not explained his failure to act when the invasions continued in March and the police refused to assist him. Two letters written by the applicant in February 2016 (annexures AM2 and AM3,) show that during the month of February 2016 the disturbances were continuing. Those interferences would have caused the applicant to approach the court for relief. The applicant states that on 8 March 2016 the Provincial Mining Director for the Midlands Province requested the police to assist the applicant to remove the respondents. From about that time the alleged invaders have, according to the applicant, remained in occupation of the mine. Thus, for about a month the applicant was aware of the facts upon which the urgency is founded but did not act.

For those reasons, the matter lost its urgency when the applicant failed to treat it as urgent. In the circumstances, I come to the conclusion that the matter is not urgent and must be struck off the roll of urgent matters.

Having found that the matter is not urgent, it is not necessary for me to consider the issue of exhausting local remedies.

In the result, IT IS ORDERED THAT:

1. The matter be and is hereby struck off the roll of urgent matters.
2. The applicant shall pay costs.

*Tamuka Moyo Attorneys*, applicant’s legal practitioners

*Magwaliba & Kwirira*, 1st and 2nd respondents’ legal practitioners