DAMOFALLS INVESTMENTS

Versus

TILFURY ZIMBABWE (PVT) LTD

And

FUNGAI BANGIDZA

And

MINISTER OF MINES & MINING DEVELOPMENT N.O.

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 17 & 25 JUNE 2020

Urgent Chamber Application

Advocate T. Nyamakura for the applicant
Advocate L. Nkomo for 1st & 2nd respondents
Ms B. T. Nyoni with Ms L. Dzumbunu for 3rd respondent

MAKONESE J: This application was initially filed at the Harare High Court on the 9th June 2020. The parties appeared before KWENDA J who issued the following order:

"It is ordered that:

1. The Registrar shall immediately transfer this matter to be heard at the Bulawayo High Court.
2. No order as to costs for this postponement."

I received the papers in this matter on the 10th of June 2002. The matter was set down for hearing on the 17th June 2020 by consent. After hearing oral submissions by the parties I undertook to deliver my ruling expeditiously. This is not the first time the parties have been in this court. Some of the matters involving the same parties are still pending. In this application the applicant seeks the following relief:

"Interim relief sought

1. Pending confirmation of the provisional order 1st and 2nd respondents, their agents, assigns, associates, employees or anyone acting under their control or direction be and are hereby interdicted or stopped from entering, staying or carrying out any construction, mining or activity of whatever nature at the remainder of Glen Arroch of the Main Belt.
2. Costs shall be costs in the cause."

"Final order sought

That you show cause to this honourable court why a final order should not be made in the following terms:

1. The 1st and 2nd respondents, their agents, assigns, associates, employees or anyone acting under their control or direction be and are hereby ordered to vacate the remainder of Glen Arroch of the Main Belt, failing which the Sheriff be and is hereby ordered to evict the respondents and all those claiming occupation through them.
2. That 1st and 2nd respondents shall pay costs of suit on an attorney and client scale."

Factual background

This is an application for an interdict filed under a certificate of urgency. The application is strenuously opposed by the 1st and 2nd respondents who contend that the application is an abuse of court process which ought to be dismissed with costs on a punitive scale. The applicant is the owner of the Remainder of Glen Arroch of the Main Belt, hereafter referred to as "Glen Arroch". In 2009, the applicant was issued with an Exclusive Prospecting Order (EPO) RA 988 over the Main Belt Farm and Glen Arroch by the Ministry of Mines. In March 2012, the 2nd respondent approached the applicants for a partial withdrawal of the Exclusive Prospecting Order and a request to prospect for minerals and mine on a 20 hectare plot falling within the EPO. Such permission was granted on 2nd April 2012. It is common cause that 1st and 2nd respondents then proceeded to register mining blocks known as Glen Arroch 80 registration number 29584, Glen Arroch 81 registration number 29585, Glen Arroch 82 registration number 29806. The respondents subsequently registered Glen Arroch 83. Between 2012 and 2018 the respondent carried on their mining operations and invested substantial sums of money in the project. Sometime in 2018 applicant alleged that the mining claims were not registered in terms of the law and sought to have the registration certificates cancelled. The respondents deny that the

registration process was tainted with illegality. A number of cases have been filed in this court in respect of the same dispute. On 21st May 2020 TAKUVA J dismissed an application for a declaratory order filed by 1st and 2nd respondents under case number HC 1707/18. On 26th May 2020, respondents filed an appeal against that decision. The matter is still pending. This urgent application is premised on the fact that on or about 7th June 2020, the applicant "discovered" that the respondents had resumed mining activities at Glen Arroch. The respondents aver that they have always been mining at the mining location and that there is no order of court preventing them from doing so. Respondents further contend that from 2018 when the applicants sought to challenge the registration certificates in respect of the mining activities, the applicant never approached the court seeking a cessation of mining activities.

Points *in limine*

The respondents have raised a number of preliminary points *in limine*, which they argue should dispose of the matter without delving into the merits. I shall deal with each of these points *in limine*.

Urgency

1st and 2nd respondents aver that this matter is improperly before the court in that it is not urgent at all. The respondents argue that this matter does not meet the requirements of urgency as contemplated by the Rules. Further, there is no justification whatsoever for the application to jump the queue and to be entertained ahead of other matters that are already before the court. The respondents aver that the matter must be struck off the roll of urgent matters with a punitive order for costs. In determining whether urgency exists in this matter it is not lost to this court that applicant categorically states in the founding affidavit that in May 2018 it "discovered" that respondents had commenced mining activities at Glen Arroch. Applicant further states that the mining activities had encroached on to residential stands belonging to the applicant. This present application was filed on the 9th of June 2020. It is apparent that the facts upon which the application is founded have been in the exclusive knowledge of the applicant by its own account since 2018. It is inconceivable that having been aware of the facts which give rise to the present

proceedings for more than two years, the applicant would, on the same facts, suddenly spring to action and allege that the matter has become urgent. It seems to me that the applicants' averments in the grounds supporting this application are mutually inconsistent. In paragraph 10 of the founding affidavit the applicant states that on 21 May 2020 the court dismissed an application which had been mounted by 1st and 2nd respondents. At paragraph 11 in the same affidavit the applicant avers that in the meanwhile the respondents have continued to mine. This betrays the fact that the applicant has always known that mining is taking place. The averments in paragraph 11 are in direct contradiction with paragraph 14 of the application where it is stated that the applicant came to know of the respondents' resumption of mining activities when in the earlier paragraph it is suggested that respondents continued to mine. The certificate of urgency filed with the application exposes the fact that the matter could not be urgent. The certificate of urgency intimates that the real basis for launching this application is the dismissal of an application which had been filed by 1st and 2nd respondents. There is clear reference to the judgment handed down on 21st May 2020 as having catalyzed the situation, resulting in the applicant deciding to file an urgent application for an interdict. The applicant suggests that this application could not be brought before the matter by TAKUVA J was finalised. That position is not sustainable on the facts. In paragraph 4 of the urgent chamber application, applicant makes the following unequivocal averment;

> *"In May 2018, the applicant discovered that the respondents were mining on a different site to the one in respect of which they had been granted the partial withdrawal. Further investigations revealed that the 2nd respondent has altered the co-ordinates he had agreed upon with the applicant which the partial withdrawal was granted. The applicant also discovered that 3 other claims had been registered by 1st respondent without the applicant's knowledge and consent."*

It is abundantly clear that for the past two years the applicant had full knowledge of the facts upon which this urgent application has been filed. What comes out clearly from the founding affidavit and all the accompanying documents that have been filed, including the reports by the Mining Surveyor dated 24 June 2019, is that at all material times since May 2018 1st and 2nd respondents have been carrying out the impugned mining activities with the knowledge of the applicant. The applicant failed to file this application since May 2018 when it

became aware of the very same facts giving rise to these proceedings. The applicant now contends that the need to act and the urgency arose on the 7th of June 2020 when mining activities "resumed." The applicant does not disclose precisely when the mining activities had stopped and whether there was an order that had ordered a cessation of these mining activities. These apparent gaps in the applicant's averments indicate that the urgency alleged by the applicant has been contrived. The applicant is not permitted to manufacture its own urgency and then act on such contrived urgency to establish urgency that does not in reality exist.

What constitutes urgency is set out in Rule 226 (2) of the High Court Rules, 1971. The principles on what amounts to are now well settled in this jurisdiction. In *Gwarada* v *Johnson & Ors* 2009 (2) ZLR 159 (H), at page 169 D to E, GOWORA J (as she then was) had to say about urgency:

> "*A matter does not assume urgency because a litigant has plans, the fulfillment of which requires an immediate solution. Urgency, in my view, arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extensive prejudice to the applicant. The existence of circumstances which may in their very nature be prejudicial to the applicant is not the only factor that a court has to take into account, time being of the essence that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threat whatever it may be. In the matter before me urgency has not been established."*

In *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 232 (H) MAKARAU J (as she then was), had this to say about the test to be applied in determining urgency at page 244D:

> *"It is my further view that, the issue of urgency is not tested subjectively. Most litigants would like to see their disputes resolved as soon as they approach the courts. The test to be employed appears to me to be an objective one where the court has to be satisfied that the relief sought is such that it cannot wait without irreparably prejudicing the legal interest concerned."*

See also *Kuvarega* v *Registrar General & Another* 1998 (1) ZLR 188 (H)

I am satisfied that the facts giving rise to the alleged urgency where known to the applicant in 2018. Between 2018 and 2020 the parties have taken each other to court for various

forms of relief. The applicant failed to assert its rights as contemplated by the Rules. Applicant failed to act when the need to act arose. This court cannot now, two years down the line, conclude that the matter has suddenly become urgent when the information at hand clearly shows that the 1st and 2nd respondents have always been mining at the mining location with the knowledge of the applicant. For these reasons, I am satisfied that this matter is not urgent. For the sake of completeness, I shall consider the other points *in limine* that have been raised on behalf of 1st and 2nd respondents.

Material non-disclosure

The second preliminary point raised by the 1st and 2nd respondents is that the applicant deliberately failed to disclose material facts that were relevant to these proceedings. The respondents contend that the non-disclosure was designed to mislead the court and hide material information from the court. In particular, it is pointed out that applicant instituted action proceedings against the respondents and two other respondents in the Harare High Court under case number HC 7244/19 on 30th August 2019. A perusal of the summons and declaration indicates that applicant sought an order in the High Court in Harare whose effect was to secure cancellation of the respondents' certificates of registration in respect of the mining claims. The applicant further sought an order to evict the respondents from the mining location. The proceedings under case number HC 7244/19 reveal three important issues. The first is that indeed the facts giving rise to the present proceedings by its own account was known to it as far back as the year 2018. Secondly, they reveal that it has always been applicant's desire to eject 1st and 2nd respondents from Glen Arroch. Thirdly, the summons and declaration in case number HC 7244/19, allege a contractual breach on that part of the 1st and 2nd respondents. Applicant makes the specific allegation that the respondents breached the agreement by failing to comply with the agreement by pegging outside the confines of the area that they were allowed to peg and mine. What is clear is that the relief sought in the summons case filed at Harare is the exact same relief which the applicant seeks as final relief in the present proceedings. At the time the applicant instituted the present proceedings it had already instituted proceedings for the ejectment of the 1st and 2nd respondents from the very same location under case number HC

7244/19. The applicant failed to disclose this very material information to this court. The applicant had a duty to disclose this fact. Upon realising that the applicant had filed an urgent chamber application when other related cases were pending at Bulawayo, KWENDA J, referred the matter back for consideration at Bulawayo. It is to be noted that litigants are discouraged from filing a multiplicity of actions in different courts seeking the same or similar relief. Time has come for legal practitioners to be reminded that it is improper for litigants to file multiple suits arising from the same facts in different courts. This conduct leads to confusion and in some instances to conflicting judgments. In this matter the non disclosure by the applicant is not only relevant but material.

It is trite that the hearing of a matter on an urgent basis by this court is an indulgence or privilege which the court accords to a selected few who fit into certain narrowly prescribed circumstances. Applicant, by seeking the indulgence to be heard ahead of other litigants whose matters were filed earlier, has the duty to disclose all material facts which are relevant to the matter at hand. The applicant must take the court into its confidence by disclosing the existence of pending matters between the same parties. The applicant clearly failed to make the material disclosure to the effect that it instituted proceedings under case number HC 7244/19 seeking relief which is similar to the final relief sought in these proceedings. This court, as a matter of principle, does not come to the aid of a litigant bent on wood-winking the court by not disclosing all the material facts. The court will refuse to grant relief where it is established that the non-disclosure was deliberate and material. In this matter I am satisfied that the non-disclosure was not only material but was deliberate. I come to this conclusion for two reasons. Firstly, the applicant filed the summons and declaration seeking the same or similar relief in the Harare High Court. At the time these proceedings were instituted, they were outstanding cases at the Bulawayo High Court related to the same matter. Secondly, at the time of the filing of this urgent chamber application, the applicant was aware that summons had been filed in case number HC 7244/19 seeking the very same relief.

I am in agreement with the remarks made by NDOU J in *Graspeak Investments* v *Delta Corporation (Pvt) Ltd* 2001 (2) ZLR 551 (H) at page 555C where the learned judge stated;

"*The courts should, in my view, discharge urgent chamber applications, whether ex parte or not, which are characterised by material non-disclosures mala fides or dishonesty. Depending on circumstance of the case, the court may make adverse or punitive costs as a seal of disapproval of mala fides or dishonesty on the part of litigants."*

In my view, it is not only *mala fides* but an abuse of court process, which ought to be discouraged, for a litigant to file multiple actions arising from the same facts and seeking the same relief. I can only conclude that the applicant was trying its luck and casting its net wide hoping that one of the cases would find "favour" though, dishonesty, with one of the courts and obtain the desired outcome. In *Centra (Pvt) Ltd* v *Moyas & Anor* HH-57-2012, BERE J (as he then was) had this to say at page 2 and 3 of the cyclostyled judgment.

"I would extend the position further and say the need to disclose material information should in fact be extended to cover any matter that is brought before the court, be it on urgent basis or not. Courts have no capacity to reward dishonesty on the part of litigants. In the instant case I am extremely concerned that the applicant's counsel deliberately chose not to disclose to the court that his client's case had been in and out of the same court and that another judge had declined to entertain it on an urgent basis. The legal practitioner then chose to embark on forum shopping for judges. This conduct is most reprehensible and does not add value to the practice of law."

I cannot not agree more with the sentiments of the learned judge. The accepted principle is that the issue of urgency can never be founded on material non-disclosure. A matter ceases to be urgent if it is founded upon deliberate withholding of vital information.

I would, therefore, find that the second preliminary point does have merit. The applicant chose to withhold vital information. The non-disclosure is immaterial. For this reason alone, the application ought to be dismissed without considering the merits. I shall, however, deal with the other preliminary point raised in this matter.

The relief sought in the interim is similar to the final relief

Although the interim relief sought in these proceedings is not couched in the same terms as the final relief sought, a close examination of the two clearly shows that the effect of the two

is the same. In the interim the applicant seeks an order to have 1st and 2nd respondents interdicted/stopped from entering, staying at or carrying out any construction, mining or activity of whatever nature at the Remainder of Glen Arroch of the Main Belt Block. This relief if granted has the effect of evicting the respondent from the mining claims. The seeking of relief on an interim basis which is similar in effect, to the final relief sought is incompetent. The applicant argued that the court has the discretion to amend or vary the draft order as it deems fit by deleting words such as "entering" the Main Belt Block. Even if the court were to amend the order as proposed by applicant's counsel, the net effect of the interim relief would be to cause the removal of the 1st and 2nd respondents from the mining location. In any event, the whole basis of this urgent chamber applicant is to secure an order of this court barring the 1st and 2nd respondents from carrying out mining activities on the mining claims.

It is a settled principle of our law that a court should not grant interim relief which is similar to or has the same effect as the final relief prayed for. The reason for this is obvious. Interim relief should be confined to interim measures necessary to protect any rights that stand to be confirmed or discharged, as the case may be.

See – *Econet Wireless (Pvt) Ltd* v *Trust Co Mobile and Anor* SC-43-13 and *Blue Rangers Estates (Pvt) Ltd* v *Muduviri & Anor* SC-29-04

It is my view that the relief sought in the interim is incompetent. Its effect is to provide final relief to the applicant. The report by the 3rd respondent confirms that 1st and 2nd respondents are substantially within the partially withdrawn area and what may be required is therefore an adjustment of the beacon positions. The validity of the report by the 3rd respondent has not been challenged. It would be incompetent and indeed improper to grant relief that would result in the ejectment of the 1st and 2nd respondents from the mining location.

I would, accordingly, uphold these preliminary points and dismiss the application without going into the merits.

In the result, it is ordered that;

1. The application be and is hereby dismissed.

2. The applicant is ordered to pay the costs of suit.

Wilmot & Bennet, applicant's legal practitioners
Mutatu, Masamvu & Da Silva Law Chambers, 1st and 2nd respondent's legal practitioners
Civil Division of the Attorney General 3rd respondent's legal practitioners