RE-INT-MINING (PVT) LTD
and
RICHMORE RUBAYA
and
CHIPO CHINGOZHA
and
CHELSEA MINING SYNDICATE (PVT) LTD
and
MINISTER OF MINES AND MINING DEVELOPMENT N.O.

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 25 & 26 November 2019 and 22 January 2020

Urgent chamber application

N. Mushangwe, for the applicant
K.F. Chifudya, for the 1st, 2nd and 3rd respondents
C. Chitekuteku with *R Mupandasekwa*, for the 4th respondent

CHIKOWERO J: I caused this application to be set down for hearing on 25 November 2019 at 10:00am.

However, I had to postpone the matter to the following day to enable the legal practitioner for 1st- 3rd respondents to take full instructions and file opposing papers.

When the hearing commenced on 26 November 2019 at 10:00am such papers had been filed and served. In addition, 1st -3rd respondents had filed supplementary opposing papers.

An answering affidavit also stood on record.

4th respondent, though in attendance, was not opposed to the granting of the application.

Applicant alleged that 1st-3rd respondents had illicitly deprived it of possession of a certain mining claim in Mtawatawa.

1st – 3rd respondents disputed this.

In addition, two preliminary points were taken.

THE URGENCY OF THE APPLICATION

Initially, 1st-3rd respondents argued that the matter was not urgent.

However, after I drew counsel's attention to paragraphs 18 and 19 of the founding affidavit, a concession was made that the matter was urgent.

Those paragraphs read:

> 18. We then set up to take effective occupation on 3rd November 2019 and possession of the block, but the next day the 1st-3rd respondents returned using the expedience of hoodlums and artisanal miners, thus despoiling us of possession. The 1st-3rd respondents have since resumed mining and there are other illegal miners who have joined in and a laissez faire situation now exists. A lot of blasting and detonation of explosives and dynamites on the site has been happening. Trenches have been dug and copious amounts of soil have been excavated in haphazard mining operations taking place as we speak.
>
> 19. Efforts to get the protection of the police have yielded nothing as we have been referred to this Honourable Court to seek an injuction against the respondents."

The concession, with which I agreed, meant that, absent any other legal impediment, I could hear the matter as an urgent chamber application.

INVALIDITY OF THE CERTIFICATE OF URGENCY AND HENCE THE FATALLY DEFECTIVE NATURE OF THE APPLICATION ITSELF

This argument was predicated on the fact that the certificate of urgency was signed a day before the founding affidavit was deposed to.

Ordinarily, and strictly speaking, this would have rendered the certificate of urgency invalid because it should be a child of the founding affidavit.

A child cannot pre-exist its parent.

Taken to its logical conclusion, this submission would entail a finding that this was an urgent chamber application filed without being accompanied by a certificate of urgency.

Since the applicant was legally represented this state of affairs would be contrary to order 32 Rule 242 (2) (b) of the High Court Rules, 1971.

That provision reads, in relevant part:

> "....unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons, his belief that the matter is .....urgent.....

In *Feature Phiri and 2 Others v Lovemilk Gwati and 2 Others* HH 298/19 I stated why I hold the view that a certificate of urgency is redundant.

I still subscribe to that view.

I share the view that a certificate of urgency is, properly construed, a case management tool. A reading of r 244 makes this clear. On receipt of a chamber application accompanied by

a certificate of urgency, stating reasons for the urgency, the registrar should forthwith place the papers before a judge for consideration.

Even where the formal requirements of an urgent chamber application have been satisfied the judge is still not bound to treat, and find, that the application is indeed urgent.

The important document is the founding affidavit. That is where the urgency should be demonstrated.

In truth, the requirement of a certificate of urgency has been blown out of proportion. It has been given a life more important than that of the founding affidavit. Yet it is an opinion of the same legal practitioner who drafts both documents: the founding affidavit and the certificate of urgency itself.

One must be realistic about these things. After all, the certificate of urgency is not a requirement for self-actors. And no one is bothered about it.

I agreed with Mr Mushangwe. The state of the applicant's papers did not prejudice anybody. The parties had gone as far as filing 4 sets of affidavits. Courts exist to resolve disputes. They do not exist to hide behind formalities to undermine the reason for their being. I had regard to the values underpinning s 69 (3) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

It was clear to me that, given the manner that the matter had been fought in the papers, and in oral submissions, the same application would have found its way before another judge of this court, had I upheld the preliminary submission. The applicant would only have taken care to ensure that the certificate of urgency did not, again, pre-date the founding affidavit.

Needless to say, I condoned this minor infraction of the rules of procedure. I could not promote form over substance. As to substance, 1st – 3rd respondents' counsel conceded that the matter was urgent. I think it was academic to cling onto the second preliminary point while admitting that the matter was urgent. This case demonstrates when not to take, or hang onto, a preliminary point. *In Telecel Zimbabwe (Pvt) Ltd* v *Postal and Telecommunications Regulatory Authority of Zimbabwe and Ors 2015 (1) ZLR 651 (H) at 659B* MATHONSI J *(as* he then was) said:

> "… Invariably when one opens a notice of opposition these days, he is confronted by a point *in limine* … which should not be made at all. We are spending a lot of time determining points *in limine* which do not have the remotest chance of success at the expense of the substance of a dispute."

I fully subscribe to these views. They are pertinent to the present matter.

THE MERITS

A perusal of the founding affidavit in light of the letters from the Ministry of Mines and Mining Development satisfied me of the following facts. That there was a dispute between the parties relating to the mining claim. A hearing was conducted. The relevant Ministry official found that the parties had mining claims close to each other. Instead of operating their own claim, the first – third respondents were conducting operations on applicant's registered claim. The Ministry had directed the parties to cease mining operations pending resolution of the dispute. On resolving the dispute, applicant had taken possession of its claim. The following day, in disregard of the determination, the first – third respondents had dispossessed applicant. Such dispossession was unlawful because it was neither with applicant's consent nor founded on any court order.

Against this backdrop I had no reason to withhold the relief sought by the applicant.

But I make some few comments. The applicant's attempt to make an additional case, in the same application, on the basis of an interdict was, strictly speaking, unnecessary.

An interdict requires that one goes into the merits of the case. An application for a spoliation order does not require such an exercise. All it is concerned with is peaceful and undisturbed possession, unlawful dispossession and entitlement to be restored to such possession.

There are mechanisms to enforce a spoliation order. The jacket of an interdict is, strictly speaking, an undesired piece of clothing.

Neither is it desirable to pray in aid language echoing a binding over order to keep the peace.

The core of the application cried out for spoliatory relief. I granted it after listening to oral argument on 26 November 2019.

The file again landed on my desk on 14 January 2020. Having given oral reasons for my decision the present constitute the written reasons requested for.

Mushangwe and Company, applicant's legal practitioners
Antonio and Dzvetero, 1st -3rd respondents' legal practitioners
The Legal Division, Ministry of Mines and Mining Development, 4th respondent's legal practitioners