

**BIGBOY NGWENYA**

**Versus**

**GARIKAYI MHINO**

**And**

**REGINA KUPFUWA**

**And**

**DERICK NDEBELE**

**And**

**THE ENVIRONMENTAL MANAGEMENT AGENCY**

**And**

**UMGUZA RURAL DISTRICT COUNCIL**

**And**

**THE COMMISSIONER OF MINES (N.O.)**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 21 & 27 DECEMBER 2012

*Advocate P. Dube* for the applicant  
*I. Mafirakureva* for 1<sup>st</sup> respondent

Urgent Chamber Application

**MAKONESE J:** The applicant filed an urgent chamber application with this court on the 14<sup>th</sup> December 2012. The applicant was requested to serve the application on all the respondents. I heard the parties in chambers on the 21<sup>st</sup> December 2012 and reserved my ruling.

The applicant seeks an interim relief in the following terms:-

“Pending the return date, the following relief is granted:-

1. The 1<sup>st</sup> and 2<sup>nd</sup> respondents, their employees, agents and all persons acting at their behest, or claiming through them, shall, forthwith, cease and desist from carrying on any mining activities upon Plots 980 and 981 Kensington.
2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents, their employees, agents and all persons acting at their behest, or claiming through them, shall forthwith remove all mining tools, equipment and plant from Plots 890 and 981 Kensington.
3. The 4<sup>th</sup> respondent shall carry out an investigation on the full impact of the mining activities carried out on Plots 980 and 981 on the environment and neighbouring properties, and shall, pending the return day, file a report with the Registrar of this Court.
4. The 6<sup>th</sup> respondent shall investigate the licensing and legitimacy of the mining activities carried out on Plots 980 and 981 Kensington, and shall, within 14 days of the date of the Order, file a report with the Registrar of this Honourable Court.”

The critical issue for determination in this matter is whether the matter is indeed urgent and should be allowed to jump the queue as it were. The applicant alleges that sometime in July/August 2012, he became aware of gold mining activities being carried on upon stand 980. The applicant is the owner of stand 978 Bernadette Street, Kensington Bulawayo although he ordinarily resides in Australia. The applicant avers that the approved land use for his property and adjoining pieces of land, save for stand 981, is residential/agricultural purposes. Plot 978 is adjacent to both plots 980 and 981. There are no buildings on plot 981 but only one cottage on stand 980.

The applicant further avers that the 1<sup>st</sup> respondent has been carrying on mining activities on stand 980 and has to that end brought on to the site an excavator and a number of persons have been seen on the stand day and night. A compressor has been used for drilling and explosives have been used. The applicant alleges that the noise and vibrations from the explosives and the compressor, as well as the noise from the excavator has been continuing day and night without regards to the rights of the neighbours. Applicant also indicates that he has dogs on his residence which have been traumatized by the explosions. In addition his chickens have also been affected, and in particular that broilers are very sensitive and the frequent noise and vibrations affect them resulting in a longer growth period, causing loss of income. I need to point out here that applicant has not tendered any scientific evidence to prove his allegations that his dogs are being traumatized by the noise and that his broiler chickens have delayed growth as a result of the use of explosives.

The applicant avers that in September 2012 he was on leave, in Zimbabwe when he personally visited offices of the 4<sup>th</sup> respondent to lodge a complaint of the mining activities being carried out by 1<sup>st</sup> respondent and also to enquire on the legality of those mining activities. The applicant says there was no action taken by 4<sup>th</sup> respondent but it is now beyond

dispute that the 1<sup>st</sup> respondent has a certificate of registration issued by the 6<sup>th</sup> respondent giving him legal rights to carry out mining activities on the plot in question. It is also established that 4<sup>th</sup> respondent has caused the applicant to cease mining operations on the property pending 1<sup>st</sup> respondent's attention to certain environmental concerns.

Firstly, in my view, there is no legal basis to allege that the mining activities are being done outside the law because the 6<sup>th</sup> respondent has issued a Certificate of Registration. Secondly, the 4<sup>th</sup> respondent whose mandate it is to ensure that all mining activities are conducted without damage to the environment has already attended to the matter and has directed the 1<sup>st</sup> respondent to cease operations and to comply with certain safety requirements. It seems to me therefore that there is no urgency at all in this matter. The applicant has been aware of these activities from as far back as July/August 2012 and just how this matter can be brought on a certificate of urgency is hard to comprehend. It has now become common place for applicants to allege urgency when there is no real urgency whether perceived or real. In this particular instance, the 4<sup>th</sup> respondent has already acted on the matter. The 6<sup>th</sup> respondent has also been made aware of the complaints by the applicant. This court is not in a position to investigate the various allegations of adverse conduct by the applicant, suffice to say however, that the fact that applicant has confirmed that 1<sup>st</sup> respondent has been advised to cease operations by 4<sup>th</sup> respondent indicates that the matter is not at this stage in the province of the courts.

The point must be made that a matter does not become urgent because a party thinks subjectively, that the matter is urgent and deserves urgent relief. It is the duty of the courts to examine all the facts placed before it by the parties, bearing in mind that no *viva voce* evidence is not being led from witnesses who are then subjected to scrutiny under cross-examination. GOWORA J as she then was had this to say in the case of *Triple C Pigs (Partnership) and Anor vs Commissioner General Zimbabwe Revenue Authority* HH-2-07:-

“As courts, we therefore have to consider, in the exercise of our discretion, whether or not a litigant wishing to have the matter treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringement of such interest if not addressed immediately would not be the cause of harm to the litigant which any relief in the future would render *brutum fulman*.”

In the result, I find that there is no urgency in this matter and on that basis alone the application is dismissed with costs.

*Phulu & Ncube*, applicant's legal practitioners  
*Mlweli Ndlovu & Associates*, 1<sup>st</sup> respondent's legal practitioners