

MOUNT GRACE FARM (PVT) LTD
versus
JUMUA METALS & MINERALS (PVT) LTD
and
MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 16 January 2020 & 12 February 2020

Urgent Chamber Application

T. Pfigu, for the applicants
S. Evans, for the respondents

DUBE-BANDA J: This urgent chamber application was placed before me on the 15 January 2020. On the same date after perusing the application, I came to the conclusion that the matter was not urgent. I then made an endorsement to the effect that the matter was not urgent and was to be struck off the roll of urgent matters. Applicant aggrieved by my conclusion that the matter was not urgent, addressed a letter to the Registrar of this court, seeking an opportunity to argue the issue of urgency before me. The letter was brought to my attention on the 22nd January 2020. I directed that the matter be set-down for the 29 January. I also directed that the respondents be served with the application and the notice of set-down. This course of action is permissible in this jurisdiction, see *Church of the Province of Central Africa v Diocesan Trustees, Diocese of Harare* 2010 (1) ZLR 346 (H).

In this urgent chamber application, the applicant seeks an order drawn in the following terms:-

“TERMS OF THE FINAL ORDER SOUGHT

It is ordered that you show cause to this Honourable Court, why a final order should not be made in the following terms:-

1. The operation of the judgement HH 844/19 granted by the Honourable Mr Justice Zisengwe on the 8th of January, 2020 in case number HC5846/19 shall not be suspended by reason of the appeal noted by the First Respondent to the Supreme Court under SC 04/2020 or any other appeals, and shall have full legal effect regardless of such appeal.

2. First Respondent and all those claiming occupation through it be and are hereby ordered to comply with all the applicable provisions of judgement HH844/19 with immediate effect.
3. The First Respondent shall pay costs of this application on an Attorney and Client scale.

INTERIM RELIEF GRANTED

Pending the finalisation of this matter, Applicant is granted the following relief:-

1. Pending the confirmation or discharge of the interim order, the First Respondent and all those claiming occupation through it be and are hereby ordered to terminate and cease all mining operations on Mount Grace Farm Subdivision 23 Of Welston Glenforest (Goromonzi District) with immediate effect.

SERVICE OF THE PROVISIONAL ORDER

The Applicant shall serve a copy of this provisional order on the Respondent through the Sheriff.”

The application is opposed by the first respondent. Second respondent filed a notice of opposition without an opposing affidavit, stating that it will abide by the decision of this court.

When the parties appeared before me, they were asked to address both the issue of urgency and the merits of the matter. In the event I find that the matter is not urgent, that would signal the end of the inquiry. However, should I find that the matter is indeed urgent, I would then proceed and deal with the merits of this case.

In the certificate of urgency, signed by a legal practitioner in terms of rule 242 (2) (b) of the High Court Rules, 1971 (Rules) it is alleged that:

1. On the 8th of January 2020, the Applicant obtained a judgement from this Honourable Court wherein the First Respondent and all those claiming occupation through it were ordered to cease all mining operations on Mount Grace Farm
2. The Applicant’s complaint before the Court in the application for an interdict was that First Respondent was unlawfully carrying out mining operations on its farm in the absence of written consent and was thus prejudicing the Applicant’s rights.
3. After judgement was handed down on the 8th of January 2020, the First Respondent, through its employees escalated and intensified its mining operations.
4. The First respondent has increased and enlarged its boundaries since the 10th of January 2020 taking up more of Applicant’s pastures and farmlands.

5. The matter is urgent in that if it is not heard promptly, the Applicant stands to suffer irreparable harm in the form of severe land degradation on its farmlands and grazing pastures which will be extremely costly to rehabilitate if that option is still even open.
6. The matter cannot wait as the house is the principled homestead continues to shake due to the tremor caused by the blasting of explosives which is now being carried out continually and if the matter is delayed, the Applicant's property may be destroyed as it may become an unsafe dwelling place
7. I have read the judgement in respect of which the appeal has been noted together with the notice and grounds of appeal filed by the First Respondent and remain on firm ground that the First Respondent enjoys no prospects of success on appeal as the grounds are meritless and have been launched to delay the inevitable.
8. The Applicant has not been sluggard in asserting its rights but has acted timeously and with urgency in that conduct complained of started on the 9th of January 2020 after judgement had been handed down on the 8th of January 2020. Applicant wrote to the First Respondent on the 10th of January 2020 requesting compliance with the judgement in contemplation of a potential suit for contempt of court. The First Respondent replied to this letter on the 13th of January 2020 stating that it had appealed against the judgement. The Applicant instructed its legal counsel its legal counsel on the 14th of January 2020 to institute and file this present application. The Applicant therefore acted when the need to act arose.
9. If the court does not expeditiously deal with this matter, the Applicant will suffer irreparable harm while the First Respondent is allowed to benefit from its unlawful conduct.
10. It is against the backdrop of the foregoing that I certify the urgency of this matter and ask this Honourable Court to exercise its discretion in favour of the Applicant and grant leave, on an urgent basis to execute the judgement of this Honourable Court.

Urgent applications are governed by rule 244 of the High Court Rules, 1971 (Rules), which provides:

“Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (b) of subrule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith. Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent.”

This court enjoys a discretion in urgent applications to authorise a departure from the ordinary procedures that are prescribed by the Rules. However the court 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 or meet the justice of the case.

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. That 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.

In assessing whether an application is urgent, this court may consider a number of factors, being whether the urgency was self-created; the consequence of the relief not being granted and whether the relief would become irrelevant if it is not immediately granted.

To pass the urgency test, applicant must show that there is an imminent danger to existing rights and the possibility of irreparable harm. In *General Transport & Engineering (Pvt) Ltd & Ors v Zimbank* 1998 (2) ZLR 301 (H) the court said:

“A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, it is not afforded, the eventual relief will be hollow because of the delay in obtaining it.”

To pass the test, good cause must be shown for the applicant to dislodge other litigants who are in the queue.

In this jurisdiction, an application for leave to execute pending appeal, is generally prosecuted by way of a court application. I accept that there could be instances where such an application may be brought to court by way of an urgent application. However, this should be the exception rather than the norm.

Cut to the borne, applicant contends that it stands to suffer irreparable harm because of the severe land degradation on its farmlands and grazing pastures caused by the 1st respondent’s mining activities. It says the matter cannot wait as the house which is the principled homestead continues to shake due to the tremor caused by the blasting of explosives which is now being

carried out continually and if the matter is delayed, the applicant's property may be destroyed as it may become an unsafe dwelling place.

Applicant's complaints are a repetition of the issues raised with this court, which issues are well captured in the judgment appealed by the respondent. This court noted in *Mount Grace Farm (Pvt) Ltd v Juma Metals & Minerals (Pvt) Ltd and Minister of Mines and Mining Development* HH 844/19 that the applicant alleges, amongst an array of complaints, that the pits, trenches and gullies excavated by first respondent are a death trap of its livestock on the farm to the extent that the viability of its once vibrant goat project is under threat. Applicant further avers that those excavations pose a clear and present danger to inhabitants of the farm as well. Applicant also complains of incessant and excessive noise generated by blasting and mining activities. Finally, applicant avers that its arable land has been rendered virtually inerrable, on account of the excavations and trenching caused by mining activities.

To me these are the same issues that applicant is complaining about in this application, which it says make this matter pass the urgency test. There appears to be nothing new, that is happening now, which was not happening when the interdict application was lodged in case number HC 5846/19, which resulted in the judgment in *Mount Grace Farm (Pvt) Ltd v Juma Metals & Minerals (Pvt) Ltd and Minister of Mines and Mining Development*. What could be different is the terminology used, not the substance of the complaints.

Further there is no evidence, apart from the *ipso dicta* of the applicant that the principal homestead continues to shake due to the tremor caused by the blasting of explosives. In any event this allegation is denied by the first respondent. This is the same complaint, raised in case number HC 5846/19.

Naturally, every litigant appearing before the courts wishes their matter to be heard on an urgent basis, because the longer it takes to obtain relief, the more it seems that justice is being delayed or denied. Equally, the courts in order to ensure delivery of justice, would endeavour to hear matters as soon as reasonably possible. This is not always possible. As a result, the court has a discretion to sift and make a distinction between those that are urgent and those that may wait. See *Triple C Pigs & Anor v Commissioner-General*, 2007 (1) ZLR 27.

My view is that this application is not urgent. This applicant must join the queue, there is no basis why it should be allowed to jump the queue and given preference over other pending matters. It can wait for its turn on the ordinary roll.

Disposition

The *onus* lies on the applicant to establish that this matter passes the urgency test. In my view, applicant has failed to show that this matter is urgent. As a result, I order as follows:

This application is struck off the roll with costs.

T. Pfigu Attorneys, applicants' legal practitioners

Mabuye Zwarevashe-Evans, respondent's legal practitioners