

RUAN MEATS ENTERPRISES (PVT) LIMITED
versus
ADDITIONAL SHERIF GWERU N.O
and
CHAD CECIL MUPANDANYAMA
and
SWIFTEAGLE INVESTMENTS BUSINESS CONSULTANCY

HIGH COURT OF ZIMBABWE
MUNANGATI- MANONGWA J
HARARE, 4 July 2023

Urgent Chamber Application

Mr *M Chipetiwa*, for the applicant
R Mabwe, for the respondent

MUNANGATI MANONGWA J: The applicant was served with a writ of execution which was issued on the 14 June 2023. The writ seeks to evict the applicant from Jilikin 25 Mine Registration 12641 BM. On 23 June 2023 the applicant approached this court on an urgent basis seeking the following interim order.

Pending the determination of this matter, the applicant is granted the following relief:

1. TERMS OF THE FINAL ORDER SOUGHT

IT IS ORDERED THAT:

- a. The 1st respondent be and is hereby ordered to desist from carrying into execution the warrant of execution in favour of 2nd and 3rd respondents under HC 6457 in an area falling in Caradac Farm Gweru with the following coordinates (A) 36K0194080 UTM 7853780 (B) 36K0194360 UTM 7853920 (C) 36K0194583 UTM 7853620 (D) 36K0194380 UTM 7853460.
- b. The 1st respondent be and is hereby ordered to desist from dismantling the stone crushing plant situate in Caradac Farm Gweru the following coordinates (A) 36K0194080 UTM 7853780 (B) 36K0194360 UTM 7853920 (C) 36K0194583 UTM 7853620 (D) 36K0194380 UTM 7853460.
- c. The 1st respondent be and is hereby ordered to desist from evicting the applicant from its residence situate in Caradac Farm Gweru with the following coordinates (A) 36K 0194080 UTM 7853780 (B) 36K019436 UTM 7853920 (D) 36K0194583 UTM 7853620 (D) 36K0194380 UTM 7853460

d. 2nd and 3rd respondents be and are hereby ordered a legal practitioner and scale.

2. TERMS OF INTERIM RELIEF

Pending the determination of this matter, the applicant is granted the following relief:

a) Pending the outcome of the physical survey report by the Mining Commissioner Gweru in respect of Jilikin 25 registration 12641BM and portion of Caradac Farm to determine any encroachment into Jilikin 25 1st respondent be and is hereby ordered to stay the warrant of execution under HC 6457/2020.

The second and third respondents objected to the application on 3 grounds:

- i) That the matter is not urgent
- ii) That the matter is *res judicata*
- iii) That there is material non-joinder.

I find that the applicant acted timeously upon receiving the writ of execution and approached court without delay. The argument by second and third respondent that the applicants were aware since 2020 that eviction would be sought is misplaced, so was the reference to an order by ZHOU J of 28 December 2020. The fact is, the applicants have reacted to a recent development. It is for this reason that I will deal with the matter on an urgent basis.

The respondents have raised the issue of *res judicata*. Reference has been made to the judgments involving the same parties and the subject matter of the dispute being Jilikin 25. In the judgment of MANZUNZU J HH 238/23 dated 5 April 2023 the eviction of the applicants from Jilikin 25 was ordered. Suffice that on p 14 of that judgment the Hon Judge stated that:

“In case number HC 2651/21 during contempt of court proceedings Ruan (Applic herein) raised similar allegations that it was mining in a different location from Jilikin 25. The claim was dismissed in that case and it remains extant.”

The applicants appealed against MANZUNZU J’s judgment in SC 253/23 wherein one of the grounds challenges its eviction from Jilikin 25 on the basis that the decision is wrong as applicant is not mining within Jilikin 25. Suffice that on 24 May 2023 ZHOU J granted the second respondent leave to execute upon the judgment pending the determination of the appeal filed in case No SC 253/23. Once again ZHOU J made a factual finding that the respondents would not be prejudiced by the granting of the order for leave to execute as they claim they are not mining on Jilikin 25 (see p 8 of the judgment). The Judge specifically stated that “the respondent feared that in enforcing the order the Sheriff might go outside Jilikin 25 and evict them from a Chinese residential area outside the mine. That is a misplaced ground of

opposition. When the Sheriff enforces an order of ejectment he has a proper description of the place. If he goes beyond the area to which the order relates the respondents have a remedy at law to stop him from encroaching on property that is not covered by the order.”

It has come to my attention that despite this court making a pronouncement on the issue that the applicants are mining on Jilikin 25 the applicants have sought through the back door to revisit the matter.

Of note is the attempt to seek to stop execution on the basis that coordinates of Jilikin 25 are not clear and hence the Mining Commissioner has to be brought in for a physical survey to determine any encroachment into Jilikin 25. Apart from the court having ordered that exercise to be done on 6 June 2022, and the applicant having refused to co-operate, this court has on three occasions, through MANZUNZU, CHITAPI and ZHOU JJJ found that the applicant is unlawfully in Jilikin 25. This is even borne by the applicant’s appeal ground 7 in S 253/23 where the finding is challenged

This court having taken a position on the issue, the applicant seeks that I review the judgment of fellow judges which I cannot do.

Equally leave to execute pending appeal having been granted, no procedure provides for the stay of that judgment. Only the outcome of the appeal will determine the final result pertaining to the applicant’s eviction. I thus uphold the point raised on *res judicata*.

I also hasten to state that this court cannot stop eviction on the basis that the applicant fears that the Sheriff will go beyond the area where execution will be carried out. No evidence to that effect has been led, if anything, the applicant in his founding affidavit refers to hearsay evidence pertaining to an alleged conversation between his legal practitioner and the sheriff. There is no evidence that the Sheriff will go beyond the area stated in the writ, in any case the applicant has simply been saved with a writ which clearly states that eviction is from Jilikin Mine Registration 12 641 BM.

Apart from the interim relief not speaking to the interference with a Chinese residence, no information has been placed before the court as to how the Chinese residence is part of the case. It is not clear who owns the residence and how it can be perceived to be within the area of Jilikin 25 where eviction will take place. In any event this issue was dealt with by ZHOU J in his judgement. Thus the issue of the Chinese residence apart from the absence of any information relating to it ZHOU J dealt with the issue at p9 of his judgment.

The application is defunct of any factual or legal basis and is at most abuse of court processes. Apparently Mr Chipetiwa appeared before MUNZUNZU J on 5 April 2023, ZHOU J on

24 May 2023 and CHITAPI J on 2 February 2021. He is well versed with the matter and should know better the path travelled by the litigants. To bring this case and profess to having liased with the Sheriff *viz* the Chinese residence and incorporate hearsay evidence in the applicant's affidavit can only be mischievous. More so when ZHOU J had considered that issue and found it without basis.

Legal practitioners should not be willing instruments to be used by litigants in mounting baseless applications at the expense of respondents. The second and third respondents have had to defend this matter yet on three occasions the respondents have been successful. Legal practitioners are officers of the court and their allegiance should not thoughtlessly lie with their clients under the guise of following instructions. A legal practitioner's duty is to advise what is legally tenable and not blindly follow instructions. A legal practitioner studied the law and should therefore guide a client accordingly.

Should a legal practitioner be found to be constantly blindly pursuing instructions which are legally untenable costs should be visited upon him /her *de bonis propriis*. This should serve as a warning to the like minded. The legal profession is a well-respected profession and never should proceedings be turned into a circus. This is because litigation costs are involved and litigation has to be justified lest the other party gets unnecessarily dragged to court. In that regard, Mr Chipetiwa is strongly warned to desist from the aforementioned conduct.

In the result, the application has no merit. The application is dismissed with the applicant paying second and third respondent's costs on a legal practitioner – client scale.

Maringe, applicant's legal practitioner
Tarugarira Sande, respondent's legal practitioner