

CHEMADEN RESOURCES (PVT) LTD
versus
EDISON KADZOMBE
and
MINISTER OF LANDS AND RURAL RESETTLEMENT N.O
and
MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 7 and 21 February 2017

Urgent chamber application

P Ranchod, for the applicant
TSTD Dzvettero, for the 1st respondent
Ms R Handuru and *L Dzumbu* for the 2nd & 3rd respondent

MWAYERA J: On the 7th of February 2017 after considering written and oral submissions by counsels I issued out an order effectively granting an application for directions for an opposed application for contempt of court to be set down expeditiously. The reasons for my disposition are captioned herein.

The applicant approached the court through the urgent chamber book, seeking an order that the contempt of court application, in case No. HC 532/17 filed on 20 January 2017, be heard on urgent basis. The background to the matter is that on 8 September 2015 this court under HC 8406/15 issued a provisional order. The terms of the order restored possession to the respondent and ordered the respondent to preserve the area under the mining claim held by the applicant located on Esbank farm against any mining activity. The terms of the provisional order being.

“Terms of FINAL ORDER SOUGHT

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

1. The interim relief granted by this court on the 8th day of September 2015 be and is hereby confirmed.

INTERIM RELIEF GRANTED

Pending the return day, it is hereby ordered by consent that:

1. 1st respondent and those claiming occupation through same are hereby ordered to return applicant status quo ante prior to this spoliation such that the applicant is returned its peaceful, quiet and undisturbed possession, occupational and use of land commonly known as Lot 6 of Re Eskbank situate in Mazoe in the District of Mashonaland Central Province, measuring 125,00 hectares.
2. The applicant shall preserve the area under the mining claim held by the 1st respondent against any mining activities save for agricultural activities.
3. To the extent that it becomes necessary, the Deputy Sheriff or his lawful deputy is hereby authorised and empowered to attend to the eviction and removal of any person and their property so occupying the said Lot 6 of the Eskbank situate in Mazowe District of Mashonaland Central Province, measuring 125,00 hectares without the knowledge and consent of applicant. Pursuant thereto, the Deputy Sheriff be and is hereby authorised to enlist the assistance of any member of the Zimbabwe Republic Police who are hereby directed to provide such assistance to the Deputy Sheriff so as to ensure that the provisions of this order are executed and implemented in full.”

The applicant has rights to the mining claim as conferred by the certificate of registration from the relevant Ministry. Annexure UC5 p 15-19 refers, while the respondent is the occupier of the land on which the mining claim is registered. The respondent's rights are to the surface area of land for agricultural purposes as mandated by the extant provisional court order. Paragraph 2 of the order is to the effect that the respondent is to preserve the area under the applicant's mining claim from any mining activity. The applicant argued that on 12 January 2017, it came to fore that there was mining activity going on at his mining claim, at Eskbank farm under the respondent's contract and that mining activities were on going as evidenced by order and the rescue operation by the police and third respondent's personnel following the entrapment of some people in the shafts, dug at the applicant's mining claim. It is these events which then cajoled the applicant to file the contempt of court proceedings through an application under HC 532/17 on 20/01/17. On 25 January, the applicant then approached the court through the urgent chamber book seeking directions, so as to expedite the hearing of the contempt of court application. The applicant argued that the respondent's conduct of not complying with the provisional court order, by not preserving the mining area would occasion irreparable harm to the applicant. The applicant further presented argument that, by seeking to expedite the hearing of the contempt of court application the respondent was treating the matter as urgent and requiring urgent redress. Further, the applicant pointed out that, the nature of relief and cause of action necessitated hearing of the present application on urgent basis, as the failure to comply with the provisional order holistically and failure to

preserve the applicant's mining claim from mining activities would clothe the matter with urgency because it is anchored on effectiveness and legitimacy of the legal system.

The respondent mounted spirited opposition of the application. The respondent, argued that the matter was not urgent as the applicant had other remedies at their disposal. These included prosecution of the contempt of court application on the ordinary roll, or prosecuting the application for dismissal of the provisional order for want of prosecution by the respondent, or reporting to the police. I must mention, at this stage that, the respondent's stance exposed ingenueness as regards compliance with a court order. To that extent, the respondent gave credence to the applicant's request to have the matter expeditiously set. It appears there is credence to the application for contempt and it is that which has propelled the applicant to act timeously and file the contempt of court application and subsequently this present application which is strictly for expeditious set down. As observed by DUBE J in *Redan Petroleum (Pvt) Ltd and Spring and Autum (Pvt) Ltd v Shumba Holdings (Pvt) Ltd and Outside Leisurs (Pvt) Ltd, Themba Mliswa and Minister of Lands and Rural Resettlement* HH 358/19 contempt of court by nature brings about the element of urgency. She remarked:

“... on going contempt by its very nature, introduces an element of urgency in proceedings because contempt of court has implication on effectiveness and legitimacy of the legal system there is a public interest element in every such case were it is alleged that a party has wilfully failed to comply with a court order and hence every such case has an element of urgency.”

I wish to add my voice that this court has inherent jurisdiction to protect and regulate its process as outlined in the Constitution. Section 176 is instructive it reads:

“The Constitutional Court, Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account interest of justice and provisions of this Constitution.”

In the circumstances of this case it is alleged that the respondent is in contempt of court and the circumstances are clear that after the provisional order the respondent sat back leading the applicant to apply for a pending application for dismissal for want of prosecution. Further, the applicant filed a contempt of court application followed up by request for expeditious set down. One wonders what it is that motivates the respondent not to desire expeditious set down. The need to protect the effectiveness of the court generally clothes the application with urgency. I am alive to the fact that the circumstances of each case have to be considered in order for the court to exercise its discretion on whether or not the matter is urgent. In *casu* the history of the matter, the cause of action and nature of relief sought

certainly clothe the application with urgency which qualifies it in satisfying the requirements of urgency. The potentially volatile and hazardous situation, given the trapping of miner leading to death of one, cannot be left unchecked. By allowing expeditious set down for full ventilation of the contempt of court application the full picture will be laid bare. The sentiments of MATHONSI J in *Jean Pamel Vant v George Jeché* HH 403/15 ring true in the circumstances of this case. He stated:

“I have no reason to doubt the facts set out by the applicant and they point to anarchy of unacceptable proportion. There is therefore a pressing need for the rules of this court relating to set down of applications to be side stepped in order to arrest the situation. After all the rules are there to assist the court achieve justice between litigant’s.”

The request to have the contempt of court application heard expeditiously given the respondent has already filed opposing papers is a matter which calls for urgent hearing, more so when one considers the alleged on going mining activities. The argument that granting the expeditious set down would infringe on the respondent’s constitutional right of due process is unattainable given there is no prejudice that will be occasioned to the parties as what is sought is expeditious filing of heads of argument and set down and not short circuiting process. It remained unanswered, what prejudice the respondent who denies that no mining activities are going on will suffer by clearing that he is not in contempt of the court order. Effectively, what is sought by the applicant, is expeditious determination of the pending contempt of court matter.

It is apparent from the circumstances of this matter that the applicant sprung to action when the need to act arose. Further is clear the delay in hearing of the main matter will occasion irreparable harm to the applicants whose recourse is the remedy they seek for expeditious set down of the main matter. The requirements of urgency which are settled have been spelt out clearly in *Plethora case* law by this court. See *Fourdrop Trading (Private) Limited v The Zimbabwe Revenue Authority* HH 68/14, *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188 *Deilwin Investments (Private) Limited v Jopa Engineering Company (Pvt) Limited* and *Document Support Centre (Pvt) Ltd v Mapurire* 2006 (2) ZLR.

In the *Document Support Centre* case MAKARAU J (as she then was) quoted with approval sentiments by CHATIKOBO J in *Kuvarega case supra* that a matter is urgent if, when the need to act arises the party springs to action as opposed to waiting for the day of reckoning. She further articulated how the cause of action and nature of relief sought are central on the determination of whether a matter is urgent or not (my emphasis) when she remarked at p 244. “It appears to me that the nature of the cause of action and the relief

sought are important considerations in granting or denying urgent applications”. In the present case there is alleged contempt of court occasioned by alleged mining of a claim on which no mining activity should occur per the extant provisional order. The relief sought is expeditious set down to investigate the veracity or otherwise of the alleged contempt. The applicants have timeously approached the court on this back drop and all these circumstance justify hearing of the matter on urgent basis. The requirements of urgency have been met.

The points *in limine* raised that the application was not served personally on the respondent but served on the practitioner is misplaced because the application before me for directions as regards set down does not require personal service but proper service to be effected. The respondent was properly served through their current legal practitioner and filed opposition. The application is therefore properly before the court. The third point *in limine* that there are material disputes of facts was not substantiated. In any event from looking at the papers there is nothing contentious raised in the respondents’ affidavit of opposition to the current application which leaves the court with no answer as regards issues before the court.

The other point *lis pendens*, again this point *in limine* appears to have been raised as obstructive and argumentative opposition without substance. The matter which is pending under HC 11370/15 is an application for dismissal of the respondent’s claim for want of prosecution. That pending matter does not negate the alleged contempt of court of an extant court order for which the applicant is seeking expeditious set down to establish the veracity or otherwise of the contempt.

The respondent further argued that the application had been overtaken by events and that the applicant lacked the *locus standi*. The respondent argued that the property in question has been earmarked for urban development. That assertion was not substantiated but even if it was correct the property was earmarked for urban development that would not override an extant order of this court for which there is alleged contempt. The point *in limine* again cannot stand given the applicant is an interested party. The issue of lack of *locus standi* does not arise. The last point *in limine* raised is that the application offends against r 227 (4) A of the High Court Rules in that, the deponent of the affidavit must be a person who can swear to the facts or averments set out herein. Clearly, this criticism as regards the applicant was unwarranted. The applicant got information of on goings at his mining claim for which the court ordered him not to attend while at the same time ordering the respondent to safeguard the applicant’s rights by ensuring that no mining activities occur. The applicant identified his source and it is settled that hearsay evidence in interlocutory urgent applications is

admissible. Strict rules of procedure as in action matters is not adhered to as it is sufficient for the affidavit to disclose facts which can be positively confirmed by the deponent. See *Johnston v Widdefield* 1966 RLR 596.

In any event the respondent submitted that there are members of the police and the relevant authority *insitu* to ensure peace and tranquillity. If that is the case then it is common cause there is need for the investigation or enquiry into the alleged contempt.

The applicants have rightly and properly approached the court on urgent basis seeking directions on expedient set down of a contempt of court application to which the respondent has already filed opposition. The requirement of urgency as contemplated by the rules of this court have been met and the balance of inconvenience favours granting of the application.

Accordingly it is ordered that:

1. The contempt of court application in case HC 532/17 filed on 20 January 2017 is urgent in nature and should be heard on urgent basis.
2. The respondent shall file any notice of opposition and opposing affidavits to the contempt application if any, within 2 days of the date of this order.
3. The applicant may file an answering affidavit, if any, within 2 days following the receipt of any opposing papers for the respondent.
4. The applicant shall file its heads of argument within 3 days of filing its answering affidavit and respondents shall file their heads of argument within 3 days of service of the applicant's heads of argument.
5. Thereafter the Registrar of the High Court shall cause the application to be set down on the earliest available date.
6. The costs of this application shall be costs in the cause.

Hussein Ranchod & Co, applicant's legal practitioners
Antonio & Dzetero, 1st respondent's legal practitioners