DINSON COLLIERY COMPANY (PRIVATE) LIMITED
versus
MINISTER OF HOME AFFAIRS AND
CULTURAL HERITAGE N.O.
and
COMMISSIONER GENERAL OF POLICE N.O.
and
SERGEANT MAZANI N.O.
and
TANAKA ENERGY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 24 February 2021 and 10 March 2021

Urgent Chamber Application

RF. Mushoriwa, for the applicant
T. Tembo, for 1st, 2nd and 3rd respondents
T. Pfigu, for the 4th respondent

MUSITHU J:

INTRODUCTION

On 10 February 2021, applicant filed this urgent chamber application seeking relief set out in the draft provisional order as follows:

> "TERMS OF FINAL ORDER SOUGHT:
> That you show cause to the Honourable Court why a final order should not be made in the following terms-
> 1. Pending determination of the ordinary application for review which is to be filed within 5 days of the resumption of filing of normal court business.
> 2. That 3rd and 4th Respondent shall pay costs of suit on the higher scale of attorney and client.
>
> INTERIM RELIEF GRANTED
> 1. Pending the return date, the Applicant shall be authorised to use its fuel storage facility at its Hwange colliery and dispense fuel as normal.
>
> SERVICE OF PROVISIONAL ORDER
> This provisional order be served on the Respondents by the Deputy Sheriff or Applicant's legal practitioners"

Applicant filed an amended draft order through its answering affidavit on 19 February 2021. The amended draft order only affects the terms of the final order sought. The interim relief sought remained unchanged.

I gave directions on the filing of notices of opposition and further pleadings in line with the latest Covid 19 National Lockdown Practice Direction. The Civil Division of the Attorney General's Office representing 1st to 3rd respondents, advised by letter of 19 February 2021 that they would abide by the order of the court. 4th respondent opposed the application. Having gone through the papers, I realised that there were matters in respect of which further clarity was required from counsel. I met the parties' counsel in court on 25 February 2021. Ms *Tembo* for the 1st, 2nd and 3rd respondents advised that her clients were not opposed to the relief sought. Somehow 3rd respondent had acted on a frolic of his own, since the matter was purely a civil dispute. She tendered a letter dated 18 February 2021, from the office of the Police's Director Legal Services addressed to the Director Civil Division of the Attorney General's office. The letter essentially stated that the 1st, 2nd and 3rd respondents would abide by the decision of the court. I will deal with this letter further in the judgment.

In light of the 18 February 2021 letter, I asked Ms *Tembo* why her clients could not just consider removing the diesel from seizure since it was 3rd respondent's conduct that applicant sought to have impeached. Once the diesel was removed from seizure, then it meant that the cause of the complaint would have fallen away, paving the way for the withdrawal of the application or the filing of an order by consent. Counsel were all amenable to this course of action, which would yield an expeditious resolution of the matter. Ms *Tembo* indicated that her clients kept shifting goal posts. She needed time to further engage and then revert back to the court in writing on or before 1 March 2021. On 1 March 2021, no written communication came. Ms *Tembo* verbally informed my assistant that she was having difficulties in getting a firm position from her clients. She could not communicate in writing on that day as per her undertaking. Her troubles were confirmed by way of her letter to the Registrar dated 8 March 2021. I shall revert to this letter latter on in the judgment. It was for the foregoing reasons that I had to prepare this judgment.

FACTUAL BACKGROUND

Applicant, a mining company purchased 40 000 litres of diesel from an entity called Daily Dose (Private) Limited (Daily Dose) on 5 January 2021. The diesel was fully paid for. It was delivered at applicant's premises on 23 January 2021. Applicant proceeded to consume

the product in its operations. On 25 January 2021, applicant learnt that a third party, Tanaka Energy (4th respondent herein) was claiming ownership of the same diesel. 4th respondent filed a police complaint of fraud against Daily Dose. On 5 February 2021, 3rd respondent seized the diesel at applicant's premises. It issued an Exhibits Seizure Confirmation Receipt. The effect of the seizure was to suspend the consumption of the diesel pending the conclusion of the criminal proceedings.

Applicant's Case

Applicant contends that the seizure of the diesel effectively crippled its business operations. The fuel tanks at its premises were not part of the evidence required by the criminal court. Applicant claimed that since it operated a colliery in Hwange, the closure of the tanks amounted to a closure of the mine. The period within which the tanks were to remain closed was unknown in light of the Covid 19 induced restrictions on the operations of criminal courts. 3rd respondent did not produce a warrant of seizure in terms of section 50 of the *Criminal Procedure and Evidence Act*[1](the Act). His conduct violated the law. Applicant's consent was not sought before the seizure.

Applicant became aware of the existence of 4th respondent after receiving an urgent chamber application under HC82/21. It was at that stage that it also became aware that 4th respondent was the complainant in the criminal case. Applicant submits that a reading of the facts in HC82/21 showed that the matter was civil and not criminal. 4th respondent's cause of action arose from a breach, which gave rise to a civil claim. 4th respondent had already pursued that route.

Applicant further contends that in the absence of a warrant of seizure issued in terms of section 50 of the Act, or its consent to the seizure, 3rd respondent's conduct was unlawful. 4th respondent did not produce any compelling evidence to prove its entitlement to the diesel. Applicant also claims that by the time 3rd respondent issued the notice of seizure, applicant had already consumed some of the diesel as its operations were heavily reliant on the commodity. The notice of seizure was only issued a fortnight after applicant took delivery of the diesel.

Applicant further submits that it could not be made to suffer from the consequences of an alleged breach of contract between 4th respondent and Daily Dose. It was not privy to that

[1] [*Chapter 9:07*]

contract. Applicant was an innocent purchaser. It had no interest in the dispute between 4th respondent and Daily Dose.

Applicant asserts that the urgency of the matter arose as a result of the 3rd respondent's seizure of its diesel on 5 February 2021. It instituted the application as soon as was practically possible in light of the Covid 19 lockdown restrictions. It continued to suffer financial prejudice as production at the mine all but ceased in the absence of diesel to run the machines. Applicant would be driven into financial ruin if the matter was not heard on an urgent basis. Applicant also averred a clear right to the relief sought. The effect of 3rd respondent's notice was to suspend all mining operations. The vehicles used in the operations were massive and could not be readily driven to a service station for refuelling. The only way to run operations uninterrupted was to have a fuel depot on site. The mine could not be run without access to diesel stocks. Harm was imminent. Applicant had obligations to be serviced from the mining proceeds. 4th respondent had civil remedies at its disposal against Daily Dose, assuming it was later found to be the rightful owner of the diesel.

The balance of convenience favoured the granting of the relief sought. The criminal case did not require that the diesel be available as an exhibit. In any case, the diesel had been partly consumed at the time of seizure. The administration of justice would not be compromised by allowing applicant to continue with operations, as compared to the total shutdown of operations. At any rate, 4th respondent had taken the civil route which was the correct procedure under the circumstances. Applicant also submitted that there was no other alternative remedy that would allow it to operate normally.

4th respondent's case

In response, 4th respondent raised the following points in *limine*: incompetent relief and lack of urgency. 4th respondent argued that the relief sought was incompetent as it was final and definitive. There would be nothing for the court to confirm on the return date. The diesel was being held as an exhibit. Once it was used up, then there would be no proof of the alleged offence against Daily Dose. The application ought to be dismissed on that basis alone.

On urgency, 4th respondent submitted that the diesel was seized on 25 January 2021. Applicant only approached the court on 10 February 2021, some 15 days later. There was no explanation for the delay. Applicant failed to act when the need to do so arose. It did not treat the matter as urgent as contemplated by the rules of court. The matter had to be struck off the roll of urgent matters on that basis.

On the merits, 4th respondent argued that it was the owner of the diesel delivered to the applicant, and not Daily Dose. Applicant had no clear right over the diesel. It was erroneously delivered to applicant by 4th respondent as demonstrated in HC 82/21. The diesel was not from Daily Dose. It was from 4th respondent who had procured it from NOIC Harare. 4th respondent then hired Viciously Thirsty (Pvt) Ltd to transport the diesel from Harare to Daily Dose premises in Hwange. It later turned out that the premises belonged to the applicant.

4th respondent disputed the harm alleged by the applicant justifying the hearing of the matter on an urgent basis. The harm was reparable. The balance of convenience favoured the removal of the matter from the roll of urgent matters. Applicant had alternative remedies. It could sue Daily Dose for the loss allegedly suffered.

Applicant's Reply

In response to the points in *limine*, applicant refuted the claim that the relief sought was incompetent. The court was reposed with discretion to grant an order with appropriate modifications. At any rate, there was no evidence to prove that the diesel seized by 3rd respondent was the same diesel claimed by 4th respondent. From the date of delivery to the date of seizure, applicant had consumed and restocked the diesel in its tanks. Further, applicant's business was heavily dependent on diesel powered machinery. At any given time, applicant would have diesel in its stocks. On the return day there would be diesel in the tanks. No one would suffer prejudice even if the court found against the applicant. There was nothing precluding 3rd respondent from taking the seized diesel into its custody as an exhibit. It was the diesel that was required as an exhibit and not the entire fuel dispensing facility. Applicant would be greatly prejudiced by being denied access to its fuel tanks and dispensing facility.

Further, in terms of the Act, a police officer was required to take the seized article to a place of security. That was not done in *casu*. The law did not make provision for the detention of an exhibit, and leaving it in the custody of a third party. That resulted in the third party incurring unnecessary expenses. The same legislation did not allow a police officer to shut down business operations without just cause. In any case, 3rd respondent's conduct was unlawful in the absence of a warrant or applicant's consent to the seizure.

Applicant argued that the date of seizure was 5 February 2021. This was confirmed by the Exhibits Seizure Confirmation Receipt issued by 3rd respondent.[2] Applicant treated the

[2] See Annexure A1 to the applicant's founding affidavit on page 15

matter as urgent. It immediately commenced litigation. Applicant was enjoying peaceful and undisturbed use of its fuel dispensing facility prior to the seizure. Litigation would have been avoided had 4th respondent pursued the party it had an agreement with. It was for that reason that applicant sought costs on the punitive scale.

PROCEEDINGS UNDER HC 82/21

Applicant herein was 1st respondent while 4th respondent herein was the applicant. Daily Dose was the 2nd respondent. In that application, 4th respondent sought the following interim relief:

> "Pending determination of this matter, the applicant is granted the following relief;
> 1. The interim relief be and is hereby granted.
> 2. The 1st respondent shall release and restore to the applicant 40 000 litres of diesel erroneously delivered to it by the applicant within 24 hours of service of order this order……."

The brief facts were as follows. On 19 January 2021, 4th respondent received an order from Daily Dose for the supply of 40 000 litres of diesel to its premises in Hwange. 4th respondent had had no prior dealings with Daily Dose and the applicant herein. 4th respondent's policy was to load fuel for delivery upon proof of payment for the product. On this occasion, it was verbally agreed that payment would be made in Hwange before the diesel was offloaded. This was meant to avoid the inconvenience of having an official of Daily Dose travel to Harare to make payment before delivery.

It turned out that the applicant herein was the owner of the premises where the fuel was to be offloaded. 4th respondent claimed that Daily Dose had misled it. Trouble started when the driver of the truck asked for payment after offloading. Applicant herein refused to make payment. A police report was made on 23 January 2021 under CR 81/01/21. On 24 January 2021, the driver was informed that applicant herein had already made payment to Daily Dose. The alleged payment to Daily Dose never found its way to 4th respondent. Proof of payment by applicant to Daily Dose was availed to the 4th respondent. According to 4th respondent, this development came as a shock. Applicant herein was never mentioned in the transaction between 4th respondent and Daily Dose. 4th respondent wanted its diesel back. It had no contractual obligation to supply applicant with diesel. It was at that stage that the police instructed applicant to stop consuming the diesel pending conclusion of the criminal proceedings.

4th respondent claims that at the police station, it was advised that its claim was civil in nature. It proceeded to seek legal advice. It approached the Hwange Magistrates Court under case number GL 01/21, seeking an order to uplift its diesel from the applicant. The court struck the matter off the roll for want of jurisdiction. That prompted an approach to the High Court under HC82/21. Applicant herein and Daily Dose opposed the application. In addition to raising preliminary objections, applicant insisted it had entered into an agreement with Daily Dose. It had been wrongly sued. For its part, Daily Dose denied any contractual relationship with 4th respondent. It claimed having a contractual relationship with Pritchard Trading (Private) Limited, the supplier of the diesel. The diesel was fully paid for. The application was placed before MAFUSIRE J who made the following remarks on 9 February 2021:

> "*1. Not urgent.*
>
> *2. Feared loss not irreplaceable"*

ANALYSIS

Incompetent Relief

4th respondent submitted that the relief sought by the applicant was final and definitive in nature. There would be nothing for the court to determine on the return date. In response, applicant argued that there was nothing amiss with the relief sought. There was no evidence to suggest that the diesel seized by 3rd respondent was the same diesel 4th respondent lay claim to. Applicant's business largely depended on use of diesel. Its tanks were restocked all the time. In any case, the court had discretion to grant an order with appropriate modifications.

4th respondent's objection brings to the fore the significance of *Order* 32 *Rule* 246 (2). It reads:

> "Where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case he shall grant a provisional order either in terms of the draft filed or as varied"

From a reading of *rule* 246 (2), a judge needs to be satisfied that the papers before him establish a *prima facie* case. That is the primary consideration. The structure of the draft order is not the paramount consideration. After all as the appellation implies, the order accompanying the application comes in draft form. The order to be granted at the end of the day is an order of the court. That explains why in my view *rule* 246(2) allows the judge to make modifications to the order. The judge must grant an order which will serve a purpose at the end of the day.

Once a judge is satisfied that a *prima facie* case has been established, he cannot decline the relief sought by an applicant on the basis that the interim relief sought is similar to the terms

of the final relief sought. I am fortified in this regard by the views of MAFUSIRE J in *Amalgamated Rural Teachers Union of Zimbabwe & Another v Zimbabwe African National Union [Patriotic Front] & Another*[3]. He said:

> "*In casu,* it is true that the interim relief sought in the original draft order was almost identical to the final order sought on the return day. In essence this relief was the interdict to restrain the respondents from continuing with the activities complained of. But my view is that the principle or requirement that the interim relief in an urgent chamber application should not be the same as the final relief to be sought on the return day is not cast in stone. Every case depends on its own facts. In appropriate situations it may be that the relief sought in the interim may be all that an applicant was concerned with yesterday, today and tomorrow. He may want it today on an urgent basis. That does not stop him from wanting it again on a permanent basis on the return day. If it is granted today on an interim basis, all he may want on the return day is its confirmation. All he shows in the interim, among other things, is an actual or perceived infringement of a *prima facie right*, even if that right be open to some doubt. On the return day he must prove, *on a balance of probabilities*, an actual or perceived infringement of a clear right. It is not altogether uncommon for the court to grant interim relief, only to discharge it on the return day. Thus, I found the first respondent's objection a moot point and lacking in merit" *(underlining for emphasis)*

I fully associate myself with these observations. Once a judge is satisfied that a *prima facie* case has been established, then he must in my view grant the interim relief sought. Errors in the construction of the draft order, and in turn the interim relief sought are remediable[4]. It is for this reason that *rule* 246(2) endures[5]. 4th respondent has not denied that applicant maintains a constant supply of diesel for its operations. The diesel will always be available at any given time. No party would be prejudiced by an order directing the consumption of the diesel pending the return date to avoid unnecessary inconvenience to operations.

In any event, the quantity of the diesel at stake is not in dispute. That the diesel was delivered to applicant's premises is also not in dispute. It is common cause. I do not see how investigations and the criminal prosecution would be stifled by allowing applicant to consume the product pending the conclusion of that process. Applicant always has the product in stock. Alternatively, 3rd respondent could move the diesel to another storage facility to avoid disrupting applicant's operations which require the constant replenishing of its diesel stocks. Accordingly I find that the objection lacks merit and is accordingly dismissed.

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[3] HMA 36/18

[4] See *Qingsham Investments (Private) Limited v Zimbabwe Revenue Authority* HH 207/17 at page 2

[5] See also *Phillip Chiyangwa v Interfin Bank Limited (In Liquidation) & Another* HH 982/15 at page 2 of the judgment

Urgency

4th respondent contends that the matter is not urgent. The diesel was seized on 25 January 2021, but applicant approached the court some 15 days later. There was no explanation for the delay in launching the application. The applicant on the other hand avers that the seizure occurred on 5 February 2021, when it was issued with the Exhibits Seizure Confirmation Receipt.[6] The application was filed on 10 February 2021.

I find the applicant's explanation plausible. The Exhibits Seizure Confirmation Receipt issued by 3rd respondent is dated 5 February 2021, though it states that the seizure occurred on 25 January 2021. There is no explanation as to why the receipt was only issued on 5 February 2021, if indeed the seizure occurred on 25 January 2021. In the absence of such explanation, then this court is persuaded to accept that the seizure was only officially done when the receipt which formalises that process was issued. Regrettably 3rd respondent chose not to oppose the application. He would have clarified the issue. The seizure was effected on a Friday. The application was filed on Wednesday 10 February 2021. The delay of two days can hardly be construed as inordinate. I am satisfied that the matter is urgent. The objection is without merit and is accordingly dismissed.

MERITS

The requirements for the granting of interim relief were set out in *Airfield Investments (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement & Ors.*[7] MALABA JA (as he then was said):

> "It must be borne in mind that an interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief. There are, however, requirements which an applicant for interim relief must satisfy before it can be granted. In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F, CORBETT J (as he then was) said an applicant for such temporary relief must show:
> "(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
> (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
> (c) that the balance of convenience favours the granting of interim relief; and
> (d) that the applicant has no other satisfactory remedy."

[6] Annexure A1 on page 15
[7] *2004 (1) ZLR 511 (S)* at 517 C-E

The court is convinced that applicant managed to satisfy the requirements for the granting of an interim relief. It was not disputed that applicant procured the diesel in dispute from Daily Dose. It is also common cause that the diesel was delivered into applicant's tanks at its premises. Under HC82/21, Daily Dose disowned 4th respondent, insisting it dealt with applicant and Pritchard Trading (Private) Limited. It was also not disputed that applicant runs a diesel intensive mining business which requires the consumption of diesel at any given time. The effect of suspending the consumption of the product is that applicant has no access to diesel for its operations. It cannot even restock. The storage facilities cannot dispense diesel for operations. That seriously affects business and operations.

It is also common cause that what triggered the approach to this court was the seizure of the diesel by 3rd respondent. The Exhibits Seizure Confirmation Receipt was issued in terms of section 50 of the Act[8]. That section requires that a seizure be done pursuant to a warrant issued by a court. Alternatively, the person in possession of the article concerned must consent to the seizure. Applicant did not consent to the seizure. No warrant was issued by the court. That made the seizure irregular.

The letter of 19 February 2021 from the Civil Division of the Attorney General's Office reads:

> **"RE: URGENT CHAMBER APPLICATION IN RESPECT OF DINSON COLLIERY COMPANY (PRIVATE) LIMITED v MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE AND 3 OTHERS: HC CASE NO. 100/21**

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[8] Section **50 Article to be seized under warrant, states as follows:**
"(1) Subject to sections *fifty-one*, *fifty-two* and *fifty-three*, an article referred to in section *forty-nine* shall be seized only by virtue of a warrant issued—
(*a*) by a magistrate or justice (other than a police officer), if it appears to the magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of any person, or upon or in any premises or area, within his area of jurisdiction;
or
[Paragraph amended by section 44 of Act 1 of 2002 and by section 17 of Act 2 of 2016.]
(*b*) by a judge or magistrate presiding at criminal proceedings, if it appears to the judge or magistrate that any such article in the possession or under the control of any person or upon or in any premises is required in evidence in the proceedings.
(2) A warrant issued in terms of subsection (1) shall require a police officer to seize the article in question and shall to that end authorize such police officer, where necessary—
(*a*) to search any person identified in the warrant or any premises within an area identified in the warrant; or
[Paragraph amended by section 44 of Act 1 of 2002.]
(*b*) to enter and search any premises identified in the warrant, and to search any person found upon or in those premises.
(3) A warrant—
(*a*) may be issued on any day and shall be of force until it is executed or it is cancelled by the person who issued it or, if that person is not available, by a person with like authority; and
(*b*) shall be executed by day, unless the person issuing the warrant in writing authorizes the execution thereof by night.

…….
Please be advised that our instruction by 1st, 2nd and 3rd respondents is that they will abide by the order of the court.

The only reason why respondents are holding on to the exhibit is that the 3rd Respondent was instructed by the prosecutor of Hwange Magistrates Court to secure the fuel in a matter which is pending between the Applicant and the 4th Respondent. In that regard, if the court finds for the relief which is being sought, we have no problem with complying with the court order.

Respectfully referred.

T. Tembo (Ms)
For DIRECTOR
CIVIL DIVISION"

As already stated, during the hearing on 25 February 2020, Ms *Tembo* tendered the letter of 18 February 2021, from the 2nd respondent's offices to the Attorney General's Office. The letter reads:

"**RE: URGENT CHAMBER APPLICATION: DINSON COLLIERY COMPANY (PRIVATE) LIMITED v MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE AND 3 OTHERS: HC CASE NO. 100/21**
……..

Our preliminary investigations to the matter revealed that the 3rd Respondent acted upon the instructions of Prosecutor of Hwange Magistrates Court to secure the fuel in dispute pending the hearing of the matter which was set down for 2 March 2021 in Hwange Magistrates Court. See instruction number 2 by the Prosecutor asking the police whether the diesel was properly secured.

The police acted upon the instructions of the prosecutor to secure the said fuel and a report of Fraud by the Fourth Respondent. The matter is, however, pending hearing in the Hwange Magistrates Court. See attached copy of the set down.

In *casu*, main battle is between the Applicant and the Fourth Respondent. Our instruction is that the 1st, 2nd and 3rd respondents will abide by the order of the High Court in the Urgent Chamber application….." (Underlining for emphasis).

Instruction number 2 from the Public Prosecutor referred to in the above letter required the Police *"to confirm whether or not the Diesel being the exhibit in this case has been properly secured in the event it has not kindly explain your position and intentions of your office…."* From the papers, it would appear 3rd respondent did not proffer the explanation sought by the Prosecutor. 3rd respondent appeared unconcerned. It was his conduct that prompted the applicant to approach this court. Similarly, 1st and 2nd respondent chose to be indifferent and took a back seat. The three respondents' attitude is also clear from the last of paragraph of the letter of 18 February 2021. The writer states *"in casu, the main battle is between the Applicant and the Fourth Respondent…."*. They dissociated themselves from these proceedings. Further,

to confirm the reprehensible manner in which 1st, 2nd and 3rd respondents approached this matter, on 8 March 2021, their counsel dispatched the following letter to the Registrar for my attention:

> **"RE: DINSON COLLIERY COMPANY (PRIVATE) LIMITED v MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE AND 3 OTHERS: HARARE HIGH COURT CASE NO. 100/21**
> …….
> Firstly I would like to apologise for the delay in giving feedback on the position of the 1st to 3rd Respondents, following the hearing which we attended on the 25th of February 2021.
>
> It is with humility that I write this letter to the Honourable Judge wishing to explain why it has taken so long before responding to the issues which were agreed on the day of the hearing. On the 26th of February 2021 after court, I wrote to my clients advising them of what had transpired in the Judge's chambers. I even gave them counsel and advised them of the suggestions which the Judge had made. The Zimbabwe Republic Police Legal Officer who was dealing with the matter phoned me and promised to resolve the matter the following day.
>
> Since that day, to date, it would appear that my clients are being evasive and no one, including the Legal Officer who is dealing with the matter seems to be willing to give me a firm position. I have incessantly called and telephonically spoken to my clients being referred from one office to the other and yet nothing decisive had been forwarded to me.
>
> My considered view is that given such evasiveness, it is my reputation which stands to suffer, both from my other colleagues and the court. I pray that the court go ahead and make a determination of the matter on the papers filed. In any event, 1st to 3rd Respondents were not opposed to the relief which was being sought. It is not fair that the Applicant should continue to suffer prejudice…."

The contents of the letter confirm that 1st, 2nd and 3rd respondents all but washed their hands off the case. They turned their back on their own counsel. They chose to be reticent and purposefully unhelpful.

A reading of the draft order shows that applicant's gripe is with 3rd respondent's conduct, and not the 4th respondent. It is the National Prosecuting Authority which sought to hold on to the fuel as an exhibit, as confirmed by the letter of 19 February 2021 from the Attorney General's office. 3rd respondent was presumably acting on instructions of the Prosecutor. The National Prosecuting Authority is not a party to these proceedings. It was 3rd respondent who placed the diesel under seizure. 4th respondent cannot purport to defend 3rd respondent's conduct, when 3rd respondent chose not to oppose the application. 3rd respondent is the offending party. In any event, in its application under HC82/21, 4th respondent made its position clear. In paragraph 20 of the founding affidavit it said:

> "When we went back to the police station where I was advised that the matter was civil in nature and I immediately sought legal advised from legal practitioners in Hwange on the 25th of January 2021. On the 26th of January 2021, an ex parte application was filed at the Magistrates Court of Hwange under case number GL 01/21 seeking an order that the applicant uplifts its fuel from the 1st respondent. ……"

The 4th respondent's opposition in *casu* is inconsistent with its avowed position under HC 82/21. It accepted that the matter was civil in nature prompting an approach to this court under HC 82/21. It cannot perform a somersault, and defend a seizure that was premised on a criminal complaint it also jettisoned. Indeed, after further exchanges between the court and Ms *Nyamutowa* for the 4th respondent during the hearing of 25 February 2021, counsel conceded that 4th respondent would suffer no prejudice if the provisional order were granted. Her only concern at this stage was the order of costs sought against 4th respondent on the scale of attorney and client. The issue of costs is however a matter for the return date.

In the final analysis and for reasons set out in the judgment, the court was satisfied that the application met all the requirements for the granting of the interim relief sought by the applicant.

Accordingly, it is ordered that:

1. Pending the return date, the Applicant is hereby authorized to use its fuel storage facility at its Hwange colliery and dispense fuel as normal.
2. This provisional order shall be served on the respondents by the Deputy Sheriff or by the applicant's legal practitioners.

Mushoriwa Pasi Corporate Attorneys, legal practitioners for the applicant
Civil Division of the Attorney General's Office, legal practitioners for 1st, 2nd & 3rd respondents
T. Pfigu Attorneys, legal practitioners for the 4th respondent