

TRYNOS NKOMO
versus
SIFA NJANI MOYO
and
THE OFFICER IN CHARGE WEST NICHOLSON
POLICE STATION NO.
and
OFFICER COMMANDING BORDER CONTROL
AND MINERALS UNIT N.O

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 13 & 14 September 2016

Urgent chamber application

Ms R Zvimba, for the applicant
B Diza, for the first respondent
L. T Muradzikwa, for the 2nd & 3rd respondent

MWAYERA J: The applicant approached the court through the urgent chamber book seeking to stop the first respondent and his companions from mining gold ore from an area in Olympus Block in West Nicholson for which the applicant claims to have a prospecting licence. The applicant sought to have the matter heard on an urgent basis since he argued that the continued actions of the respondent and other unknown panners would occasion commercial or economic loss culminating in irreparable harm.

TERMS OF THE FINAL ORDER SOUGHT

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

- 1) The 1st respondent be and is hereby ordered not visit applicants mining location at Olympus Block in West Nicholson, Gwanda unless in terms of the law.
- 2) The respondent be and is hereby barred from mining gold ores at applicant's mining location Olympus Block in West Nicholson Gwanda.
- 3) The 1st respondent to pay costs of suit on attorney client.

INTERIM RELIEF GRANTED

Pending the return date of this matter, the applicant be and is hereby granted the following interim relief:

- 1) The 1st respondent be and is hereby ordered not to remove the three truckloads of gold ore that he illegally mined at applicant's mining location, Olympus block at west Nicholson, Gwanda. In the event that the 1st respondent has already removed the three truckloads of gold ore from Olympus Block he and is hereby ordered to return the said three truck loads to Olympus block forthwith and offload them.
- 2) The 2nd respondent be and is hereby ordered to release to the applicant the one gold ore truck load that was removed from applicant's mining location, Olympus block by the Police.
- 3) The first respondent be and is hereby ordered to offload all the 4 truckloads of gold ore that he illegally mined at Olympus block and leave the gold ore at the applicant's mining location.
- 4) The 1st respondent be and is hereby ordered not to interfere with applicant's mining location at Olympus block in Nicholson Gwanda unless in terms of the law.
- 5) The 1st respondent be and is hereby ordered to pay costs of suit on the attorney client scale.

The respondents opposed the application citing that the application was not urgent and that there was a material misjoinder of the second and third respondents who have no mandate to enforce the court orders in place of the Sheriff. Further the second and third respondent argued that the relief sought for release of gold ore held by the police in a pending criminal matter was incompetent. The applicant had lodged a report of theft of gold ore leading to recovery of the trucks of gold ore held as exhibits in criminal matters. Further it was conceded that s 219 on Police Service functions did not seek to usurp the power of the Sheriff in enforcement of orders.

Worth noting from these concessions is the fact that the applicant already had a remedy to the issue of allegedly stolen gold ore which was now held by the police as an exhibit. To that extend therefore the requirements of urgency cannot be met given the circumstances of this case. The urgency is clearly self-created given the history of the matter involving the applicant and the first respondent and or Sixo syndicate. It is evident from the papers that the first respondent has links with Sixo syndicate, which syndicate claims same

interests as applicant at the Olympus Mining claim. At the time of lodging the application both the applicants and the Sixo syndicate had lodged prospecting and licensing documents with the relevant Ministry of Mining which was glaring not a part to the proceedings. Given the lack of clarity on which area the applicant had claim and the first respondent, and Sixo which was not part to the proceedings there are clearly material disputes of facts which cannot be resolved on paper let alone on urgent basis. The applicant and Sixo have coexisted at the area since 2014 and now to then turn round and claim urgent relief on self-created urgency is not the urgency contemplated by the rules of this court. The availability of other remedies like resort to the regularizing authority the Ministry of Mines for demarcation of the area for the respective parties and also that the ore claimed is held as an exhibit in criminal matter by the police is another indicator and pointer of lack of urgency. The truck loads of gold ore are in police custody thus the danger of financial loss at the hands of the respondent is already eliminated.

The requirements of a prohibitory interdict are settled and can be summarised as follows:

1. Existence of a *prima facie* right though subject to doubt.
2. There is an injury actually committed or reasonably apprehended.
3. That there is absence of a similar or adequate remedy.
4. That the balance of convenience favours granting of the relief.

See *Fairprop Trading (Pvt) Limited v Zimbabwe Revenue Authority* HH 68-14.

In the absence of a threat or infringement of the right and in the absence of danger of irreparable harm occurring there is no basis for granting the relief sought. Moreso in the face of other readily available remedies.

It is apparent as conceded by the applicant that the second and third respondents, were unnecessarily dragged to court. The circumstances of the case do not disclose the type of urgency contemplated by the rules of this court. This is more so when one considers the requirements of urgency, as pronounced in a number of cases before this court. See *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188. *Tripple C Pigs and Anor v Commissioner General, ZIMRA* HH 7/07,

Document Support Centres (Pvt) Ltd v Mapuvire 2006 (2) ZLR 140 and *Madzivanzira and 2 Others v Dextrint Investments (Pvt) Ltd and Another* HH 245-02.

In *Mapuvire* case *supra* MAKARAU JP as she then was made pertinent observations when she highlighted the importance of the cause of action and nature of relief sought in determining whether or not a matter is urgent. She stated

“..... It appears to me that the nature or the cause of action and the relief sought are important considerations in granting or denying urgent applications Some actions, by their very nature, demand urgent attention and the law appears to have recognised that position.”

In this case the applicant and the respondent and Sixo syndicate appear to have co-existed over years and in the absence of a clear map of demarcations the cause of action and relief sought is not one which ought to be redressed on urgent basis given the obvious material disputes of facts. The rights of the parties from papers appear uncertain.

A matter is viewed as urgent if it is of such a nature that it cannot wait, for waiting would occasion irreparable harm. Further a matter is viewed as urgent if a party springs to action when the need to act arises and not wait for the day of reckoning as happened in this case. Self-created urgency is not the urgency contemplated by the rules of this court. The applicant has clearly displayed she has other remedies from the regulatory authority the Ministry of Mines and also the criminal court where she lodged a report. In the absence of any irreparable harm being occasioned and requirements of urgency not having been met there is no justification in allowing the matter preferential treatment of being heard on urgent basis.

I decline to deal with the matter on urgent basis and make the following order:

1. The application is dismissed.
2. The applicant shall pay the respondents' costs on an ordinary scale.

Zvimba legal practitioners, applicant's legal practitioners
Mhishi Legal Practice, 1st respondent's legal practitioners
Civil Division of the Attorney General's office, 2nd & 3rd respondent's legal practitioners