HB 62/20
HC 2776/19

ANTECH LABORATORIES (PVT) LTD

Versus

KHAN AND MAWADZI MILLING SYNDICATE

And

KWEKWE CITY COUNCIL

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 29 NOVEMBER 2019 & 14 MAY 2020

Urgent Chamber Application

Ms E. Sarimana for the applicant
S. Farai for the 1st respondent

TAKUVA J: This is an urgent chamber application in which the applicant seeks the following relief:

> "Terms of final order sought
>
> That you show cause to this honourable court why a final order should not be made in the following terms:
> 1. That the first respondent is hereby permanently interdicted and prohibited from allowing any of its employees to live at or in the structures on applicant's property being Purdown Farm of Aspdale held under Deed f Transfer number 2586/90.
> 2. That first respondent be and is hereby ordered to pay the costs of suit on the attorney and client scale.
>
> Interim relief granted
>
> Pending the final determination of this matter, it is ordered:
>
> 1. That pending the granting of a final order in this suit first respondent be and is hereby ordered to evict its employees and all those claiming occupation through it from living in structures situated upon applicant's property being Purdown Farm of Aspdale held under Deed of Transfer number 2586/90.

2. Should the first respondent fail or neglect to abide by order 1 of the interim order within five (5) days of service of the provisional order , then any duly authorized member of the Zimbabwe Republic Police stationed at Kwekwe be and is hereby empowered and authorized to evict all unauthorized persons found at the structures situated on Purdown Farm of Aspdale.

A service of the application and provisional order on first respondent

The application and provisional order shall be served by the Sheriff or his deputy."

Background

Purdown Farm is owned by the applicant as indicated in the Deed of Transfer Number 2586/90. On the 6th of December 2017 the 1st respondent advised second respondent that it was making an application to the Ministry of Mines for the granting of a special grant over a portion of Purdown Farm. The second respondent raised no objection to the issue of a special grant. Subsequently the special grant SG 6899 was issued on the 27th of August 2018 by the Permanent Secretary for Mines and Mining Development. The applicant was not given an opportunity to be heard in violation of the *audi alteram partem* rule. Applicant only learnt of the issue of SG 6899 after the first respondent's employees came to its property and started clearing the ground.

Consequently, applicant filed an urgent chamber application under case number HC 2790/18 challenging the issue of SG 6899. A provisional order was issued by this court per MABHIKWA J ordering the first respondent pending the granting of a final order, not to conduct any work or commence, or continue any mining operations under or in terms of the provisions of Special Grant 6899 issued on 27 August 2018.

On 14th October 2019 applicant's manager Edson Luwobo discovered that there were unauthorized occupants living in the structures situated on the applicant's property within the confines of SG 6899. Luwobo requested the occupants to vacate but they refused. He was later informed by Ms Khan that the unauthorized occupants are the first respondent's employees who have a right to live there as her father built the structure on it. Following Luwobo's unfruitful encounter with Ms Khan, applicant's legal practitioners addressed a letter of demand to 1st respondent's legal practitioners demanding that its entire employees vacate from applicant's

property. The 1st respondent's legal practitioner responded on 25 October 2019 by stating that the 1st respondent had invested much money on this special grant and thus the security personnel and their respective families are living on the premises to secure first respondent's investment. Applicant's legal practitioners wrote another letter on 31st October 2019 again inviting the 1st respondent to arrange the removal of the unauthorized occupants. There was no further response from 1st respondent nor have the unauthorized persons vacated applicant's property. Applicant then filed this application for eviction of the unauthorized occupants living in structures situated on its property.

Applicant's case is based on the following grounds:

1. Urgency and irreparable harm

   Urgent eviction of 1st respondent's employees is sought for a number of reasons. Firstly, there are no ablution facilities or running water in the area in question. This not only poses health and safety risks to the 1st respondent's and applicant's employees but also to the other residents living in that area. Secondly, the 1st respondent's employees are relieving themselves in an open area next to the laboratory. This is likely to contaminate the environment and cause adverse health effects to the applicant's employees as there is a real threat of an outbreak of diseases which threat requires the urgent intervention of this court. Thirdly, the presence of the first respondent's employees living next to Antech Laboratory, an internationally accredited laboratory owned by the applicant may negatively affect the assaying business of the laboratory. As an internationally accredited laboratory, Antech Laboratory has a professional image and reputation that it must maintain. It however cannot do so if there are unauthorized occupants living next to the laboratory. Finally, it was contended that the security of Antech Laboratory is at risk as there are strangers living next to the laboratory whom the applicant has no control over.
2. Balance of probabilities

   The balance of probabilities favours the applicant as it is not only the owner of the property in question but also of the structures on it wherein the 1st respondent's

employees are living. Further, the 1st respondent is prohibited by the provisional order in case number HC 2790/18 from doing so.

3. Other remedy

   Applicant argued that it has no other recourse at law except the urgent intervention of this court.

Applicant's *prima facie* right

The structures wherein the unauthorized occupants live, are situated on Purdown Farm owned by the applicant and not the first respondent. They were built by the applicant for its own use and were not erected by the first respondent nor the father of Ms Khan. It therefore follows that the first respondent must first seek permission from the applicant before its employees and their respective families may occupy these structures. Applicant has not permitted the occupation thereof by the 1st respondent's employees and their respective families. Consequently, the first respondent's employees and their respective families have no right to occupy applicant's property.

Further, despite the second respondent's attaching as a condition of its consent to the special grant application that the 1st respondent must "make use of the existing tanks and infrastructure available", it had no such right nor the legal authority to do so. If first respondent is relying on that baseless condition which incidentally is not a condition of the SG 6899 itself it is mistaken. In any event the SG 6899 is being challenged by applicant in case number HC 2970/18 and the matter is pending before this court.

Also, no employees should be on the area as there is no work to be done. The first respondent has therefore contravened the provisional order by allowing its employees and their respective families to stay on the structures situated in the applicant's property. There is no need for first respondent to have security personnel since there is nothing to secure.

The 1st respondent opposed the application. It raised seven (7) points *in limine* which I shall deal with *seriatum*. The first point it raised is couched as;

"Lack of urgency or explanation thereof in the founding affidavit". The argument here is that urgency arose on the 14th October 2019 but action was only taken on the 22nd November 2015. Since the applicant was able to live with the unpleasant situation for a period well in excess of one calendar month, the urgency is self created.

I must hasten to point out that the principle that has emerged from a plethora of cases is that a matter is urgent if at the time the need to act arises, the matter cannot wait. There is no set time period to establish urgency but it is the situation which the applicant finds itself and the circumstances thereof that justifies the matter being urgent. In this instance, it is true the urgency arose on the 14th of October 2019. However, before taking action on 22nd November 2019, applicant took a series of steps to try and protect its rights before filing this application. Applicant instructed its manager Edson Luwobo to request the unauthorized occupants to vacate applicant's premises. Nothing positive came out from this engagement. Applicant then wrote two letters of demand for the eviction of the unauthorized occupants. The letters were written to the 1st respondent's legal practitioners of record. First respondent refused to cooperate and applicant then filed this application.

It is clear from the above that the applicant did not sit on its laurels between the 14th of October 2019 and the 22nd of November 2019 when it filed this application. I find therefore that this matter is urgent. The point *in limine* is therefore dismissed.

Secondly, first respondent complained of "Defective application and/or available alternative relief." According to the first respondent, the applicant should have filed a court application for contempt of court instead of an urgent chamber application. Therefore, the allegation that first respondent violated the provisional order falls away completely.

The applicant seeks an eviction order and not contempt order and hence there was no need for it to file a contempt application. In terms of section 291 of the Act, a special grant may be issued to any person to carry out <u>prospecting</u> operations or <u>mining</u> operations or any other operation for mining purposes. In casu, Special Grant 6899 was issued to the first respondent to carry out <u>mining</u> operations not <u>prospecting</u> operations. However, the provisional order which

was granted in favour of the applicant in case number HC 2796/18 interdicted the first respondent from carrying out the same operations. In my view, it follows that without the right to carry out any mining activities there is absolutely no basis for the first respondent to allow its employees to occupy applicant's property.

It has not been denied that there are many people including children staying there and there are no ablution facilities or running water. Surely it does not make sense for the applicant to wait for an outbreak of a disease before acting. Further, a special grant only grants mining rights to the first respondent and not ownership rights of the area covered by the special grant. The owner retains its ownership right. This explains why section 291 (3) of the Act provides that the Secretary has a duty to notify the owner of the land falling within the area covered by the special grant of the issue of the special grant.

If it was the case as argued by the first respondent that once a special grant has been granted ownership no longer vests in the owner of the land in question, then there would be no need to notify the owner of the land or even to refer to him or her as the owner of the land, as it would be automatic that the area covered by the special grant is no longer his or hers. Moreover, the special grant is for a limited time, *in casu*, it is for two years. The clear provisions of section 291 (3) of the Act show that it cannot have been the intention of the Legislature that every holder of a special grant has ownership rights over the area covered by the special grant as that would create an absurd situation.

Reporting first respondent to the police and Environmental Management Authority would not have amounted to alternative remedies in that the applicant seeks an eviction order, a remedy that would not have been granted by either of the two institutions. In the circumstances the application and relief are not defective at all and the point *in limine* is hereby dismissed.

Thirdly first respondent objected to what he termed "Defective and biased certificate of urgency." The contention here is that the certificate of urgency is fatally defective because the legal practitioner did not apply his mind to the facts. It was further argued that the legal practitioner based his conclusions on assumptions and not "a clear and obvious lack of any other

remedy." The deponent of the certificate was supposed to satisfy himself before "trying to create urgency out of it," so the argument went.

Finally, the legal practitioner was criticized for "joining hands with applicant in declaring the special grant premises as the property of the applicant" when this is untrue. Therefore any reference to ownership in the certificate of urgency "falls away" so first respondent contended.

The first respondent is clearly misinformed as regards the true test to be applied to certificates of urgency. It is whether the legal practitioner applied his mind to the issues and concluded that the matter is urgent, giving his reasons for his conclusion. It follows that the genuineness of the belief postulated in the certificate must be tested by reference to all the surrounding circumstances and facts to which the legal practitioner is expected to have regard.

In casu the certificate shows that indeed a case had been made out that justifies the hearing of the matter on an urgent basis. I say so because Melisa Khan in her opposing affidavit admitted the existence of a pit latrine and that water is brought in bousers. It was not denied that there is no fresh running water and first respondent is contemplating "sinking a borehole". This is mind boggling given the fact that the first respondent obtained SG 6899 on the 27th of August 2018 which is set to expire on the 26th of August 2020 and it is only suggesting sinking a borehole now, after the applicant has filed an urgent chamber application. I find for the above reasons that the certificate of urgency *in casu* is valid. I therefore dismiss this point *in limine*.

The fourth point *in limine* relates to *locus standi* wherein Ms Khan avers that Orpheus Mining (Pvt) Ltd which is applicant's original name, does not clothe applicant with *locus standi* to institute the present proceedings. This conclusion is incorrect in that Orpheus Mining (Pvt) Ltd and the applicant are one and the same entity as can be seen from the certificate of change of name document attached to the application as annexure "A". In view of this irrefutable fact, the complaint about *locus standi* falls away. This point *in limine* is also without merit and it is hereby dismissed.

The fifth point first respondent took *in limine* is that applicant ought to have stated on the face of the application the "exact nature of the application". It was further contended that as it stands, no-one knew whether or not the applicant "is seeking an interdict, spoliation or any other remedy."

I honestly fail to comprehend the first respondent's argument here. In terms of the High Court Rules 1971 an application of this nature must clearly state the grounds on the face of that application. *In casu*, this is exactly what the applicant has done. On the face of the application there are three grounds namely;

(i) That the 1st respondent has violated the provisional order granted by this court by allowing its employees to occupy applicant's farm;
(ii) There is a real risk of outbreak of diseases on the farm; and
(iii) There is a security risk being posed to the applicant because of the presence of strangers on its farm which farm also houses an accredited laboratory.

It is evident from the above that the applicant seeks to evict the first respondent's employees from the property. Accordingly, the application is not defective and the preliminary issue must therefore fall away.

First respondent argued as its sixth point *in limine* that the relief being sought by the applicant is incompetent in that applicant should have issued summons for eviction since there is much factual disputes. It also argued that applicant through this application wants to "overtake" the dispute between the parties under case number HC 2790/18 which is yet to be finalised. Further, it was contended that this property does not belong to the applicant and granting a final eviction order would have the effect of "killing the merits of the main dispute" under HC 2790/18 should the matter be decided in first respondent's favour.

This point was raised in bad faith in my view. All applicant wants as its relief is to evict first respondent's employees from its property. The special grant issued to first respondent authorized it to carry out mining operations and not to place its employees in applicant's

property. In any event if first respondent is barred from carrying any mining activities by the court, it therefore follows that there is no reason for its employees and their families to be in the premises. First respondent claims to have bought material to set up hammer mills and placed it on the premises. What is baffling is why it would do that if it was barred from carrying out mining activities in case number HC 2790/18?

Finally, first respondent complained bitterly that there has been "no proper service" of this application on its legal practitioners it had hired under HC 2790/18. According to Ms Khan this prejudiced her in that she saw the application late. In his answering affidavit Mr Raymond Maxime Smithwick, applicant's director stated the following:

> "9.1 The applicant chose to serve the first respondent on its legal practitioners because in case number HC 2790/18 the Deputy Sheriff could not locate the first respondent's address on the special grant. In an effort to bring the application to the attention of the first respondent, I thought it will be more practical if 1st respondent was served on its legal practitioners given that the legal practitioners were aware of the matter and had responded to the applicant's letter of demand. Little did I know that applicant will later on be criticized for that."

I agree entirely with this observation. Ms Khan corroborates this observation by confirming that she indeed was in a remote place in rural Gokwe at the time the application and notice of set down were served. In any event the rules on service of documents are there to ensure that court documents are brought to the attention of a party to be served with these documents. In casu, an effort was made to bring the application to the attention of the first respondent. Ms Khan even filed her opposing affidavit and no prejudice was suffered by the first respondent. In the circumstances, the point *in limine* has no merit and it is hereby dismissed.

On the merits, I find that the area of land is owned by the applicant. The first respondent acquired rights to carry out mining as opposed to prospecting operations on the land in dispute. The first respondent's rights to conduct mining operations were taken away by an order of this court in case number HC 2790/18. I take the view that the acts of purchasing, stock piling and

assembling mining equipment Is tantamount to carrying out mining operations which task was specifically prohibited under HC 2790/18. As regards the first respondent's so called employees, I am convinced that the first respondent is letting the premises to those so called security guards. It is not ideal to have families staying there as there are no ablution facilities nor running fresh water.

In the circumstances, there is need for the court to intervene urgently and protect human health and the environment. Accordingly an interim relief is granted in the following terms;

Pending the final determination of this matter, it is ordered;

1. That pending the granting of a final order in this suit, first respondent be and is hereby ordered to evict its employees and all those claiming occupation through it from living in structures situated upon applicant's property being Purdown Farm of Aspdale under Deed of Transfer number 2586/90.
2. Should the first respondent fail or neglect to abide by order 1 of this interim order within five (5) days of the service of the provisional order, then any duly authorized member of the Zimbabwe Republic Police stationed at Kwekwe be and is hereby empowered and authorized to evict all unauthorized persons found at the structures situated on Purdown Farm of Aspdale.
3. The provisional order in this matter shall be served on first respondent at the offices of its legal practitioners, Farai and Associates, first floor South Wing, Beverley Building, R G Mugabe Way, Kwekwe.

Coghlan & Welsh, applicant's legal practitioners
Farai & Associates, 1st respondent's legal practitioners