

YOLANDA MUTUTUMA
versus
MINISTER OF MINES AND MINING DEVELOPMENT
and
THE COMMISSIONER GENERAL OF POLICE
and
MASTER OF HIGH COURT
and
LAWRENCE SHERENI

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 26 May and 1 June 2022

Urgent Chamber Application

M.N. Mugiya, for applicant
Ms. M. Mavhemwa, for 1st and 2nd respondents
Advocate E. Donzwambeva, for 4th and 5th respondents

TAGU J: This is a simple urgent chamber application were the applicant is seeking a provisional order for protection of some estate assets pending the winding up of a deceased estate by the Master of the High Court. The undisputed facts are that the applicant's husband passed on sometime on 23 October 2021 following life threatening injuries sustained in a tragic Road Traffic Accident that occurred on 13 October 2021. As is usually the norm with greedy relatives the applicant who is the surviving spouse of the Late Jonah Shereni was on the 30 April 2022 despoiled of her homestead and mine called Rosa 10 mine Glendale, Chiweshe Registration number 43086, by her late husband's relatives led by one Lawrence Shereni and Brian Gombera. The applicant then approached this court under HC 2978/22 suing the said Lawrence Shereni and Brian Gombera and all those claiming occupation through them for a spoliation order, and this court granted an order by consent in her favour on 10 May 2022. The court order was to the following effect-

“IT IS ORDERED BY CONSENT THAT:

1. The Respondents and all those claiming through them be and are hereby ordered to restore to the applicant and her family and to the applicant and her workers at Rosa 10 Mine, Chiweshe, the status quo ante that was prevailing as at 29 April 2022.
2. The Applicant is allowed to retain her control of Rosa 10 Mine at Jeke Village, Chief Negomo, Chiweshe and shall exercise her control in consultation with the first respondent pending the appointment of the Executor for estate late Jonah Shereni under DR. 1414/22.
3. Each party to bear its own costs.”

Barely three days later after the order by consent was granted, and on 13 May 2022 the applicant’s late husband’s relatives hired gold panners (the Mashurugwis) who came to the mine and violently took over the mine and chased her away from the mine and her homestead causing chaos. She reported the matter to the second respondent at ZRP Chombiro, showed them the court order but the Police told her that they could not do anything since it was a civil matter. On 16 May 2022 she wrote a letter of complaint to the second respondent, the Minister of Mines and Mining Development, but the second respondent ignored her letter. She had no option but to approach this Honourable Court on 20 May 2022 on a certificate of urgency for an interdict against the first to the third respondents seeking the following provisional order-

“TERMS OF THE FINAL ORDER SOUGHT

1. The second respondent’s refusal or failure to act on the applicant’s report of illegal mining activities at Rosa 10 Mine, Glendale, Chiweshe be and is hereby declared to be unlawful.
2. The first respondent is ordered to suspend all mining activities at Rosa 10 Mine Glendale, Chiweshe until the Executor of Estate late Jonah Shereni DR 1414/22 is appointed by the third respondent.
3. The first respondent is ordered to assist the Applicant to conduct mining activities at Rossa 10 Mine, Glendale, Chiweshe orderly and in terms of the law.
4. The Respondents to pay costs of suit jointly and severally, one paying the others to be absolved”.

INTERIM RELIEF GRANTED

Pending the confirmation or discharge of the provisional order, an interim relief is granted on the following terms;

1. First respondent is ordered to issue a stoppage order for all mining activities at Rosa 10 Mine, Glendale Chiweshe forthwith or at least not later than 24 hours from the date of this order.

2. The second respondent is ordered to enforce the directive by first respondent referred to in para 1 above.
3. The applicant is ordered to provide private security services at the mine, once the ZRP has provided order and cleared all illegal panners.

SERVICE OF THE PROVISIONAL ORDER

Leave is hereby granted to the applicant to serve the respondents with the order.”

At the hearing of this matter Advocate E. Donzwambeva made an application for the joinder to these proceedings of Lawrence Shereni and Brian Gombera as the fourth and fifth respondents respectively. The application for joinder was not opposed by the other counsels. Lawrence Shereni and Brian Gombera were duly joined to the proceedings by consent.

Only the second respondent filed written Notice of Opposition supported by oral submissions. The other respondents made oral submissions.

In his oral submissions the counsel for the applicant stated that he stands by the papers filed of record. He said this is a simple application where applicant is seeking protection pending the Master of the High Court appointing an executor to the estate of the late Jonah Shereni DR. 1414/22. According to the counsel for the applicant there is already Case HC 2978/22 which restored the applicant in possession of the mine and the homestead. Hence it is applicant who is in charge of the mine and the enterprise she was running with her husband. He said it would be absurd if any party opposes an order protecting the estate pending the appointment of an executor under the registered estate DR. 1414/22. In essence he said the mine falls under property of the estate. That property can only be benefited in terms of the Administration of Estates Act, [*Chapter 6.01*] or s 10 of the Deceased Family Maintenance Act [*Chapter 6.03*].

It was his further submission that the Applicant does not seek to benefit ahead of any beneficiaries in this matter. She is a mere surviving spouse of the deceased Jonah Shereni. The applicant has thus approached the court complaining about the chaos and looting of Gold ore at the mine.

Commenting on the second respondent’s papers he said it is clear there are a number of criminal matters arising at the mine. This chaos is disrupting the estate. He said according to the order on p 10 it is clear it is only applicant’s workers who must be at the mine. For second

respondent to say people at the mine are her workers the second respondent is compromised. Second respondent interprets the order in favour of one Lawrence Shereni and made him a partner to applicant which is not part of the order he is interpreting. If the Police are helping applicant as they purport they should not support looters. He further said there is a case HC 3241/22 in which the applicant has complained against the persons described by the Officer –in-charge (O.I.C.) as her workers. He further said it is sad from the second respondent's Opposing affidavit paragraph 8 in which the O.I.C. says he cannot enforce the court order but the Master and accused the applicant of not knowing the law. For the record the Master of High Court does not enforce Court orders, he administers estates.

The applicant's counsel therefore submitted that it is clear that the Police failed to act when required to act. The applicant is therefore seeking relief against the first respondent and not the second respondent. It would be shocking that the Minister refuses to protect the mine unless he is conniving with the people looting at the mine. The Police are ordered to enforce a stoppage order by the Minister of Mines which is their constitutional duty. Hence the entire opposition by the second respondent does not suggest that they are opposing the relief sought and the relief will not prejudice any of the respondents before the court. He said it is even worse for fourth and fifth respondents who have just been joined whose intentions are mysterious because they are benefitting in the looting. He therefore prayed for an order in terms of the draft.

In her submissions on behalf of the first respondent the counsel for the first respondent said the first respondent is not opposed to the interim relief sought by the applicant but requested the applicant to provide full registration number of the mine in question. She said Rosa 10 mine is not a full description of the mine.

As to the second respondent the counsel for the second respondent said the second respondent is being called upon to enforce the court order. She said the second respondent is opposed to the granting of the order as it is the duty of the Sheriff to enforce court orders. She further submitted that the second respondent may only come to assist if called by the Sheriff where there is resistance to the order. Second respondent cannot be called to enforce the court order the applicant is calling for. Commenting on the suggestion that the second respondent is compromising by refusing to act on the report made to them, she said this is a premature allegation

by the applicant as there are investigations underway in respect of the report made by applicant to the first respondent. She denied that the O.I.C. is compromised or working with Lawrence Shereni.

Coming to the and fourth and fifth respondents their counsel made oral submission to the effect that where an applicant files a matter to be heard on urgent basis this is an indulgence which the court grants. Such a litigant has a duty imposed by law to make full disclosures in its papers and take the court into confidence including facts detrimental to her. See *Graspeak Investments (Pvt) Ltd v Delta Operations (PVT) LTD & Anor* 2001 (2) ZLR 551 (H). *In casu*, he said the applicant failed to disclose that at the time she filed the present application on 20 May 2022 there were three other pending matters HC 3238/22, HC 3240/22 and HC 3241/22 dealing with the people who are said to be looting at the mine. He said such material non- disclosure shows *mala fides* on her behalf. Secondly he said the applicant failed to satisfy essential elements of urgent chamber applications where applicant is seeking a mandamus to enforce a State organ to perform a prescribed duty. See *Dube and Others v Constitutional Select Committee* HB 43/10 where a mandamus was defined.

He therefore submitted that the Applicant has no clear right but a prima facie right because the estate of the late Jonah Shereni has not been registered and the order that applicant wants is to defeat the rights of the fourth and fifth respondents. According to him the allegations by the applicant are hollow and not supported by facts hence she is on a fishing expedition hoping that if she loses one case she might win another thereby obtaining conflicting judgments. When asked by the court whether the cases he said were not disclosed involved the current respondents or not and whether the reliefs are the same, counsel for the fourth and fifth respondents was candid to say they are not the same.

Mr. M.N. Mugiya for the applicant respondent to the counsel for the fourth and fifth respondents by saying there is no need to disclose the matters cited because the relief sought in the present matter is against the first respondent and not the parties in the cases referred to. He further submitted that the order on page 10 of the record restrains the fourth and fifth respondents and by consenting to the order they admitted they had despoiled the applicant. Hence the order gave her a clear and not prima facie right. He said reliefs being sought by applicant in those cases are different from the current relief she is seeking hence there was no need to disclose those cases but relevant facts to the current application. According to him requirements for a mandamus have

been established. He further said the Minister of Mines is the only person who can issue stoppage orders in terms of the Mines and Minerals Act and this cannot be enforced by the Sheriff. In any case the Minister has said he has no problem in issuing a stoppage order. In the present case there is no order sought against the fourth and fifth respondents. He submitted therefore that the fourth and fifth respondents' claim are baseless because a look at the relief sought will also mean that the applicant will be affected by the stoppage order as well so it is not being done to prejudice the fourth and fifth respondents.

As to the submissions by the first respondent he maintained that the first respondent is responsible for issuing stoppage orders. The second respondent is responsible for maintaining law and order. As to the second respondent he maintained that the second respondent is under misapprehension as to who should enforce stoppage orders, it is not the sheriff nor the Master of the High Court. He provided the registration number of the mine as 43086 and applied that para 1 of the provisional order be amended after the word Mine in second line with the inclusion of Registration no. 43086.

It is clear in this case therefore, that after the passing on of the late Jonah Shereni the applicant remained at the mine and the homestead where she had been staying during the lifetime of the late Jonah Shereni as a surviving spouse. It cannot be disputed that the mine and the homestead are part of the deceased estate. The estate has been registered under DR 1414/22 and the executor has not yet been appointed by the Master of the High Court. It is further not in dispute that on 30 May 2022 relatives of the late Jonah Shereni despoiled the applicant of the estate property being led by Lawrence Shereni and Brian Gombera. This is confirmed by order under HC 2978/22 where the applicant was allowed control of Rosa 10 Mine Chiweshe and that she was to exercise control in consultation with the fourth respondent. From the papers filed of record she was again chased away from the same and as we speak there is chaos and looting of Gold ore at the premises. In order to protect the estate property pending the appointment of an executor, the applicant reported to the second respondent. The second respondent has confirmed having received such a report in the Opposing Affidavit.

Be that as it may the second respondent has not exercised his constitutional mandate to enforce law and order at the mine. The applicant again reported to the second respondent who by now has not issued a stoppage order to protect the estate property. Second respondent's contention

is that they are still investigating the report. Neither did the first respondent issued a stoppage order in order to protect the assets of the estate. The applicant approached this court on an urgent basis so that the respondents exercise their constitutional mandates in the interest of the estate assets. No relief is sought against the fourth and fifth respondents as the same had already been secured by consent in HC 2978/22. The current respondents except the third respondent were not parties to HC 2978/22. Other people other than the current respondents are being sued in other matters that are still pending before this Honourable Court where the applicant is seeking different reliefs from the ones she is seeking in the present matter. The non-disclosure of those other cases and the non-joinder of the fourth and fifth respondents in the present proceedings cannot be by any stretch of imagination be treated as a sign of mala fide on her part.

The requirements for an application of this nature are trite. By virtue of the order under HC 2978/22 the applicant has not only a prima facie right but a real right to the property in question. She has a duty to protect the assets of the estate pending the appointment of the executor. To show that there is no mala fide on her part she even asked the first respondent to issue a stoppage order in terms of the Mines and Minerals Act. She is not by any stretch of imagination doing this to prejudice the rights of the fourth and fifth respondents who may at the end of the day found to be beneficiaries of the assets in question.

Having considered the submissions in this case it is my view that a case has been established by the applicant warranting the grant of the provisional order she is seeking. The provisional order as amended will be issued.

IT IS ORDERED THAT

TERMS OF FINAL ORDER SOUGHT

1. The second respondent's refusal or failure to act on the applicant's report of illegal mining activities at Rosa 10 mine, Registration No. 43086, Glendale, Chiweshe be and is hereby declared to be unlawful.
2. The first respondent is ordered to suspend all mining activities at Rosa 10, Registration No. 43086, Glendale, Chiweshe until the Executor of Estate late Jonah Shereni DR 1414/22 is appointed by the third respondent.

3. The first respondent is ordered to assist the applicant to conduct mining activities at Rosa 10 Mine, Registration 43086, Glendale, Chiweshe orderly and in terms of the law.
4. The respondents to pay costs of suit jointly and severally, one paying the others to be absolved.

INTERIM RELIEF GRANTED

Pending the confirmation or discharge of the provisional order, an interim relief is granted on the following terms:

1. The first respondent is ordered to issue a stoppage order for all mining activities at Rosa 10 Mine, Registration No. 43086, Glendale, Chiweshe forthwith or at least not later than 24 hours from the date of this order.
2. The second respondent is ordered to enforce the directive by first respondent referred to in para 1 above.
3. The applicant is ordered to provide security services at the mine once the ZRP has provided order and cleared all illegal panners.

SERVICE OF THE PROVINCIAL ORDER

Leave is hereby granted to the applicant to serve the respondents with the order.

TAGU J.....

Mugiya and Muvhami, law Chambers, applicant’s legal practitioners
Civil Division of the Attorney General, first and second respondent’s legal practitioners.