PALATIAL GOLD INVESTMENTS
and
PARATON HOLDINGS (PRIVATE) LIMITED
and
SIMON ZVOUSHE
versus
NAISON TINAPI
and
THE SHERIFF OF THE HIGH COURT
OF ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
MUSHURE J
HARARE, 28 October & 6 November 2024

Urgent Chamber Application for an interdict

A. Kadye, for the applicants
E. Chibondo for the first respondent
No appearance for the second respondent

MUSHURE J:

Introduction

[1] The first applicant is a registered owner of certain mining claims in Chakari Kadoma. On 13 February 2024 the first applicant entered into a tribute agreement relating to those mining claims with the second applicant. The tribute agreement was registered on 15 March 2024. The second applicant subsequently entered into a mining agreement with the third applicant on 21 June 2024.

[2] Prior to entering into a tribute agreement with the second applicant, the first applicant had entered into a tribute agreement over the same mining claims with the first respondent in August 2021. The tribute agreement was valid for a year. An intention to extend the duration of the tribute agreement by a further two years was expressed in a letter to the Ministry of Mines and Mining Development dated 21 November 2023.

[3] However, on 5 April 2024 the first applicant wrote to the Mining Affairs Board advising the Board that it would not proceed with the registration of the extension of the tribute

agreement between it and the first respondent. The withdrawal of the application was acknowledged and the application for registration was formally rejected on 21 August 2024.

[4] The first applicant alleges that it advised the first respondent of the withdrawal of the application for registration of the tribute agreement on 3 July 2024. The first respondent however states that it was only upon his arrest at the behest of the third applicant on 20 July 2024 on allegations of mining at the mining claims illegally that he sought to investigate the third applicant's status. Only then did the full picture unfold to him.

[5] He then approached the court on urgent basis, seeking spoliatory relief against the third applicant. The application was granted. The order has culminated in a series of further litigation in this court and in the Supreme Court, including an application for eviction filed by the first applicant against the first respondent. The first respondent has in turn filed summons seeking the cancellation of the tribute agreement between the first and the second applicants.

[6] The first applicant alleges that on 15 October 2024, despite being fully aware that he has no rights to the first applicant's mining claims, the first respondent went to the mining claims and removed the third applicant's mining equipment and machinery. In the process, he disrupted mining operations. Twenty-three workers were also arrested.

[7] On 16 October 2024, the first respondent and his associates attempted to remove gold ore from the first applicant's mining location without the first applicant's consent. The truck loaded with six tonnes of gold ore was intercepted by a security reaction team and the driver was arrested for theft of gold ore.

[8] Before me is an urgent chamber application for an interdict. The applicants approached the court on a certificate of urgency on 24 October 2024 seeking the following relief:

> "**TERMS OF FINAL ORDER SOUGHT**
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms -
>
> 1. 1st Respondent, his employees, invitees, assignees, agents, friends and/or relatives and anyone acting through him be and are hereby interdicted from removing machinery and gold ore from 1st Applicant's mining claims and from interfering in any manner with Applicants' mining activities pending finalisation of 1st Applicant's Court Application for eviction under Case No. HCH 3961/24.
> 2. The 1st Respondent shall pay Applicant's costs on a Legal Practitioner and Client scale.
>
> **INTERIM RELIEF GRANTED**
>
> Pending determination of this matter, the Applicant is granted the following relief -
>
> 1. 1st Respondent, his employees, invitees, assignees, agents, friends and/or relatives an anyone acting through him be and are hereby interdicted from removing machinery and gold ore from 1st Applicant's mining claims and from interfering in any manner with Applicant's mining activities.

SERVICE OF PROVISIONAL ORDER
The Applicants' legal practitioners are granted leave to serve the provisional order on the Respondents."

[9] The application is opposed by the first respondent.

First respondent's opposition

[10] In response to the application, the first respondent raised several preliminary points. Firstly, that the matter is not urgent. Secondly, the second and third applicants were not properly before the court because they did not depose to founding affidavits and in any event, the supporting affidavits had been deposed to a day before the founding affidavit had been executed and there is no way that the second and third applicants could support an affidavit that was not there. Thirdly, the founding affidavit by the first applicant's representative was not properly before the court because the founding affidavit was commissioned on 18 October 2024, the same day the first applicant had deposed to an affidavit in an earlier urgent chamber application which the first applicant had then withdrawn.

[11] Fourthly, there was material non-disclosure in that the applicants were creating an impression that the first respondent was operating illegally without any court order yet he had obtained a spoliation order out of the High Court. He narrated the legal battles he and the applicants are currently embroiled in and stated that the third applicant did not comply with the spoliation order so he had involved the police to restore the status *quo ante*. He also argued that the first applicant ought to have disclosed that it had filed a defective urgent chamber application which it withdrew after opposition. The fifth preliminary point raised by the first respondent is that one cannot seek to interdict a lawful process, namely the spoliatory relief.

[12] The sixth preliminary point is that the certificate of urgency is defective because it mostly regurgitates word for word the grounds upon which the application is premised. Further, the certificate of urgency explains that the need to act arose on 15 October 2024 yet it does not explain why the application was filed on 21 October 2024.

[13] The seventh preliminary point raised relates to the fact that the first applicant indicated in the founding affidavit that the application was being made in terms of Rule 40 of the High Court (Commercial Division) Rules, 2020, yet it was filed in the General Division of the High Court. The first respondent contends that this means that the matter is a commercial court matter and that a matter filed in terms of the Commercial Court Rules cannot be filed in the General Division of the High Court.

[14] On the merits, the first respondent argues that he still holds a tribute agreement between himself and the first applicant which expires in November 2025. The withdrawal done by the first respondent was done behind his back and he has challenged it through the filing of summons in the High Court. He complains that the first applicant seeks to put on hold his operations 'pending the determination of an otherwise defective application for eviction brought on a platform of motion proceedings in the face of a plethora of material disputes of fact'. He submits that the application for his eviction does not disturb the status *quo ante* granted by this court. He further challenges the validity of the mining agreement entered into between the second and the third applicants. He insists that he is at the mining claim on the basis of the spoliatory relief granted by this court. He exhorts this court not to turn around and interdict its own processes and orders and assume review or appeal powers it does not have in such matters.

[15] Finally, the first respondent pays for the dismissal of the application with costs on a higher scale.

[16] I turn to deal with the preliminary points as follows:-

Urgency of the matter and defective certificate of urgency

[17] These preliminary points were raised separately but I have decided to co-join them since they relate to the same subject matter, that of urgency.

[18] The determination whether a matter is urgent or not is at the discretion of the court. An applicant who approaches the court on an urgent basis essentially seeks an indulgence and to be afforded preferential treatment. See *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 (H). However, urgency is not there for the asking. For any argument on urgency to be sustained, an applicant must have acted promptly, as soon as he or she acquired knowledge of the respondent's prejudicial conduct. It is, therefore, trite that urgent relief will not be granted in circumstances where the claimed urgency is self-created. See *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 (HC); *Gwarada* v *Johnson & Ors* 2009 (2) ZLR 159 (H); and *Nyakudya* v *Vibranium Resources (Pvt) Ltd* HH–409–21).

[19] The facts before me show that the need to act arose on 15 October 2024. It persisted on 16 October 2024. The first respondent states that a defective application was filed on 21 October 2024. It was withdrawn after the first respondent pointed out the defects. The applicants then filed the present application on 24 October 2024. The first respondent cannot seriously argue that a delay of ten days qualifies to classify the applicants as having sat on their laurels. The

comments by MATHONSI J in *Telecel Zim (Pvt) Ltd* v *POTRAZ & Ors* 2015 (1) ZLR 651 (H) at p. 658H-659B are apposite:-

> "I find myself having to repeat what I stated in *Prosecutor-General* v *Busangabanye & Anor* HH-427-15 at p 3:
>
> > "In my view this issue of self-created urgency has been blown out of proportion. Surely a delay of 22 days cannot be said to be inordinate as to constitute self-created urgency. Quite often in recent history we are subjected to endless points *in limine* centered on urgency which should not be made at all. Courts appreciate that litigants do not eat, move and have their being in filing court process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time they should be accorded audience. It is no good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a holocaust."

[20] I find that the applicants acted promptly as soon as they acquired knowledge of the first respondent's prejudicial conduct.

[21] A further requirement on urgency is that an applicant must demonstrate that the situation which he or she seeks to arrest may become irrevocable if the court does not intervene. It has been held that

> "urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant"

(*Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 240 (H) at p244 C-D).

[22] In *casu*, the applicants argue that if the court does not intervene, the first respondent will persist in his prejudicial conduct. He has already interfered with the machinery and the gold ore at the mining claims and some workers have been arrested. He is therefore interfering with the applicants' mining operations.

[23] For a court to be able to form an opinion and exercise its discretion judiciously, it is a procedural requirement that the application be accompanied by a certificate from a legal practitioner setting out, with reasons, his or her belief that the matter is urgent (r 60 (4)(b) of the High Court Rules, 2021).

[24] A legal practitioner is required to state in the certificate of urgency his own belief in the urgency of the matter. He must be able to conscientiously concur to the submissions he makes in that certificate. He must also apply his own mind and own judgment to the circumstances, and reach an independent conclusion that the matter is indeed urgent (See *General Transport & Engineering* (*Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation Ltd supra* and *Chidawu and Others* v *Shah & Others* 2013 (1) ZLR 260 (S))

[25] Our courts have discouraged the practice of regurgitating word for word the contents of the founding affidavit and passing them off as a certificate of urgency (*Nyakudya* v *Vibranium Resources (Pvt) Ltd supra*).

[26] The first respondent contends that the legal practitioner who prepared the certificate of urgency regurgitates word for word in most parts the grounds on which the application is based. He states that it does not explain the cause of the delay between 15 October 2024 and 21 October 2024. I find that argument without merit. The certificate of urgency establishes a legitimate ground for treating the matter as urgent. It outlines the first respondent's prejudicial conduct and when the applicants became aware of the prejudicial conduct, which was on 15 and 16 October 2024. The certificate was prepared on 18 October 2024. The first respondent cannot then expect the legal practitioner who prepared the certificate to comment on events post the preparation of the certificate. I consider that the certificate of urgency substantially complies with the provisions of r 60 (4) (b) of the High Court Rules, 2021. As such, I find it necessary to determine the matter on an urgent basis.

Defective affidavits

[27] At the hearing of the application, counsel for the applicants conceded that the affidavits by the second and third applicants were improperly before the court for the reason that they were commissioned before the founding affidavit had been commissioned and as such, it was impossible for the second and third respondents to support the contents of an affidavit which had not yet been executed. Counsel consequently withdrew the second and third applicants' application. I take the view that by virtue of the withdrawal, the second and third applicants were no longer before the court and any objections relating to their affidavits were rendered moot.

[28] I do not find merit in the preliminary point that the first applicant's representative's founding affidavit in the urgent chamber application that was later withdrawn was deposed to on the 18th of October 2024, the same day the founding affidavit in the current proceedings was deposed to. The first respondent argues that there is no explanation why the affidavit was not filed in that application if it was there. The first respondent states that one cannot resist a conclusion that there was tampering with dates and it is possible that there was no appearance before a commissioner of oaths. From a reading of the allegations raised by the first respondent, they are based on speculation. The first respondent is motivating the court to speculate on what could have happened in a matter that is not before it. There is no rule which says that an applicant is required to explain in a new application why it did not file a founding affidavit in a withdrawn application, or why the content in the first affidavit is

different from the content in the subsequent affidavit. On that premises, the point in *limine* is accordingly dismissed.

Material non-disclosure

[29] The first respondent's complaint is that the applicants seek to create a misleading impression that he is acting unlawfully without any court order. He outlines the court processes he has had to go through with the applicant, including an aborted urgent chamber application filed by the applicants against him just before the current application was filed. He asserts that the applicants ought to have disclosed that they filed an urgent chamber application then withdrew it.

[30] In *Graspeak Investments P/L* v *Delta Corporation P/L & Anor* 2001 (2) ZLR 551 (H), it was held that an urgent application is an exception to the *audi alteram partem* rule and, as such, an applicant is expected to disclose fully and fairly all material facts known to him or her. It was further held that although the court has a discretion to grant or dismiss an application even where there is material non-disclosure, the court should discourage urgent applications, whether *ex parte* or not, which are characterised by material non-disclosures, *mala fides* or dishonesty. Depending on the circumstances of the case, the court may make adverse or punitive orders as a sign of its disapproval of the *mala fides* or dishonesty on the part of litigants.

[31] From a reading of the first applicant's founding affidavit, the spoliation process is not mentioned. The founding affidavit only makes mention of the application for eviction by the applicant and the summons issued by the first respondent. However, the first applicant attached the court application it issued against the first respondent to the current application. The founding affidavit in that application makes reference to the spoliation order and attaches the judgment of this court in the spoliation proceedings.

[32] In my opinion, in the circumstances outlined above, I do not think there has been material non-disclosure in the present case. My conclusion is based on the provisions of Rule 58 (4) of the High Court Rules, 2021 to the effect that:-

> "(4) An affidavit filed with a written application—
> (*a*) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein; and
> (*b*) may be accompanied by documents verifying the facts or averments set out in the affidavit and any reference in this Part to an affidavit shall be construed as including such documents."

[33] My understanding of Rule 58 (4) is that an affidavit is construed as including any documents attached to it. It cannot be successfully argued that there has been material non-

disclosure where the judgment of the court in the spoliation proceedings is attached to the affidavit. In any event, material non-disclosure must have been motivated by a *mala-fide* intention or a scheme of deception (*National Association of the deaf T/A Zimbabwe National Association of the Deaf* v *Sandybeds Investments (Pvt) Ltd & 4 Ors* HH 300/23). In my view, the fact that there is reference to an application which not only discloses the spoliation proceedings but also attaches the judgment handed down in the spoliation proceedings cannot be said to have been a scheme of deception by the applicants.

[34] With regards non-disclosure of the withdrawn urgent chamber application, I do not see how the disclosure would take either the first applicant's or the first respondent's case further, neither do I see how it would have assisted the court. The withdrawal of the application does not influence the decision of the court hence in my view, its non-disclosure cannot be said to be material to the current proceedings. In the result, the argument that there has been material non-disclosure is without merit and this point *in limine* is dismissed.

One cannot interdict a lawful process

[35] It is a fundamental principle of the law that one cannot seek to interdict lawful action (*Airfield Investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004 (1) ZLR 511 (S) on p. 549C and *Mayor Logistics (Pvt) Ltd* v *Zimbabwe Revenue Authority* 2014 (2) ZLR 78 (C) at page 84 G-H).

[36] The first respondent argues that the first applicant cannot seek to interdict him because he is at the mine pursuant to an order of this court which restored the status *quo ante*. He states that the present application seeks to interdict processes ordered by this court, and this is tantamount to circumventing extant court orders as well as asking the court to review the decision it made.

[37] The order the first respondent relies on is to the effect that:-

> 1. "Respondent and all those claiming rights of occupation through him are hereby ordered to immediately upon sight of this order to vacate applicant's mining site, being claims with the following registration numbers 17479, 15402, 17254 and 17477 Chakari Kadoma and to restore the status *quo ante* in favour of the applicant.
> 2. Respondent to pay the costs of suit."

[38] The order was sought and granted against the third applicant, whose application stands withdrawn. In this application, the first applicant seeks to interdict the first respondent from removing machinery and gold ore from its mining claim and from interfering with its mining activities pending the return date in the interim and pending the finalisation of

the eviction proceedings which the first applicant has instituted against the first respondent as a final order.

[39] I have neither been asked to review nor interdict the judgment of NDUNA J. I am being asked to assess whether or not there is merit in the application for a provisional order. The parties' substantive rights stand to be determined in the eviction proceedings. This is an application pending those eviction proceedings.

[40] On the argument that the present proceedings are meant to circumvent an extant court order, the essence of spoliation proceedings is to restore status *quo ante,* no matter how unlawful someone's possession may be (*Nyamande v Mahachi* & *3 Ors* SC 45-23 at p.8). Spoliatory relief is meant to discourage members of the society from taking the law in their hands and resorting to self-help. It seeks to induce people to follow due process. Spoliation proceedings summarily restore possession that has been taken forcibly or wrongfully and without consent. As such, a spoliation order does not operate in perpetuity. Neither is it a bar to subsequent legal proceedings to determine the dispute of right between the parties. There is therefore no bar against the relief the first applicant seeks, provided the legal requirements are met.

[41] In my opinion, it would be improper for a court to bar a person who wishes to follow due process to restore their legal right to property on the basis that there is an extant spoliation order, yet the real reason behind granting spoliatory relief is to encourage a person to follow due process in enforcing his or her rights. The first respondent cannot dictate how the applicant should enforce its rights. In any case, the interdict sought is not based on the spoliation order, it is based on the first respondent's actions on 15 and 16 October 2024. At that time, the first applicant had already instituted eviction processes against the first respondent and is motivating the court to intervene pending those proceedings based on what it deems to have been prejudicial conduct exhibited by the first applicant. I find that the first applicant is well within its rights to utilise the legally provided remedies to protect its rights. This preliminary point must also fail.

Lack of clarity whether the application is in the General or Commercial Division of the High Court

[42] In deposing to the founding affidavit, the first applicant averred that the application was being made in terms of Rule 40 of the Commercial Court Rules, 2020. At the hearing of the matter, first applicant's counsel conceded the error and explained that he had attempted to lodge the application in the Commercial Division of the High Court. However, the application had been rejected because it made reference to records which had been filed in

the General Division of the High Court. He attributed the omission to correct the rule to the pressure generally involved in urgent chamber applications. He immediately moved the court to condone the error as the pleadings filed complied with the High Court Rules, 2021 and the error had not caused any prejudice to the respondents. Mr *Chibondo* persisted that the first respondent was prejudiced and he was not sure as to which court he was due to appear.

[43] This court has previously emphasised that the mere citation of a wrong rule does not always render an application defective. What matters is the substance or content of the pleadings. (See *Muhlwa* v *Alpha Media Holdings (Pvt) Ltd t/a Southern Eye & 2 Ors* HB 117-22). I am of the view that the mis-citation of the rule is not fatal in the circumstances. I am of also the view that there is no prejudice suffered by the first respondent who has been able to oppose the application and appear physically to argue the matter. I conclude that this is an appropriate case to condone the error made in citing the wrong rule in the interests of justice and finality in litigation.

[44] I now turn to deal with the merits of the matter.

Analysis on the merits

[45] It is critical to note that at this stage the first applicant is seeking a provisional order and such an order is established on a *prima facie* basis because it is merely a caretaker temporary order pending the final determination of the dispute on the return date. (See *Rodgers* v *Chiutsi & 5 Ors* SC25-22 and *Hwange Coal Gasification Company (Private) Limited* v *Mutuke* HB 30-24).

[46] *Nhende* v *Zigora* SC 102-22 is instructive on the purpose of a provisional order-

> "……in an urgent application, the applicant is usually granted interim relief on the basis of a *prima facie* case as the applicant would not have proved his or her case. The procedure allows a litigant which can show a *prima facie* right to be accorded interim relief that usually protects the status *quo ante* until the return date of the provisional order. See *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188."

[47] What the applicant in *casu* seeks is an interim interdict. The requirements for the grant of such an order have been restated by our courts with consistency over the years. In *Charuma Blasting and Earthmoving Services (Pvt) Ltd* v *Njainjai & Ors* 2000 (1) ZLR 85 (S) at 89E-H, SANDURA JA the court stated that:-

> "The granting of an interim interdict pending an action is an extra ordinary remedy within the discretion of the court. Where the right it is sought to protect is not clear, the matter of an interim interdict was lucidly laid down by INNES JA in *Setlogelo* v *Setlogelo* 1914 AD 221 at p 227. In general the requisites are:
> (a) a right which, 'though *prima facie* established, is open to some doubt'.

> (b) a well-grounded apprehension of irreparable injury,
> (c) the absence of ordinary remedy;
> In exercising its discretion, the court weighs inter alia the prejudice to the applicant if the interdict is withheld against the prejudice to the respondent if it is granted. This is sometimes called, the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated, for example, the stronger the applicant's prospects of success the less the need to rely on prejudice to himself. Conversely, the more the element of 'some doubt' the greater, the need for the other factors to favour him … Viewed in that light, the reference to a right which, 'though prima facie established is open to some doubt'; is apt, flexible and practical, and needs no further elaboration."

[48] It is not in dispute that the applicant is the registered owner of the mining claims. However, a perusal of the first applicant's founding papers will show that the first basis of the relief it seeks is that on the 15th of October 2024, the first respondent went to the first applicant's mining location and removed the third applicant's mining equipment and machinery, thereby disrupting mining operations. The first applicant also avers that the disruption caused the arrest of twenty-three works who were on site. The first respondent submitted that those workers are third applicant's workers and this is not in dispute. It is also not in dispute that the first applicant is currently not operating at the mining site but it is the third applicant who is doing so by virtue of the mining agreement he entered into with the second applicant.

[49] Properly construed, the rights the first applicant seeks to protect relate to the third applicant who is no longer before the court. It can be argued that the rights of the third applicant flow from the rights of the first applicant. However, the Court notes that the order by NDUNA J directed the third applicant and all those claiming rights of occupation through him to, immediately upon sight of his order, vacate the applicant's mining site namely mining claims registration numbers 17479, 15402, 17254 and 17477. That order is still extant and has not been set aside.

[50] The mining claims which the third applicant was directed to vacate in NDUNA J's order are the same mining claims which form the basis of the first applicant's application. It can be deduced from the papers before the court and the oral submissions that despite an extant court order, the third applicant has stayed put at the mining claims. The net result is that the order of this court has not been obeyed and the first applicant now seeks to use procedures of the court to protect the third applicant who has disobeyed an extant court order. My view is that the first applicant has not established a *prima facie* right to entitle it to interim protection. The basis upon which the relief is sought is to enforce the rights of a third party who has been ordered off the mining claims by the High Court. In the face

of the extant court order which not only affects the third applicant but the third applicant appears to have disregarded, it does seem to me that the application should fail.

[51] The second basis of the application is that the first respondent attempted to remove gold ore from the mining location. It is common cause that the driver who attempted to do so was immediately arrested and police investigations were ongoing. There was no sufficient explanation on why the first applicant was of the view that the harm was continuing. There was no explanation whatsoever on if resort to the police was inadequate. It has not been established that the remedy utilised by the first applicant has failed. In the result, the second basis fails to pass the well-grounded apprehension of irreparable harm and the absence of other satisfactory remedy tests.

[52] The two bases having failed to meet the factors outlined above, there is no reason to consider the other factors as these naturally fall away: *Ismail* v *St John's College & Ors* 2019 (2) ZLR 134 (S) at p. 141C.

Disposition

[53] For the reasons stated above, I am not convinced that the applicant has made the necessary averments and crossed the threshold required to merit the grant of a provisional order. In the result, the application stands to be dismissed.

[54] The first respondent has prayed for costs on a legal practitioner and client scale. He has not sufficiently substantiated why he is of the view that he is entitled to costs on a higher scale. As such, I see no reason why punitive costs should be ordered in the matter.

Order

[55] Accordingly, I make the following order:

> "The application for a provisional order be and is hereby dismissed with costs."

MUSHURE J: ……………………………………………………….

Mlotshwa Socilitors applicants' legal practitioners
Gumbo & Associates Legal Practitioners, first respondent's legal practitioners