LEVY MPONYA

And

ISRAEL SYNDICATE

Versus

ALLAN SIBANDA

And

PREACHMORE MASEKO

And

THE PROVINCIAL MINING DIRECTOR, MIDLANDS PROVINCE N.O

HIGH COURT OF ZIMBABWE
SIZIBA J
BULAWAYO 5 SEPTEMBER 2024 & 12 SEPTEMBER 2024

URGENT CHAMBER APPLICATION

Mr A. Mutatu for the applicants
Mr C. Makwara for the 1st & 2nd respondents
Mr S. Jukwa for the 3rd respondent

SIZIBA J

The major issue to be decided in this case is whether a party is entitled to seek audience in order to make oral submissions on urgency where a judge has made a decision that the matter is not urgent and ordered that the case should be struck off the roll of urgent matters with reasons which appear on the face of such order. In the case at hand, the applicants filed an urgent chamber application on the 17th of July 2024 seeking an interim order to interdict the 1st and 2nd respondents from carrying out mining activities at the disputed mining site. It is common cause that prior to the said application and on the 5th of July 2024, the 3rd respondent had adjudicated over the same dispute at the instance of the applicants and made a decision which was not palatable to the applicants. When the matter was placed before, the parties had

filed several pleadings and the 1st and 2nd respondents had raised points in *limine* which included the accusation that the matter was not urgent. After reading the papers, I formed a view that the matter was not urgent and I then made an order striking it off the roll of urgent matters and on the face of the order I also endorsed my reasons for this decision as follows:
"The applicant basically seeks an interdict that will contradict a lawful order of this court which stayed execution of judgment in HC111/23. There is no urgency in the application as the dispute between the parties was adjudicated upon by the 3rd respondent."

Subsequent to the above development, I was advised that the applicants' legal practitioner wrote a letter to the registrar whereby he was seeking audience with me so as to address me on the issue of urgency. On the other hand, counsel for the 1st and 2nd respondent replied the said letter, indicating that I was *functus officio*. I then directed that the matter be set down on the 5th of September 2024. On the hearing date, it was agreed that the parties should address me on the propriety of seeking audience with me and also on the question of urgency and I made it clear that if I take the view that the request for audience was improper, I would not delve into the question of urgency.

Mr Mutatu's submission was that where a judge says that the matter is not urgent, such is a *prima facie* view which is not binding to the judge and which view the judge can depart from upon hearing oral submissions from the parties. His basis was that the judge would not have heard the parties' oral submissions. His submission was that the judge under such instances would not be *functus officio*. His view was that it makes no difference whether the judge would have given reasons or not because every decision that a matter is not urgent means that a judge would be having reasons for such view. Counsel's vehement arguments were based upon this court's decisions in *Chadenga* v *Magistrate Manhibi N.O* HMT – 24 -20, *Sikhala* v *Gofa N.O & Others* HH – 176 – 23, *Searson & Others Chimutanda N.O & Others* HH – 337 – 18, *Kembo* v *Mavhangira & Others* HH – 162 – 18, *Kasinauyo* v *Zimbabwe Football Association* HH – 279 – 18.

A reading of the above cases will show that they are distinct from this case. The distinction lies in the fact that in the above matters, the learned judges had made comments through the

Registrar that the matters were not urgent without giving reasons and hence the applicants were entertained when they sought audience on the issue of urgency. Where reasons are provided as in the matter at hand, the position should be different. Mr Jukwa indicated that the 3rd respondent would abide by the decision of this court.

Mr Makwara's submission was that where a judge decides that a matter is not urgent, it is improper for the applicant to seek audience with the judge. Counsel's submission was that the effect of such audience would be to ask the judge to revisit, re examine and review his own decision. His submission was that such an exercise may potentially lead to a situation whereby the judge gets persuaded that the matter is urgent and such view would then contradict an extant order that he would have previously made. His view was that the judge who makes a decision that the matter is not urgent becomes *functus officio* on the question of urgency. I agree. Judges do not approbate and reprobate. The notion that a judge makes a *prima facie* decision that he can later change on the same facts and issues is alien at law. What is known at law is a *prima facie* right in the context of an urgent interdict, a *prima facie* case in the context of an application for discharge at the close of the state case in a criminal trial or at the close of the plaintiff's case in a civil trial. A judge's view is final and it can only be revisited where there are recognized exceptions in terms of the statutes, rules of court or common law such as in an application for rescission of judgment. *Mr Makwara* referred this court to a paper that was presented by Gowora JCC at the Judges' end of First Term 2019 Symposium whereof at page 27 of the paper, the learned Justice of the Constitutional Court posed the question as to whether a judge who makes a determination that the matter is not urgent becomes *functus officio* to which the answer was "yes". If such cannot be the case, litigants would be excused in thinking that judges do not apply themselves when they are faced with urgent applications because when they say a matter is not urgent, a party may persuade them otherwise. Such course would erode public confidence in the courts. Judges say what they mean and they mean what they say when they say that a matter is not urgent. A judge who takes such view would have read the papers and applied his or her mind to the issues to be decided. The only proper follow up by a party to a judge under such circumstances may be to request for reasons for the decision where such reasons are not provided.

In consideration of the above, I am of the firm view that the applicants' approach in seeking audience with me on the question of urgency is improper. I am *functus officio* in this matter on the question of urgency. I will not therefore make any further pronouncement on the issue of urgency. At the hearing of this matter, none of the parties addressed me on the question of costs and as such no order of costs shall be made.

Mutatu & Partners, applicants' legal practitioners

Mandipa, Makwara & Chikukwa, 1st and 2nd respondent's legal practitioners

Civil Division of the Attorney General's Office, 3rd respondent's legal practitioners