ESTATE LATE GEORGE MAKURIRA
(Represented by ANGELA CHANDAENGERWA)

And

BEN MAKURIRA

Versus

JIN YANG AFRICA

And

PROVINCIAL MINING DIRECTOR, MIDLANDS

And

MINISTER OF MINES AND MINING DEVELOPMENT

And

THE CO-ORDINATOR CID, MINERALS

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO25 MARCH 2022 & 27 APRIL 2023

Urgent Chamber Application

B. Masawi for the applicant
C. Makwara for 1st respondent

TAKUVA J: This is an urgent chamber application for stay of execution in respect of paragraph 4 of a court order under HC 663/20. This order cancelled a certificate of registration of Olympia 7 Mine. The stay is sought pending the determination of an application for upliftment of a bar currently operating against the 1st and 2nd applicants for failure to file opposing papers on an application for confirmation of a provisional order under HC 663/20 as required by the rules of this court.

Factual matrix

Sometime in March 2022 the 1st respondent herein approached this court through an urgent application (HC 663/20) seeking to interdict 1st and 2nd applicants herein from

conducting any mining operations at Bonsor South Mine and Bonsor South West Mine. As terms of the final order, the 1st respondent also sought an order for the 1st and 2nd applicants to cease mining operations at Bonsor South Mine and a permanent interdict thereof.

Although 1st and 2nd applicants consented to the granting of the interim order they filed opposing papers wherein they clearly disputed that they were interfering with any mining operations at Bonsor South and Bonsor West mine neither were they mining at the said mining claims. Their position was that they were mining separately at Olympia 7. Hence in and out of goodwill the applicants consented to the order claimed by the 1st respondent since they perceived it to be of no bearing upon them.

Sometime in August 2020 the 1st respondent approached this court seeking an order for confirmation of the provisional order which the applicants had consented to its granting. The applicants herein did not file opposing papers since they further perceived that there was no prejudice to them since the relief sought was similar to the one they had consented to. As a result, they were automatically barred for failure to file opposing papers.

The applicants were shocked upon perusal of the court order confirming the provisional order which they discovered that the court had ordered the cancellation of their certificate of their mining claim (Olympia 7). The shock arose from the fact that Olympia 7 is distinct from 1st respondent's mines and that cancellation of their certificate was never prayed for by the 1st respondent. Earlier, in 2015, the 1st respondent once unsuccessfully applied to have applicants' certificate cancelled. The application was dismissed on the grounds that Olympia 7 did not encroach into any of the 1st respondent's mines.

Applicants' case

1. The applicants are convinced that considering the historical background of the matter, the 1st respondent is likely to seek execution of the default order dispite that the applicants have already filed an application for upliftment of bar and served it on the respondents.
2. If 1st, 2nd and 3rd respondents proceed to execute the judgment thereof, in particular paragraph 4 thereof, the applicants will suffer irreparable harm since the mine in question is their only source of livelihood.

3. The 1st, 2nd and 3rd respondents do not suffer any prejudice should execution of paragraph 4 of the order thereof is stayed until the application for upliftment of bar is heard and finalized.
4. Applicants' prayer is that execution be stayed pending the outcome of the application for upliftment of bar which is pending in this court.

1st respondent's case

The 1st respondent opposed the application on the following grounds:

In limine

1. (a) The matter is not urgent in that the judgment applicants seek to impugn was served on them on 3 February 2022 but they did not seek to stay the execution. Instead, they sought to appeal and later withdrew the appeal.

(b) Nothing has been placed on record to show that any of the respondents have acted in a manner which shows that they intend to execute the judgment in the manner alleged.

(c) Failure to mention the date when the need to act arose in both the certificate of urgency and the founding affidavit is fatal to the application.

(d) A clear reading of paragraph 4 of the impugned order clearly shows that there is nothing for the respondents to execute in terms of that paragraph, which requires this court to urgently stay execution. The respondents simply need to acknowledge the order in paragraph 4 and not to execute it.

(e) There is therefore nothing which is sought to be executed. In actual fact, the 1st respondent needs to execute paragraphs 1, 2, 3 and 5 of the impugned judgment which do not form the basis of this application. The application is clearly ill-conceived and is clearly not urgent. It ought to be struck off the roll of urgent matters with costs on a higher scale.

2. Applicants are approaching the court with dirty hands in one or more of the following:

(a) Applicants have not paid costs which were granted against them in case number HC 663/20. Also applicants have not paid the wasted costs for the appeal under SC-13-22.

(b) There is material non-disclosure of what really transpired in this case by the applicants. The applicants are fully, aware of the factual background that led to the granting of the order as all parties were given an opportunity to file further submissions if they so wish. Applicants elected to abide by the report of the 2nd respondent. The court then made the judgment.
"There is therefore no bar to talk of."

3. The order being sought by the applicants is incompetent in one or two of the following:

(a) The applicants are seeking to obtain a final order in an interim relief.

(b) The applicants are seeking this court to review its own decision. The court cannot stay execution only on paragraph 4 without having reviewed the findings of the court which made it grant that part of the order.

On the merits

It was contended that the judgment granted was not a default judgment but one granted after having considered all parties positions on the merits of the matter. The issue of a bar is therefore resolved by the court order under HC 1777/21. Further, the applicants have not met the legal requirements of the application for stay of execution in that there are no special requirements that have been highlighted to convince the court to exercise its discretion and halt the execution of its process.

The 1st respondent submitted that the applicants where supposed to show that they have a right which is under threat, they have no alternative remedy and that the balance of convenience favours the granting of the order. *In casu*, the applicants have no certificate to the mining claim in that the claim was pegged on ground not open for prospecting.

By applying for upliftment of the bar, applicants are clutching at straws since the decision of the court was based on a detailed report by the 2nd respondent. The conclusions of facts and law by the court logically flow from the report. The records under HC 663/20 and HC 1777/21 are clear as to what was prayed for by the 1st respondent. The court was not obliged to follow the draft order but had a discretion to grant what is just and equitable in the circumstances. This is exactly what the court did in this matter. If applicants were unhappy with the court's decision they should have appealed to the Supreme Court.

I now deal with the issues brought out by the pleadings in this case.

Urgency

In *Documents Support Centre* v *Mapavire* 2006 (2) ZLR 240, MAKARAU JP (as she then was) had this to say in relation to urgent chamber applications;

> "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 be there to act subsequently as the position would have become irreversible and irrevocably so to the prejudice of the applicant."

In *Kuvarega* vs *Registrar General & Anor* 1998 (1) ZLR 188 (H) CHATIKOBO J stated that;

> "What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is urgent if the time the need to act arise, the matter cannot wait."

In casu, the timelines are as follows;

1. Applicants were served with the court order they are now challenging on the 3rd of February 2022.
2. On 6th February, they filed a notice of appeal to the Supreme Court seeking to discharge paragraph 4.
3. On 28th February 2022, the applicants withdrew the appeal after realizing that the order they had appealed against was a default judgment and also that there was a bar operating against them.
4. On 8th March 2022 applicants filed an application for upliftment of bar.
5. On 10th March 2022, applicants filed this urgent chamber application for stay of execution.

In my view, the above narration shows that the applicants did not just sit on their laurels after receiving the order on 3 February 2022. They immediately filed a notice of appeal. It is trite that the notice had the effect of suspending the operation of the order. In that view, the urgency of the matter arose the moment they withdrew the appeal. I take the view that applicants acted timeously and also treated the matter with urgency. I find therefore that this

matter is urgent. As regards the argument that paragraph 4 is not executable, I differ with that view because 1st respondent is free to approach the Minister of Mines in terms of section 50 to give effect to paragraph 4 and cancel applicants' certificate.

Dirty hands principle

This principle was ably laid out in *Nhapata* v *Masawi & Anor* SC-38-15 as follows;

> "The dirty hands principle is a principle that people are not allowed to come to court seeking the court's assistance if they are guilty of lack of probity or honesty in respect of the circumstances which cause then to seek the relief from the court."

Applicants cannot be accused of failing to pay costs that have not been taxed and ascertained. Also the wasted costs for the Supreme Court appeal were challenged by the applicants and 1st respondent took the matter no further. The 1st respondent has not laid out why he believes he has complied with the law as regards the claim for costs including taxation of such costs. Accordingly, I find that the applicants are not approaching this court with dirty hands.

Material non-disclosure

The 1st respondent alleges that applicants are guilty of material non-disclosure of the background facts of this dispute. I disagree. These facts were fully disclosed in paragraph 8 – 9 of the founding affidavit in some considerable and sufficient detail. The case took several twists and turns and I do not consider a failure to cover all the stages in detail to be a material non-disclosure warranting censure by the court. This point *in limine* has no merit at all.

Whether there is a bar operating against the applicants under HC 663/20

The provisional order was granted by consent of both parties after applicants had as self-actors filed opposing papers indicating that their claim was separate and distinct from that of the 1st respondent. They therefore saw no reason to "oppose" the order sought. At confirmation stage the record shows that neither a notice of opposition nor heads of argument were filed in opposition of the application for confirmation of the interim order thereby resulting in the bar automatically operating against them. It follows that the judgment of this court per MAKONESE J is a default judgment. On page 2 of the cyclostyled judgment, the court said;

> "1st and 2nd respondents did not file opposing papers. Respondents where therefore duly barred by operation of law …" This is the same judgment 1st respondent *in casu* relies on to argue that "there is no bar to talk about."

It should be noted that the applicants had no intention to challenge the confirmation of the provisional order as they believed that there was no prejudice since the relief was similar. However, the complexion of the case changed drastically when 1st respondent filed an "Amended draft order". On page 8 of the cyclostyled judgment, the court commented thus;

> **"Disposition**
>
> The applicant has satisfied all the requirements for the granting of a final interdict. An amended draft order has been filed by the applicant. Applicant seeks cancellation of the registration certificate for Olympia 7 Mine …" "the emphasis is mine)
>
> There is no dispute that it is this "amended draft order" that introduced for the 1st time the issue of the cancellation of the applicants' registration certificate. It was not pleaded in the interim and final relief sought, hence applicants' assumption that they were not going to be prejudiced by the final relief.
>
> Thus the argument by the 1st respondent in which they allege that the judgment is not a default judgment and that there is no bar operating against applicants is flawed in my view.

The Propriety of applicants' appeal

The law is settled that one cannot appeal against an order granted in default. Instead, the proper and only available remedy to the aggrieved party is to seek rescission of the judgment thereof. See *Sibanda & Ors* v *Nkayi Rural District Council* 1999 (1) ZLR 32 SC. Therefore once a conclusion is reached that this was a default judgment based on an automatic bar, the proper procedure is to apply for the upliftment of the bar and rescission thereafter. I find that the applicants adopted the correct procedure.

Whether real and substantial justice so demands stay of execution

It is trite that execution is a process of the court. This means that this court has discretion to set aside or stay or suspend execution of any judgment in the exercise of any inherent power to control its own process – See *Mupini* v *Makoni* 1993 (1) ZLR 80 (5) at 83B-C where the approach was stated thus:

> "Execution is a process of the court and the court has an inherent power to control its own process and procedure subject to such rules as are in force. In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution or, for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The onus rests on the party seeking a stay to satisfy the court that special circumstances exists. The general rule is that a party who has obtained an order against another is entitled to execute upon it. See also *Cohen* v *Cohen* (1) ZLR 1979 at 184, *Chibanda* v *King* 1983 (1) ZLR 116 (H) at 119C-H; *Sime* v *Stime* 1983 (4) SA 850 (C) at 852A." (my emphasis)

In casu, the question becomes whether or not the applicants have managed to satisfy the court that there are special circumstances that warrant this court to suspend execution of paragraph 4 of the order they are intending to challenge?

In my view they have, and the following factors prove it;

1. It is a settled position in our law that a court of law cannot grant an order which was not prayed for by the litigants. By doing so, the court will be descending itself into the arena and assume the position of the parties to the dispute thereby misdirecting itself in the process; See *Divyland Investments* v *David Chiweza* SC-250-19 where the Supreme Court stated;

> "it was held that, it is an accepted principle of our law that it is not open to a court to rewrite an order not prayed for by the parties … a court must determine, a matter based on papers and evidence placed before it by the parties. It cannot go on a frolic of its own – *Nzara & Ors* v *Rashamba N.O. & Ors* SC-18-18.

This principle simply means that the function of the court is to determine the dispute as placed before it by the parties through their pleadings, evidence and submissions. Pleadings include the prayers of the parties through which they seek specified orders from the court. Each party places before the court a prayer he or she wants the court to grant in its favour.

Herbestein in his book *Principles of Civil Procedure* observed that the requirements seek to ensure that the court is merely determining issues placed before it by the parties and not going on a frolic of its own. See also *Proton Bakery* v *Takaendesa* 2005 (1) ZLR 60 SC. *In casu* the court granted an order for cancellation of Olympia 7 Mine which was never sought by the 1st respondent. It is clear from the relief that 1st respondent sought a prayer for a permanent interdict not cancellation of a certificate of registration of the applicants' mine.

2. In their notice of opposition the 1st respondent alleges that their draft order was merely a draft and in that regard t gave the court power to extend its discretion and proceed to cancel the certificate of registration of the applicants' mine. Such an argument does not in my view take 1st respondent's argument any further. At confirmation stage, a court confirms or discharges the provisional order in terms of the final order sought, nothing else. If at all an amendment to the final relief sought is permitted at the eleventh hour, the respondent must at the very least be afforded an opportunity to be heard in accordance with the *audi alterem* principle.

   This was particularly so because the order for cancellation of the applicants' certificate of registration affects their real and substantial rights. Also this mine is applicants' sole source of their livelihood since 2005.

3. In any event, the report by the 2nd respondent never recommended the cancellation of the applicants' registration certificate. There is great prejudice to the applicants' if paragraph 4 is executed in that the 2nd and 3rd respondents are supposed to gazette the order for cancellation of the registration certificate in terms of section 50 of the Act. Hence, if that process is initiated and effected, any challenge by the applicants will be rendered academic.
4. Moreso and most astonishingly, if the position of the 1st respondent is correct that they need not to execute paragraph 4 of the order, the million dollar question becomes why are they opposing this application? The 1st respondent in paragraph 4.3 of the notice of opposition indicated that they only need to execute paragraph 1, 2, 3 and 5 of the judgment. This impliedly is a concession that it never prayed for the cancellation of the applicants' certificate of registration. It can also be inferred that 1st respondent will suffer no prejudice if the execution of paragraph 4 of the order is stayed.
5. Further, in its careful study of the history of this dispute the court seems to have misled one narrative namely that the 1st respondent once made an application to the Minister of Mines in 2015 for the cancellation of Olympia 7 Mine in terms of s50 of the Act. The application was dismissed and that determination by the Minister is still extant. The reason for the dismissal was that Olympia 7 did not encroach into any of 1st respondent's claims.

Finally, I find that his is one of those cases where real and substantial justice demands that the 1st, 2nd and 3rd respondents be stopped from executing paragraph 4 of the order to enable applicants to challenge it. The applicants have managed to show that there are special circumstances that warrant this court to suspend execution of paragraph 4 of the order which they intended to challenge.

In the result, the interim relief is granted in the following terms:

Pending the confirmation or discharge of the order applicants are granted the following relief;

(a) That pending the outcome of the application for upliftmnt of bar filed with this court under case number HC 410/22; X Ref HC 663/20, execution of judgment in particular paragraph 4 thereof be and is hereby stayed.
(b) The 1st, 2nd and 3rd respondents be and are hereby ordered to stay execution in particular paragraph 4 of the order thereof until this matter is finalized.
(c) This order suspends any further execution until the matter is finalized.

Masawi & Partners for the applicants
Mutatu & Mandipa Legal Practice for the 1st respondent