

HURUYADZO MINING (PRIVATE) LIMITED

Versus

THEUNS JOHN COETZEE

And

PROVINCIAL MINING DIRECTOR MASHONALAND WEST PROVINCE

And

THE OFFICER IN CHARGE MFFU KADOMA

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J

BULAWAYO 2 JULY 2021 & 15 JULY 2021

Urgent application

Balamane, for the applicant

Matiyashé, for the respondent

DUBE-BANDA J: Before me is an urgent chamber application. This application was launched in this court on 17th June 2021. It was placed before me and I directed that it be served on the respondents together with a notice of set down for 2nd July 2021. The application is opposed by the 1st respondent. The 2nd and 3rd respondents are cited in their official capacities because the implementation of the order sought by the applicant, if granted may require their services. The applicant seeks the following relief:

Terms of the final order

It is hereby ordered that you show cause to this honourable court why the provisional order granted by this honourable court should not be confirmed in the following terms:

1. That 1st respondent's continued mining operations at Lili 13B mine Kadoma after receipt of a notice of cancellation of agreement of sale of the mine from the applicant be declared unlawful.
2. That 1st respondent's continued use of applicant's gold processing plant at Lili 13B Kadoma after receipt of a notice of cancellation of agreement of sale of the mine from the applicant be declared unlawful.

3. That all rights that accrued to respondent *via* an agreement entered between with applicant (*sic*) on 4 March 2021 over the sale of rights and title to Lily 13B mine extinguished once applicant served 1st respondent with a notice of cancellation of the said agreement on 10 June 2021.
4. That 1st respondent be and hereby ordered to bear costs of this application on an attorney and client scale.

Interim relief granted

That pending the confirmation of the provisional order the applicants are granted the following interim relief: that pending determination of this application applicant is granted the following relief:

1. That 1st respondent and all those acting through them be and are hereby ordered to cease any mining operations including any processing of gold bullion at Lily 13B kadoma.
2. That 1st respondent and all those acting through them be and are hereby interdicted from using or interfering with any machinery belonging to the applicant at Lily 13B mine kadoma.
3. Should 1st respondent and all those acting through them fail to comply with paragraph (1) and (2) above, the 3rd respondent be and is hereby ordered to enforce compliance by the 1st respondent and all those acting through them by arresting the 1st respondent and all those acting through him for contempt of court.

Service of the provisional order

This order shall be served by the Deputy Sheriff, or any person in the employ in the firm of applicant's legal practitioners.

Background

This application will be better understood against the background that follows. Applicant is the registered owner of Lily 13B Mine (mine) registration number 17509. On the 4th March 2021, applicant and 1st respondent entered into an agreement of sale in respect of the mine. The purchase price was agreed to be USD 60 000.00, payable in six instalments. There is a dispute whether 1st respondent has failed to make payments in terms of the agreement. Applicant contends that there has been a breach, and as a result thereof it has cancelled the

agreement. This is disputed by the 1st respondent. Applicant launched this application seeking an interim order to stop 1st respondent from working at the mine pending the finalisation of eviction and / or arbitration proceedings. It is against this background that applicant has launched this application seeking the relief mentioned above.

Other than resisting the relief sought on the merits, 1st respondent took a preliminary point which was also a subject of argument in this matter. 1st respondent contends that this application is not urgent and urged this court to dismiss it on the preliminary points without a consideration of the merits.

Preliminary point

At the commencement of this hearing I informed counsel that in this case I shall adopt a holistic approach. This approach avoids a piece-meal treatment of the matter, and the preliminary points are argued together with the merits, but when the court retires to consider the matter it may dispose of the matter solely on preliminary points despite that they were argued together with the merits. I now consider the preliminary point.

The 1st respondent contend that this application is not urgent. It was argued that this court must dismiss this application with costs on a higher scale. In considering whether a matter is urgent this court looks at the certificate of urgency to establish whether the application is indeed urgent. In *Chidawu & Others v Sha & Others* SC 12/13 the Supreme Court held that the certificate of urgency is the *sine qua non* for the placement of an urgent chamber application before a judge. In making a decision as to the urgency of the application a judge is guided by the averments in the certificate of urgency.

The entitlement of litigants to approach a court on an urgent basis is trite. This court enjoys a discretion in urgent applications to authorise a departure from the ordinary procedures that are prescribed by its rules. It is usually hesitant to dispense with its ordinary procedures, and when it does, the matter must be so urgent that ordinary procedures would not suffice. See: *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188; *Triple C Pigs and Another v Commissioner-General* 2007ZLR (1) 27. *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27. In the ordinary run of things, court cases must be heard strictly on a first come first serve basis. It is only in exceptional

circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis. The *onus* of showing that the matter is indeed urgent rests with the applicant. An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue and have its matter given preference over other pending matters. This indulgence can only be granted by a judge after considering all the relevant factors and concluding that the matter is urgent and cannot wait. See: *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188; *Triple C Pigs and Another v Commissioner-General* 2007 ZLR (1) 27.

The leading case within this jurisdiction in relation to urgency is *Kuvarega v Registrar General & Anor* (*supra*), a judgment by CHATIKOBO J. The learned judge had the following to state at p 193F-G.

What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated rules. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.

In assessing whether an application is urgent, the courts have in the past considered various factors, including, among others: the consequence of the relief not being granted whether the relief would become irrelevant if it is not immediately granted; and whether the urgency was self-created. See: *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27. Further to pass the urgency test, applicant must show that there is an imminent danger to existing rights and the possibility of irreparable harm. See: *General Transport & Engineering (Pvt) Ltd & Ors v Zimbank* 1998 (2) ZLR 301; *Document support Centre (Pvt) Ltd v Mapuvire* 2006 (1) ZLR 240 (H); *Dextiprint Investments (Pvt) Ltd v Ace Property Investment company* HH 120/2002; *Madzivanzira & Ors v Dextrint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H).

In the certificate of urgency, signed by a legal practitioner of this court it is contended that:

1. On the 4th March 2021, the applicant and the 1st respondent entered into an agreement of sale of rights and title to Lily Mine registration 17509 on terms. I have had sight of the agreement of sale.
2. On 10 June 2021, the applicant notified 1st respondent of its intention to cancel its agreement with the 1st respondent on the basis of breach. The notice of cancellation incorporated a notice to cease operations and vacate the mine within 48 hours. I have also had sight of the cancellation.
3. The 1st respondent wrote back to the applicant refusing the cancellation of the agreement and the request to cease operations and vacate the mine. I have had sight of the letter of defiance.
4. 1st respondent is now illegally mining and / or conducting cyanidation operations in the applicants Lily 13B mine because the agreement that authorised him to do so stands cancelled.
5. The urgency of the matter stem from the fact that since the 1st respondent received the notice of cancellation, he has escalated the extraction of gold ore to levels never experienced at the time. (sic)
6. He has brought in six more excavators that are plundering the resource to ensure that when he eventually vacates the area there would be nothing left for the applicant. (My emphasis).
7. Applicant sought help to have to have 1st respondent stopped from continuing to operate in applicant's mines but the 2nd and 3rd respondents have both failed to stop the 1st respondent from illegally operating applicant's mine.
8. The applicant has separately approached this court seeking the eviction of the 1st respondent from Lily mine which process naturally takes time.
9. The only remedy available to the applicant is an order of this court obtained on an urgent basis interdicting the 1st respondent from continuing to conduct mining operations, extraction of gold ore and cyanidation of gold at Lily 13B mine Kadoma until eviction and / or arbitration proceedings are finalised.
10. The gold natural resource in Lily mine is depletable. If the 1st respondent is left to continue plundering the resource they might be nothing to be explored by the applicant when arbitration and / or eviction proceedings are finalised. This is the harm that applicant has approached this court to seize or arrest.

11. The only remedy available to the applicant is an order of this court obtained on an urgent basis interdicting the 1st respondent's mining operations extraction of gold ore and mining of gold at Lily 13B mine Kadoma stopped forthwith.
12. The gold natural resource in Lily mine is depletable. If the 1st respondent is left to continue plundering the resource they might be nothing to be explored by the applicant when arbitration and / or eviction proceedings are finalised. This is the harm that applicant has approached this court to arrest.
13. An application for an interdict is by its very nature urgent and warrants to be instituted on an urgent basis.
14. I am satisfied that the applicant has established and satisfied all the requirements of a permanent interdict and is entitled to the relief sought. Proceedings by any other means would render the relief sought a *brutum fulmen*. This matter be treated with the due urgency it deserves.

In its certificate of urgency the applicant sets out a variety of bases for the contention that the application is one of urgency. There is a massive conflict of fact between the applicant's account of relevant events and that of the 1st respondent. In fact the factual correctness of a number of applicant's contentions are disputed by the 1st respondent. In his oral submission Mr *Balamane*, counsel for the applicant contended that after receiving the letter of cancellation, 1st respondent refused to accept the cancellation and to vacate the mine. It is argued that the trigger point is the fact that after cancellation 1st respondent then brought to the mine six excavators and stepped up the mining operations, thus depleting the gold reserves, such that when the eviction or arbitration proceedings are finalised there would be no gold to mine. It is argued that should the state of affairs continue, even if applicant is victorious upon the conclusions of the eviction or arbitration proceedings, such would amount to empty victory as there would be no gold to mine.

For the 1st respondent it is argued that this application is not urgent. It is contended that the need to act arose on the 7 April 2021, when applicant allegedly cancelled the agreement. Mr *Matiyashe*, counsel for the 1st respondent argued that the facts upon which the claim of urgency is anchored are false. It is said no excavators have been brought to the mine. The mining site is used for processing gold dumps or gold sands brought from 1st respondent's other mines. There is no extraction of gold at the mine. 1st respondent has neither before the dispute

nor after its commencement extracted gold ore from the mine. It is contended that 1st respondent has not escalated operations at the mine. 1st respondent is doing normal operations and nothing has changed.

To meet the sting of the opposition, Mr *Balamane* had no meaningful submissions to make. All he could submit is that:

We could not get more evidence in support of the allegations anchoring urgency. We concede that we ought to have submitted evidence from other sources to substantiate the allegations. We were not favoured with such evidence.

Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. See: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C; *Ripoll-Dausa v Middleton NO* 2005 (3) SA 141 (C) at 151A- 153C. The first enquiry is to ascertain whether or not there is a real dispute of fact. As was observed by MAKARAU JP (as she then was) in *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) at 136F-G:

A material dispute of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.

The applicant carry the burden to prove what it alleges. At this stage applicant must establish a *prima facie* case. See: (1) *Swimming Pool & Underwater Repair (Private) Limited* (2) *Aepromm Resources (Private) Limited* (3) *Tolrose Investments (Private) Limited* (4) *Patterson Fungai Timba v (1) Jameson Rushwaya (2) Annie Rushwaya* SC 32/12. On the factual matrix of this case, I cannot find that 1st respondent has taken six or any excavators to the mine. I cannot find that 1st respondent is extracting gold ore from the mine. I cannot find that 1st respondent has escalated mining activities at the mine. I cannot find that 1st respondent's allegations that the mining site is used for processing gold dumps or gold sands brought from other mines; that no excavators have been taken to the mine; that 1st respondent has neither before the dispute nor after its commencement extracted gold ore from the mine; that 1st respondent has not escalated operations at the mine; and that nothing has changed at the mine - to be so far-fetched or clearly untenable. I take the view that the facts alleged by the 1st

respondent are such as to raise a real, genuine and *bona fide* dispute of fact which is neither far-fetched nor clearly untenable. I take the view that applicant has failed established a *prima facie* case. This court cannot be justified in rejecting 1st respondent's factual allegations merely on the papers. The urgency is anchored on disputed facts. The trigger point is itself disputed. I cannot find on such disputed facts that this application is urgent.

Again, in the certificate of urgency applicant contends that it has cancelled the sale agreement; that 1st respondent has refused to accept the cancellation; that 1st respondent is illegally mining and / or conducting cyanidation operations at the mine; and that gold is going to be depleted if mining operations continue. Even if such facts were correct, still they could not be a trigger of urgency. In general, this is what all other litigants have to contend with while awaiting for their matters be set-down and be finalised in the ordinary court rolls. These are not the facts that would permit a litigant to gain advantage over persons whose disputes are being dealt with in the normal course of events. See: *General Transport & Engineering (Pvt) Ltd & Ors v Zimbank* 1998 (2) ZLR 301 (H) at 302; *Dilwin Investments (Pvt) Ltd v Jopa Enterprise Co Ltd* HH 116-98. Every litigant bringing their cases before these courts wishes to have their matters heard on an urgent basis, because the longer it takes to obtain relief, the more it seems that justice is being delayed and thus denied. This is not possible. See: *Triple C Pigs and Another v Commissioner-General* 2007(1) 27. For a litigant to successfully motivate the court to hear its matter on an urgent basis, it must show that its matter is out of the ordinary. This court must be on the guard of litigants who may try to take advantage and abuse the urgency procedure in order to get a procedural advantage over other litigants that have to wait in queue for their matters to be heard. There must be an emergency. There is no emergency in this case. This matter is not urgent and it cannot be afforded a hearing in the roll of urgent matters. It falls to be removed from the roll with an appropriate order of costs.

What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. Accordingly, the applicant must bear the 1st respondent's costs.

Disposition

In the result, I make the following order:

1. The point *in limine* on urgency is upheld.

2. This application is not urgent and is removed from the roll of urgent matters with costs of suit.

Hlabano Law Chambers c/o Tanaka Law Chambers, applicant's legal practitioners
Matiyashe Law Chambers c/o Sansole & Senda, 1st respondent's legal practitioners