AMOS MACHONA

Versus

ELITE PARK ENTERPRISES (PVT0 LTD

And

THE MINISTRY OF MINES

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 19 JANUARY 2021 & 21 JANUARY 2021

Urgent application

N. Mlala, for the applicant
J. Mugova, for the 1st respondent
B.T. Nyoni, for the 2nd respondent

DUBE-BANDA J: This is an urgent application. This application was lodged in this court on 15 January 2021. The application is opposed by both 1st and 2nd respondents, although 2nd respondent did not contribute much to the debate. Applicant seeks a provisional order formulated in the following terms:

Terms of final order sought

That you show cause to this Honourable Court on the return date why a final order should not be made in the following terms:

1. The 1st respondent be and is hereby ordered to vacate Imbesu Kraal and carry out its mining activities as directed by the certificate of registration.
2. The pegging of any mining claim by the 1st respondent at Imbesu Kraal be declared to be unlawful.
3. The respondent to pay the costs of suit at an attorney-client scale.

Interim relief granted

Pending the finalisation of this matter, the applicant be and hereby granted the following relief:

1. The 1st respondent be and are hereby interdicted from carrying out any mining activities within 450 metres of the applicant's homestead at Imbesu Kraal.

2. Failing which the Sheriff of the High Court with the assistance of the members of the police Zimbabwe Republic Police be and are hereby directed to stop the 1st respondent from carrying out any mining activities within 450 metres of the applicant's homestead at Imbesu Kraal.

Service of provisional order

That this provisional order and the urgent application shall be served upon the respondents by the applicant's legal practitioners / Sheriff.

Applicant is a beneficiary of the land resettlement programme. In 2007, he was allocated a farm known as Imbesu Kraal. He built a homestead on the farm, he rears goats and cattle. The 1st respondent has a mining claim, in the certificate of registration the claim is located at Fundisi Farm, however on the ground applicant says it is his farm – Imbesu Kraal. Applicant's appears aggrieved by 1st respondents mining activities. He says he has been to the police, Ministry of Agriculture, and to the Ministry of Mines and Mineral Development, in an effort to get 1st respondent out of the mining claim. All such efforts have failed. Applicant has then approached this court, seeking a provisional order quoted *supra*.

In resisting this application, 1st respondent raised four points *in limine*, these are; that this matter is not urgent; the second is that 2nd respondent is a non-existent legal entity, i.e. applicant sited Ministry of Mines, the correct party should have been the Minister of Mines and Mining Development. *Mr Mlala,* counsel for the applicant, conceded this point; the third is that final relief sought is defective as it is not supported by the pleadings, and that the interim relief sought is a final relief disguised as an interim relief; the fourth is that the application itself is defective for want of the proper form. I heard argument on the points *in limine* and reserved judgment.

I now deal with the point *in limine* in respect of urgency. 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. 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. 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, this Court has in the past considered various factors, including, among others: whether the urgency was self-created. The hearing of a matter as urgent is entirely the discretion of the court and that the court exercises its discretion in favour of the applicant to jump the queue on the strength of a certificate issued by a legal practitioner. Where there is nothing to suggest that the legal practitioner applied his mind before certifying the matter as urgent, a conclusion may be drawn that the matter is not urgent. See: *Gapare & Another v Mushipe & Another*HB17/1; *Tinofara Kudakwashe Hove v The Commissioner-General Zimra* HB 29/11.

This application is accompanied by a certificate of urgency. In his founding affidavit, applicant avers that:

1. Then the 1st respondent also got a mining claim on my farm or near my farm. I say so because the certificate of registration states that the claim is located on Fundisi Farm about 1.5 km west of the homestead.
2. This was about 2016, but the 1st respondent did not appear until last year in October. The respondent has been mining on my farm. At first I approached them in order to ascertain whether they have the rights to mine on that area. The workers showed me the certificate of registration. I queried it because it does not indicate Imbesu Kraal but clearly states Fundisi Farm which is the next farm.
3. However, I was told that the peggers and surveyors have pointed out that the claim is situated there where they are mining at my farm. They showed me the maps which I do not understand. However, no surveyor has approached or pegger has approached me to show me where the actual claim, it is only the claim by the workers and directors of the 1st respondent.

Mrs Mugova, counsel for the respondent, contends that the need arose in October 2020. It is argued that according to applicant's version, 1st respondent has been mining at the claim for a period approximating three months. Applicant should have acted immediately when the need to act arose, he cannot come to court after such a period of inactivity and plead urgency. *Mr Mlala,* argued that applicant decided to exhaust internal remedies available to him before approaching this court for relief. It is contended that he sought assistance from the Ministry of Mines and Mining Development and the Ministry of Agriculture, and in both instances no help was given to him. He then eventually decided to seek relief from this court.

Applicant by his own version, has been aware that the 1st respondents has been carrying out mining activities on the disputed claim from October 2020. An urgent matter requires immediate action, if one has the luxury to first try other remedies, it shows that the matter is not urgent – in the sense anticipated by the rules court. Applicant contends that 1st respondent's mining activities have moved into the vicinity of his homestead, and he says he dug a well "after their shaft cut across the casings of my borehole and destroyed the pipes and as a result water spilled off and I could not access my water anymore." Applicant does not say when the mining activities commenced moving to his homestead, and he does not state when the borehole was destroyed. The founding affidavit shies awayfrom the details around these issues, such does not score much for a litigant, particularly where time-lines are an issue. What applicant says is that "when they blast at night they make an awesome lot of noise and we always awakened by the shaking of the ground. My house has developed cracks because of these blasts. In November 2020, the goats ran away for some days after they set the explosives. Some of the rubble falls on top of the roof and it wakes us up during the right. This has disturbed my peace in my place." What is apparent from this paragraph is that by November 2020, the problems applicant is complaining about were already happening. It then seems to me that there is nothing new, which is happening now, which was not happening when 1st respondent commenced its mining activities at the farm. If this matter was urgent, it must have been urgent in October 2020, not 15 January 2021.

In his oral submissions, *Mr Mlala* made the point that what makes this matter urgent is also that, because of Practice Directive 1 of 2021, this court does not accept the filing of court applications. The applicant has no other remedy, except to file this urgent application. When asked whether such would make this matter urgent, he made a little turn and submitted that, it is not the only reason, but one of the reasons that makes this matter urgent. It is correct that in terms of this Practice Directive, with effect from 5 January 2021, the filing of new cases, process, documents,

pleadings and papers have be suspended for a period of thirty days up to 3 February 2021, unless the period is earlier extended or revoked, and the limited services that are provided by the courts are initial remands; urgent processes and applications; and bail applications. While it is true that court applications could not be filed from the 5 January 2021 to the 3 February 2021, as provided for in the Practice Directive, I do not agree that because the filing of court applications has been suspended, this can justify filing unmeritorious urgent applications. A matter is urgent because it is urgent, not because applicant cannot, by operation of law file any other application except an urgent application. If the matter is not urgent, it must wait until such time that it can be filed in terms of the law. What applicant is dong in this case is to attempt to by-pass the Practice Directive 1 of 2021. A court of law cannot authorise an attempt to subvert the law. The Practice Directive is for a noble cause, i.e. to arrest the spread of the deadly coronavirus disease which has caused untold suffering in the world. It has infected millions the world over, killed over a million in the world, infected thousands in this country and killed hundreds of people in this country.[1] By attempting to subvert the Practice Directive applicant is unnecessarily exposing court officials, opposing litigants and opposing counsel to the risk of this deadly virus. This is unacceptable and wrong.

The certificate of urgency itself is not helpful at all, it does not shown that the applicant acted when the need to so act arose. It does not provide a time-line of events which makes this matter urgent. The only date that appears in the certificate of urgency is 2007, being the date applicant was allocated the farm. The certificate is full of conclusions, without any factual basis to support such conclusions. The applicant cannot expect the court to exercise its discretion to accord him audience on an urgent basis without useful information in the certificate of urgency to sustain such claim.

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 can wait. See: *Triple C Pigs & Anor* v *Commissioner-General*, 2007 (1) ZLR 27.

My view is that this application is not urgent. This is the kind of urgency which stems from a deliberate or careless abstention from action until the deadline draws near, and is not the type of urgency contemplated in the rules. This application must join the queue, there is no basis why it

[1] The media keeps live count of the numbers of those who have perished.

should be allowed to jump the queue and be given preference over other pending matters. It can wait for its turn on the ordinary roll.

Although a total of four points *in limine* were raised by the 1st respondent, my finding on the first points raised, i.e. urgency, makes it unnecessary for me to consider the rest of the points *in limine*. I say so because having found that the application is not urgent disposes of the matter. There would be no useful and practical purpose served by interrogating the other three points *in limine.*

Costs

Mrs Mugova, asked that this application is an abuse of court process and must be struck off the roll of urgent matter with costs on a legal practitioner and client scale. *Mr Mlala*, when asked the make submissions on the issue of costs, all he could say was that in the event points *in limine* are upheld, there would be no justification to order costs on a legal practitioner and client scale, as applicant approached this court to vindicate his rights and it cannot be said that he was unreasonable.

More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. See: *Orr v Solomon* 1907 TS 281. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or *mala fides* (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court. See *Public Protector v South African Reserve Bank* [2019] *ZACC* 29.

The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium. It should only be in relation to conduct that is clearly and extremely scandalous or objectionable that these exceptional costs are awarded. See: *Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC).

To mulct a litigant in punitive costs requires a proper explanation grounded in our law. All of the above said, these are costs that are meant to be penal in character and are therefore supposed to be ordered only when it is necessary to inflict some financial pain to deter wholly unacceptable behaviour and instil respect for the court and its processes. The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant. The question whether a party should bear

the full brunt of a costs order on an attorney and client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. See: *De Lacy v South African Post Office* [2011] ZACC 17; 2011 JDR 0504 (CC); 2011 (9) BCLR 905 (CC) at *paras* 116-7 and 123 A court is bound to secure a just and fair outcome. A punitive costs order is justified where the conduct concerned is "extraordinary" and worthy of a court's rebuke.

In casu, this matter is not urgent and it should not have been brought to this court as an urgent application. I am also concerned about the submission by *Mr Mlala,* that, what makes this matter also urgent is that in terms of Practice Directive 1 of 2021, applicant has no other remedy, and he cannot file any other application, except an urgent application. This attempt, in the face of the killer corona virus, to by-pass and subvert the Practice Directive, is not acceptable and deserves of a rebuke. However, I take the view that this is a boarder-line case, and therefore the red-line to costs on a legal practitioner and client scale has not be crossed. I will issue a *yellow-card* and spare applicant costs on a legal practitioner and client scale.

Disposition

In the result, I order as follows: This application is struck off the roll of urgent matters with costs on a party and party scale.

Sansole and Senda, applicant's legal practitioners
Calderwood, Bryce & Hendrie, 1st respondent's legal practitioners
Civil Division of the Attorney-General's office, 2nd respondent's legal practitioners