HWANGE COLLIERY COMPANY LIMITED
versus
THE COMMISSIONER GENERAL OF THE
ZIMBABWE REPUBLIC POLICE N.O
and
THE OFFICER IN CHARGE OF HWANGE POLICE
STATION N.O
and
THE SHERIFF OF THE HIGH COURT
OF ZIMBABWE
and
AMARRY SAULA
and
ZIMBABWE CONGRESS OF THE TRADE UNIONS

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 27 February 2018 & 23 May 2018

Urgent Chamber

K.T Madzetse & Advocate Zhuwarara, for the applicant
Ms *B. Shava*, for the 1st and 2nd respondents
M. Gwisai, for the 4th and 5th respondents
O. Shava for the 6th respondent

MAKONI J: At the end of the hearing, l delivered an *ex temporae* judgment. The applicant has requested for written reasons. These are they:

This is an urgent chamber application in which the applicant seeks the following relief:

A. Terms of the final order:
    1. The applicant and its invitees have a right to the peaceful and unhindered use and enjoyment of its immovable property being number 1 Coronation Drive Hwange. Consequently

2. No demonstration and or protest, procession or meeting as defined in the Public Order and Security Act may be conducted at the Applicant's afore stated property without the express approval of the Applicant.
3. The 1st Respondent and his functionaries are at all times obligated to cause the disbursement of any protest, rally, meeting or procession carried out on the Applicant's afore mentioned property by persons without the Applicant's express approval.
4. The 1st Respondent to pay costs of the Application.

B. Terms of the interim relief granted

1. Pending the return date the 1st Respondent, with the assistance of the 2nd and 3rd Respondents shall immediately disperse any protest, rally, meeting or procession carried on within the confines of Number 1 Coronation Street Hwange without the Applicant's express permission or approval.
2. 1st and 2nd Respondents e and are hereby authorised to use any means necessary to cause the removal of any person or persons at the Applicant's property, being Number 1 Coronation Drive, who is thereat without lawful authority are at the express invitation of the Applicant.

The applicant, Hwange Colliery is a company situated at Number 1 Coronation Drive Hwange and administers its business of extracting coal for commercial benefit. On 29 January a large number of demonstrators, including women and children overwhelmed the Applicant's security and invaded the applicant's property. They occupied the applicant's premises on the basis of the Applicant's failure to pay their spouses salaries as at and when they became due, for the last five years.

The applicant made an urgent chamber application under case number HC1004/18 in a bid to compel second and third respondent to disperse the women and children. However, the applicant withdrew that urgent chamber application. It filed two other urgent chamber applications one at the Bulawayo High Court and the current one. The one at the Bulawayo High Court was struck off the roll by MATHONSI J on the basis that there was another application pending before this court. The applicant did not cite the women and children when it made the application. The fourth and fifth respondents, representing the women and children then made an oral application for joinder

which was granted by consent of all parties. The sixth respondent a duly registered trade union and one of its affiliates is the National Mining Workers Union of Zimbabwe whose members are employees of the applicant, also made an oral application for joinder which was granted by consent of all parties.

The respondents raised points *in limine*. Firstly, that the matter was not urgent given that the demonstrations had begun on 29 January 2018 and the present application was filed on 7 February 2018. They also argued that the certificate of urgency did not comply with r 242 (2) (b) in that it does not justify why the application should be accorded any urgency. Thirdly, the respondents argued that the relief sought in the answering affidavit seems to change the relief which was sought in the provisional order as supported by the founding affidavit. They further submitted that the draft order sought is not consistent with the founding affidavit and an application stands or fall on founding affidavit. The respondents further submitted that the applicant's answering affidavit introduced new evidence at a late stage. In response the applicant argued that the evidence attached to the answering affidavit is in response to the allegations duly made by the fourth, fifth and sixth respondents in their opposing papers.

I will deliver my ruling regarding the two points *in limine* raised, that is, the issue of whether the matter is urgent and the issue of whether the answering affidavit should be expunged from the record, in other words, whether the application is properly before the court. My view is that I should first of all deal with the issue of urgency and if I find that the matter is urgent and that parties should proceed to address me on the merits, that is when I then should make a determination of whether the answering affidavit is properly before me. So I will determine the issue of urgency first.

The applicant approached the court on a certificate of urgency seeking relief as is contained in the provisional order filed of record. In the main, the applicant seeks that the second and third and respondents shall immediately disperse and any protest, rally, meeting carried on within the confines of No. 1 Coronation Hwange without the applicant's express permission or approval. The first and second respondents are the Commissioner General of the Police and the Officer in Charge Hwange Police Station as the first and second respondents respectively.

In an urgent chamber application, the starting point is the certificate of urgency, which is provided for in terms of r 242 (2) where it is provided that in an urgent chamber application where

the applicant is represented by a legal practitioner, the legal practitioner should give his or her opinion regarding the issue of whether the matter is urgent or not. What is urgent has been defined in quite a number of cases. The *locus classicus* being the *Kuvarega* v *The Registrar General* 1998 (1) ZLR 188. In an urgent chamber application an applicant is asking the court to drop everything that is before it and attend to that matter. In my view a certificate of urgency should be able to demonstrate to the court that it should leave everything else that it is dealing with to attend to its matter.

In this case we have a certificate of urgency where a legal practitioner certifies that the matter is urgent. In the certificate of urgency, the legal practitioner more or less regurgitates what is contained in the founding affidavit. Paragraph 1 tells us that the applicant is the owner of a certain immovable property being No. 1 Coronation Drive Hwange. Paragraph 2 tells us why the applicant is approaching the court, which is that a large of group of demonstrators overwhelmed the applicant's security and invaded the aforementioned property. In my view paragraph 3, is neither here nor there when one is looking at the issue of whether the matter is urgent or not. Thereafter the certificate of urgency addresses the requirements of an interdict which are the harm, the prejudice and the balance of convenience. The legal practitioner then concludes its certification by saying that the applicants have acted, when the need arose. They did not sit on their laurels and that they will suffer irreparable harm if the order sought is not granted.

My view is that the certificate of urgency does not meet the requirements of r 242 (2b) in that the legal practitioner who certifies to urgency should have read the applicant's affidavit and made deductions from the applicant's affidavit whether the matter should be heard on an urgent basis or not rather than to regurgitate the founding affidavit.

Further, in this case we are told that the demonstrators moved on to the applicant's premises being No. 1 Coronation Drive Hwange on 29 January 2018. The present application that I am dealing with was filed on 7 February 2018. There is an averment that the applicants did not sit on their laurels. But there is no explanation, in the certificate of urgency, as to what has been happening between the 29th of January and the 7th of February when this present application was filed. The applicant attempts, to explain in some way, the delay between the 29th and the 7th of February by saying that the applicant was engaging the police. When it failed to get assistance from the police that is when it then approached this court. The certificate of urgency is silent on

the fact that the applicant at one point approached this court on an urgent basis and what happened to that application. It is a silent on the fact that the applicant had approached this court at Bulawayo and what became of that application.

The certificate of urgent is also silent as to how the applicant approached the first and second respondents. Was it filing a criminal complaint or was it seeking assistance and if it was seeking for assistance as was deposed to by the Commissioner General, they were so provided with the assistance in the sense that the police were dispatched to ensure that the demonstrators carried out their demonstrations in a peaceful manner.

The applicant further goes on to say it has no other remedy in law. If you look at the provisional order what the applicants are seeking is the dispersing of any protest, rally, meeting or procession. It is not clear from the certificate of urgency whether the police were approached to seek the dispersal of any protesters. Rather the certificate of urgency talks about the applicant approaching the second respondent for assistance and has been denied such assistance, which has resulted in it approaching this court to intervene. I think the use of those terms, in my view, in a matter of this nature, does not assist the applicant in establishing that the matter be dealt with on an urgent basis. This is a situation where the police are on the ground ensuring a peaceful demonstration. It is a question of differing in approach. Maybe the applicant wants much more than the assistance being rendered by the police at the present moment. This should be made clear in the papers.

My view is that the applicant has failed on the first hurdle. When dealing with urgent matters, to satisfy the court that it should drop everything and attend to this matter. As a result, I will find that the matter is not urgent and have the matter removed from the role of urgent matters.

In view of that finding it will not be necessary for me to determine the second point *in limine*.

Mr *Gwisai* for the fourth and fifth respondents applied for costs to be granted against the applicant on the basis that fourth and fifth respondents represent a group of persons who are indigent and the very cause of the demonstration is the very difficult position they are in. He further submitted that the fourth and fifth respondents have been made, to go to great extend to defend an action for which adequate remedy had already been provided for by the first and second respondents.

Mr *Zhuwarara* argued that the purpose of an award of costs is to indemnify a part who has been put through or having been compelled to initiate or defend proceedings. He added that in the present matter the applicant did not put the third, fourth, fifth and sixth respondents to costs. They voluntarily took it upon themselves to be joined in the proceedings. He submitted that the order that was being sought did not call on them in their capacities, to do anything but they are the ones who averred that they have substantial interest and they joined the fray.

I would want to agree with the submissions by Mr *Gwisai* that although the relief being sought by the applicants is directed at the first and second respondents only, it affects the fourth and fifth respondents. If the order was to be granted, it is the fourth and fifth respondents who would be affected by that order. In my view it was proper for them to seek joinder to these proceedings rather than wait and until they are being disbursed and then rush to court to seek protection.

As regards the sixth respondents, l agree with Mr *Zhuwarara* that it exposed itself to these proceedings and in my view it was not necessary for the sixth respondent to have joined these proceedings. Looking at the nature of the relief that the applicants were seeking and that there is no relief being sought against it. The relief that was being sought by the applicants would not have affected them. So, l will make an order of cost in favour of the fourth and fifth respondents as against the applicant. No order as to costs in respect of first and second respondents and the sixth respondents.

In the result, it is ordered that:

1) The matter is not urgent and is removed from the roll of urgent matters.
2) The applicant to pay the 4th and 5th respondents costs.
3) No order of costs in respect of 1st and 2nd respondents.

Mawere Sibanda Commercial Lawyers, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st and 2nd respondent's legal practitioners
Munyaradzi Gwisayi and Partners, 4th and 5th respondent's legal practitioners
Mbidzo Muchadehama and Makoni, 6th respondent's legal practitioners