

ALBERT TEWENDE
and
QUEENSDALE MINING (PVT) LTD
versus
TAWANDA DZVITI
and
D & S MINING SYNDICATE
and
SHERIFF/DEPUTY SHERIFF GWERU
and
MINING COMMISSIONER KADOMA
PROVINCIAL MINING DIRECTOR MASHONALAND WEST (PMD)

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 21 & 28 September 2021

Urgent chamber application

F. Misishairambwi, for the applicant
Ms *V. Vhera* with her *T. Moyo*, for the 1st and 2nd respondents

ZHOU J: This is an urgent chamber application for an order interdicting the first, second and third respondents from removing the applicants from a mining site known as Jamcro 30 mine and for restoration of the applicants' occupation of the site. Applicants also seek an order that the respondents be ordered to stop illegal mining activities at the site.

The application is opposed by the first and second respondents. The third respondent filed a report in which he explained his involvement in the matter, which was essentially that he was enforcing an order of court. Clearly, the seeking of relief and costs against the third respondent was misconceived. The Sheriff is an officer of this court. If he acts in the execution of a judgment, which is what he is mandated by law to do, he should not be dragged into disputes in which he had no legal interest unless he is cited merely for the purposes of enforcing the judgment.

The facts which are material for the purposes of the instant application are as follows: The second applicant is the holder of title in the mining claims known as Jamcro 30 mine. The first applicant is a director of the second applicant. On 10 June 2021 and in case No. HC998/21, the first and second respondents obtained a judgment of this court pursuant to an urgent chamber application. The cited respondent in that case is Spencer Tshuma. It is common cause from the attached Form CR14 that Spencer Tshuma is also a director of the second applicant. There has been a dispute between the parties over mining boundaries in the past. On 21 March 2021 the first applicant wrote to the Provincial Mining Director complaining about encroachment onto the second applicant's mine. The complaint was directed at the second respondent. The Provincial Mining Director also wrote a letter to the Zimbabwe Republic Police Officer Commanding CID Minerals, Flora and Fauna Unit for the province asking him to investigate and stop the alleged illegal mining activities.

The order which was granted in HC 998/21 was for the respondent and all those claiming occupation through him to restore to the applicant vacant possession of the "mining location being a portion of Queensdale Farm measuring 9 hectares with the following coordinates: A0199925; 7958476; B0200125; 7958914; C0200278; 7958822; D0200115; 7958045; DP02000045; 7958510." An application for leave to execute the judgment in HC998/21 pending appeal was granted by MANZUNZU J pursuant to an urgent chamber application filed under Case No HC 3039/21. The first and second respondents so it is alleged, then used the order granted in HC 998/21 to eject the applicant from Jamcro 30 mine.

In opposing the instant chamber application the first and second respondents raised a number of points *in limine*. These are (a) that the matter is not urgent; (b) that the relief sought is incompetent; (c) that the first applicant has no *locus standi*, and (d) that there is material non-disclosure. A reading of the papers filed illustrates that all these objections *in limine* lack merit and reflects the growing appetite by legal practitioners to raise points *in limine* as a matter of course. The time has come for the court to penalise litigants and legal practitioners who abuse the procedures of this court in this manner notwithstanding the concern which has been raised in many judgments of this court about the raising of groundless preliminary objections. In many cases the raising of these objections results in the papers becoming unnecessarily bulky to the prejudice of litigants who have to incur the unnecessary costs occasioned by the raising of these objections.

In relation to the question of urgency the first and second respondents state that the dispute arose in March 2021, and then make reference to what Spencer Tshuma did. Spencer Tshuma is not a party before this court. But in the submissions made before me the respondents suggested that the present application was a reaction to the judgment in HC 998/21. Leave to execute that judgment was only granted on 8 July 2021. The applicants state, and it has not been disputed by the respondents, that the first applicant became aware on 8 September 2021 that the third respondent had visited Jamcro 30 mine the previous day. Clearly, this was when the need to act arose. This application was filed two days later on 10 September 2021. The objection that the matter is not urgent is therefore without merit. It is dismissed.

The objection that the relief sought is incompetent is predicated upon the omission by the applicant's legal practitioners to state that the interim relief is being sought pending determination of the matter on the return date. Such a minor omission cannot justify the kind of determined argument which was presented in connection with it. I do not accept that the relief is incompetent as the provisional order is subject to confirmation or discharge on the return date. The objection is accordingly dismissed.

The *locus standi* of the first applicant is not an objection that disposes of this matter. While it would indeed be sound if it had been taken on the ground that he occupies the place though the second applicant, it is only of academic interest. The respondents could only have moved for the name of the first applicant to be struck out for want of *locus standi*. However, it is apparent that the order in HC 998/21 was also being enforced against the first applicant in his personal capacity. A submission made on behalf of the respondents suggests that their understanding is that the second applicant is one of those occupying the area to which the order relates through Spencer Tshuma. The first applicant has shown that he occupies the area in his own right as a director. The objection is therefore dismissed.

The alleged material non disclosed pertains to the relationship between the applicants and Spencer Tshuma and the fact that there were orders in HC 998/21 and HC 3039/21 which were granted against Spencer Tshuma. Attached to the founding affidavit is the second applicant's form CR 14 in which Spencer Tshuma is clearly listed as a director, together with the first applicant. The submission that the association with Spencer Tshuma was not disclosed is, therefore, a falsehood. In the founding affidavit the applicants do mention the visit by the Sheriff to the mining

site. As they were not parties to the judgments which the Sheriff was executing they did not need to say more than what they have stated. Their cause of action is not predicated upon those judgments. After all, the draft provisional order does mention the judgment. There was therefore no material non-disclosure such as would warrant the dismissal of the application or a finding that matter is not urgent. The objection based on material non-disclosure is accordingly dismissed.

On the merits, what is being sought is a temporary interdict. The requirements for such an interdict are settled. They are:

1. That the right which is sought to be protected is clear, or
2. That (a) if it is not clear, it is *prima facie* established, though open to some doubt; and (b) there is a well grounded apprehension of irreparable harm if the interim relief is not granted and the applicant ultimately succeeds in establishing his right;
3. That the balance of convenience favours the granting of interim relief; and
4. The absence of any other satisfactory remedy.

See *Watson v Gilson Enterprises & ors* 1997 (2) ZLR 318 (H) at 331 D-E; *Nyika Investments (Pvt) Ltd v ZIMASCO Holdings (Pvt) & ors* 2001 (1) ZLR 212 (H) at 213G-214B; *Econet (Pvt) Ltd v Minister of Information* 1997 (1) ZLR 342 (H) at 344G – 345B.

This court has held that the existence of a right is a question of substantive law; whether or not that right is clearly or only *prima facie* established is a question of evidence. In this case the second applicant's right to mine on Jamcro 30 mine is admitted by the respondents, see para 39 of opposing affidavit. In any event, the applicants have attached proof of title to the mining claims at Jamcro 30, see pages 14-15 of the founding papers being the "Certificates of Registration after Transfer." Thus the applicants have established a clear right to Jamcro 30 mine. Even if it was to be held that the right has only been *prima facie* established, their reasonable apprehension of harm arises from the threatened eviction from the area. While the first and second respondents have disputed that the eviction extends to Jamcro 30, the applicants say it does. It is for determination on the return date, which should necessarily involve the office of the fourth respondent, to establish the exact parameters of the area to which the order in HC 198/21 relates.

The balance of convenience favours the granting of the relief. The respondents have already said that they have no intention to enforce the order at Jamcro30 mine. They make no claim to it. This application pertains to Jamcro 30 mine. On the other hand, the applicants

would be irreparably prejudiced if the interim relief is not granted and it is ultimately established that the eviction had extended to their mine. Nothing would stop the respondents from extracting the ore from the disputed place if the interim relief is not granted.

There is no alternative satisfactory remedy which has been postulated which would achieve the result intended by the interdict being sought *in casu*. Once the ejection takes place occupation of the site will necessarily be given to the first and second respondents to the exclusion of the applicants.

In all the circumstances, I come to the conclusion that the applicants are entitled to the relief sought.

In the result, the provisional order is granted in terms of the draft filed of record subject to some amendments.

Lawman Law Chambers, applicants' legal practitioners
Tamuka Moyo Attorneys, 1st and 2nd respondents' legal practitioners