CHARLES MABHENA

Versus

UMGUZA BLACK EMPOWERMENT SYNDICATE

And

MESSENGER OF COURT BULAWAYO

And

THE OFFICER IN CHARGE QUEENS PARK POLICE

And

THE PROVINCIAL MINING DIRECTOR, BULAWAYO PROVINCE

And

ISMAIL LUNAT

IN THE HIGH COURT OF ZIMBABWE
NDLOVU J
BULAWAYO 9, 14 & 29 JUNE 2023

Urgent Chamber Application.

B. Sengweni with H. Moyo, for the Applicant.
D. Dube, for the 1st Respondent.
No Appearance for the 2nd Respondent.
L.T. Muradzikwa, for the 3rd & 4th Respondents.
S. Nkomo, for the 5th Respondent.

NDLOVU J: This matter came before me on an urgent basis in which the applicant is seeking a stay of execution pending a review of a Magistrates' Court's decision pending in this court. The application is opposed by all the respondents save for the 2nd respondent. The opposition is fronted on partly similar and partly different fronts by all of the respondents.

Each one of the active respondents took points *in limine*, of which some were similar and others different. I will in this judgment avoid allocating the points *in limine* taken to individual respondents who took them, for the sake of brevity.

BACKGROUND FACTS

The Bulawayo City Council owns land in which there is a farm going by name Look Kraal Farm. The applicant's parents have been renting that farm for several years. It happens that the farm is now more known for gold than the farming of any kind. The 1st respondent is a mining syndicate needless to say attracted to and interested in gold. The 5th respondent owns a gold mine near the Look Kraal Farm. The gold mine in question is called Wolley Dog Mine. These are the main players in this dispute.

The parties have been in and out of Court over the mining activities in the concerned area. According to the applicant, this time around it is the conduct of the 2nd respondent the Messenger Of Court ***[the MOC]*** under the directions of the 1st respondent that has birthed the conundrum that has landed the parties before this court.

According to the applicant, the 1st respondent approached the Magistrates' Court seeking a spoliation order through which it sought to be restored of the occupation of its Mahatshula mining situate at Wilsgroove Farm against him. He opposed the application on the basis *inter alia* that Willsgrove Farm is at least 10 Kilometres from Look Kraal Farm. His opposition was unsuccessful and the 1st respondent got the relief they sought. The end result of that is that the 1st respondent through its legal practitioners directed the MOC to Loot Kraal Farm and evicted the applicant. As if that was not enough trouble, an identical order was sought by the 5th respondent against the applicant under case number ***HC [UCA 39/23]*** Look Kraal Farm had nothing to do with Wilsgroove Farm and the court order. According to the applicant, all this was brought to the attention of the presiding Magistrate, and unfortunately did not receive the attention and the response the applicant hoped for from the Magistrate. It is on the basis of these brief facts that the applicant then launched a review application of the Magistrate's decision and subsequently this application.

POINTS *in limine*

As already indicated above, a lot of points *in limine* were taken by the respondents in this matter. The majority of those points had no potential of disposing of this matter at all or could be excused under the discretional power that *Rule 7* accords to the Court. I do not intend to unnecessarily expend energy on those points. Litigants must know and appreciate their case, in

order for them to avoid raising every imaginable objection as a point *in limine*. It is trite that a point in limine must be meritorious and be capable of disposing of the matter. The party taking a point *in limine* must be bona fide in doing so. It is now not uncommon to find a defence on the merits of the matter being taken as a point *in limine*. The kitchen sink approach courts are experiencing these days in respect of points *in limine* in urgent chamber applications amount to harassing the opponent, unnecessarily stressing the Court, misapplying the court's time, and stretching the litigant's resources when after all the matter would have been made to jump the queue. This practice must simply stop and should be discouraged whenever appropriate to do so in order for the Court to optimally utilize the time it has and for the represented litigant to get value for money.

1. **Urgency.**

An application for a stay of execution is by its nature an urgent application. In this case, the Court had already allowed the matter to jump the queue.

2/3. Lis pendens/Res judicata.

The matters cited did not involve the parties as are involved in this matter and they involved different subject matters.

4. Incompetent relief sought in the alternative.

The Founding Affidavit is clear on what the application is seeking in the main. The relief sought in the alternative is just that and no more, *in the alternative.* Above all, a Draft Order does not bind the Court.

5. The misnaming of the 4th Respondent.

With or without citing the 4th respondent, the applicant's case stands, on the facts of this case.

6. Mining Commissioner's injunction.

The injunction has nothing to do with the applicant's cause of action in this matter.

7. Failure to pay or to file proof of payment of the Sheriff's costs in respect of the application for review matter.

The application for review is not before me. Even if it were to be legitimate for me to entertain the point *in limine* taken, I would dismiss the point *in limine* taken as I hereby do in the exercise of my discretional powers derived from *Rule 7*.

8. Material dispute of fact.

Not every dispute of fact in an application matter is material to such a degree that it inhibits the court from determining the matter on papers. The same applies to what has been said are material disputes of fact in this matter. I do not find any inhibiting me from resolving this matter on the papers filed.

9. Locus standi.

Clearly, whether or not the lease agreement in respect of the Loot Kraal Farm is not in the name of the applicant is neither here nor there. What matters is that he is the one who was cited in the Court proceedings that resulted in him being evicted and he is dissatisfied with the eviction and has challenged it on review and the matter is hearing.

10. Utilization of Domestic remedies.

Only a Court of law in this jurisdiction has the power to stay the execution of a Court order.

11. Issue estoppel.

In the manner and words, this point has been put on paper and the fact that it was not argued orally, make the reasons I have given in dismissing the points *in limine* taken on urgency, *lis pendens*, and *res judicata* apply to this point with equal measure.

12. Interim interdict is final in nature.

It is trite that stay of execution orders and spoliation orders are orders in a class of their own. To argue that the applicant should have proceeded along the route of an urgent application seeking a final relief is to emphasize form over substance.

13. Dirty Hands.

An individual should not at law be characterized by an unconcluded criminal matter against him as he is presumed innocent until proven guilty by a competent court of law.

I dismiss all the above points *in limine* taken by the respondents for the brief reasons I have given above per the individual point and because they are without merit.

I turn to consider those points *in limine* taken by the respondents and I consider them to be legitimate and potentially decisive in this matter.

14. The matter has been overtaken by events.

The execution this court is being asked to stay took place more than 52 days before the applicant filed this application. This court simply has nothing to stop or stay anymore. The alternative prayer that in the event that execution has already taken place, it be reversed is unhelpful and disingenuous because at the time the application was filed, the applicant knew that execution had already taken place. It was not a question of a case whereby the applicant at the time he decides to apply and start the process is still on the ground but by the time he files and before he serves the application, the MOC or the Sheriff would have executed.

I uphold this point *in limine*

15. **Proprietness of the application**.

The Order by the Magistrate, the Warrant of ejectment as well as the Review application are not attached to the Founding Affidavit in this case. The application is on those basis not properly before me.

I uphold that point *in limine* too.

DISPOSITION

Having upheld two out of the fifteen points *in limine* taken, I, therefore, dismiss this application with costs.

Sengweni Legal Practice, Applicant's Legal Practitioners.
Dube Legal Practice, 1st Respondents' Legal Practitioners.
Civil Division, Attorney General's Office, 3rd & 4th Respondents' Legal Practitioners.
Mathonsi Ncube Law Chambers, 5th Respondent's Legal Practitioners.