JACOB KOTZE CARSTENS
versus
EDWARD MARK WARHURST N.O.
and
ROLLDICE MINING SERVICES (PRIVATE) LIMITED
and
MASTER OF THE HIGH COURT
and
MINISTER OF MINES AND MINING DEVELOPMENT N.O.
and
FIDELITY PRINTERS AND REFINERS (PVT) LTD

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 11 and 16 June 2021

Urgent Chamber Application-Interdict

F. Munyamani, for the applicant
E. Mubaiwa, for the 1st and 2nd respondents

MUSITHU J:

INTRODUCTION

The applicant is a Chief Mining Engineer and Shareholder in 2nd respondent, which is a mining entity under judicial management. He seeks a prohibitory interdict, which is specific to the 1st respondent. The applicant claims to have founded the 2nd respondent in 2003. 2nd respondent specializes in gold mining and processing. 1st respondent is a legal practitioner, and the judicial manager of the 2nd respondent. He has some financial interest in the 2nd respondent having made significant financial investment in that entity. The arrangement was that applicant and 1st respondent would get shareholding in 2nd respondent, commensurate with their investment. That arrangement was to be formalized through the signing of a shareholder's agreement. It is not evident that such agreement was signed.

2nd respondent was placed under judicial management by this court on 15 July 2015. The three parties are the major players in the dispute that has spilled over into the courts. From the papers, it appears there was a complete breakdown in relations between the applicant and the 1st respondent in his capacity as the judicial manager. This urgent chamber application was filed on 9 June 2021. It was placed before me on 10 June 2021 around 1430 hours. I set it down for hearing on 11 June 2021 at 1430hours. The relief sought is set out in the draft provisional order as follows:

"A. <u>TERMS OF FINAL ORDER SOUGHT</u>

That you show cause, if any, why a final order should be made in the following terms: -

1. Pending the determination of the dispute between the parties in the matter under Case No. HC 1256/21 which is an application for removal of the 1st Respondent from the position of judicial manager of the 2nd Respondent, the 1st Respondent shall not do the following: -

a. any step which amount to the eviction of the Applicant from the mine house which is located at Gloy without an order of court,
b. ordering the Applicant to submit gold, cash and any company documents to James Duguid or to him without following due process,
c. act in any way unless entitled to so act in the Court Application for removal of the 1st Respondent from the position of judicial manager, and
d. do anything that will cause financial prejudice to the 2nd Respondent and or to the Applicant.

2. 1st Respondent shall pay costs of this Application on an Attorney-client scale.

B. <u>INTERIM RELIEF GRANTED</u>

Pending the determination of this matter, the Applicant is granted the following relief;

1. 1st Respondent, his agents and employees (security personnel) be and are hereby interdicted from interfering or threatening to interfere with Applicant and his members' projects at Rolldice Mining (Pvt) Ltd.
2. 1st Respondent, his agents and employees be and are hereby interdicted from approaching Applicant's property being a residential house which is located in one of the Applicant's mining claims or approaching within 400m radius of the said property.
3. 1st Respondent, his agents and or employees be and are hereby interdicted to disturb the Applicant's privacy and the 1st Respondent must remove his illegal security personnel within 12 hours of granting of this order failure of which Sheriff of High Court with the assistance of members of Zimbabwe Republic Police situated at Mt Darwin Police Station are mandated to remove the said security personnel.
4. The hearing that is scheduled for the 11th of June 2021 is hereby suspended pending the outcome of the main matter under case number HC 1256/21
5. Costs shall be in the cause."

BRIEF FACTUAL BACKGROUND

As anticipated, the fallout between the applicant and the first respondent had a domino effect. One thing led to the other. On 7 April 2021, the applicant filed a court application for the removal of the 1st respondent as judicial manager of the 2nd respondent. The application was served

on the 1st respondents' legal practitioners of record on the same day. On 3 June 2021, the 2nd respondent wrote to the applicant informing him of misconduct charges that were to be laid against him under the Labour (National Employment Code of Conduct) Regulations, SI 15 OF 2006. The letter is referenced "RE: SUSPENSION FROM DUTIES AT ROLLDICE MINING SERVICES (PVT) LTD: MISCONDUCT CHARGE SHEET". A similar letter was also written to Natasha Claringbould, a bookkeeper, public officer and company secretary in 2nd respondent. The applicant was informed that a disciplinary hearing would be conducted via zoom on 11 June 2021. Unfortunately, the letter attached to the applicant's founding affidavit appears to have a missing page containing the time of the hearing, and the manner it was to be conducted.

On 7 June 2021, 1st respondent wrote to the applicant summarily suspending him from the employ of the 2nd respondent. A Mr James Duguid was taking over his place as the Senior Operations Manager. Also suspended on the same day was Natasha Claringbould. The suspension letter required the applicant to vacate the 2nd respondent's premises immediately. He was also required to surrender all vouchers, company documents, accounting records and gold receipts. He was also informed that Classic Protection Services, presumably a security firm, was to secure the mining site. Applicant contends that it is the letter of 7 June 2021 that triggered an approach to this court on an urgent basis.

When the parties appeared before me on 11 June 2021, the applicant was represented by Mr F *Munyamani*, while 1st respondent was represented by Ms *Stone*. Prior to the hearing, I had received in chambers a letter from 1st respondent's legal practitioners advising that they had consulted with applicant's legal practitioner on the need to have the matter postponed to enable 1st respondent to file his opposing papers. The reason given for the request was that *"1st Respondent has been engaged in a disciplinary hearing pertaining to the same matter this morning for the entire morning and will be unable to file his opposing papers before the hearing this afternoon. 1st Respondent has also instructed counsel to argue the matter and his counsel of choice is unavailable this afternoon."* The letter is dated 11 June 2021.

Ms *Stones* applied to have the matter postponed to allow 1st respondent to file his opposing papers as well as brief counsel of choice. Mr *Munyamani* denied that he had been consulted on the issue. He also denied having consented to a postponement of the matter as alleged in the letter from 1st respondent's counsel. He submitted that he would not have consented to a postponement

of the matter since part of the relief sought by the applicant was the suspension of the same hearing that 1st respondent was alleged to be conducting on the same day. Mr *Munyamani* was only agreeable to a postponement of the matter on condition that an undertaking was made that the 1st respondent would suspend the acts contemplated in the letter of 7 June 2021. That also included the suspension of the disciplinary hearing. The letter of 7 June 2021 was the gravamen of the applicant's complaint. Ms *Stone* refused to relent, insisting that 1st respondent was within his rights to act in the manner he did. A postponement of the matter without the required undertaking meant that by the time the hearing resumed, the harm threatened would have been accomplished. The application would have been overtaken by events.

I raised this issue with Ms *Stone*, and she begrudgingly requested a ten-minute adjournment to allow her to consult her client. I granted the requested adjournment. At resumption, Ms *Stone* advised that she was amenable to a postponement of the matter with the undertaking that the acts complained of by the applicant would be suspended until I heard the matter on the merits. Mr *Munyamani* was satisfied with the undertaking. Both counsel agreed that there was no need to reduce the undertaking into an order of court since the postponement of the matter was consensual. In my notebook, I however recorded that the parties had agreed *"to preserve the status quo ante"* pending my hearing of the matter on the merits. I postponed the matter to Wednesday 16 June 2021 at 0900 hours.

Before the resumption of the hearing on 16 June 2021, I received in chambers, a letter from 1st respondent's legal practitioners bearing the same date. It reads in part as follows:

> "Please find attached a copy of the labour disciplinary determination against the Applicant, which forms the subject of the Urgent Chamber Application.
> In light of this development, we will be making submissions premised on the fact that the Applicant has ceased to be an employee who can claim the relief sought in the Urgent Chamber Application.
> ……"

At the hearing, the 1st respondent was now represented by Mr *Mubaiwa*. He applied to have the disciplinary determination tendered in the proceedings before the court. Mr *Munyamani* opposed the application arguing that the disciplinary process had been carried out contrary to the undertaking given by Ms *Stone* to freeze all the acts contemplated in the letter of 7 June 2021, pending the hearing of this application. In any case, the urgent chamber application was served

before the disciplinary hearing allegedly commenced. In the exercise of my discretion in terms of rule 246(1)(a), I admitted the disciplinary determination.

Following its admission, Mr *Mubaiwa* submitted that there was no application before the court. It had been overtaken by events. The relief sought was premised on the applicant being an employee of the 2nd respondent. He ceased to be an employee after his dismissal. He further submitted that his instructing counsel's interpretation of the words *"to preserve the status quo ante"*, was that the disciplinary hearing could proceed since it was already underway. Mr *Mubaiwa* further submitted that the 1st respondent never agreed to suspend the disciplinary hearing. Mr *Munyamani* on the other hand argued that 1st respondent had come to court with dirty hands. He breached an undertaking made by his counsel to suspend all acts threatened in his letter of 7 July 2021, pending the hearing of the application. That also included the disciplinary hearing that the applicant refused to partake in because it was part of the issues before the court. Having heard the submissions on that point, I reserved judgment.

THE ANALYSIS

This matter brings to the fore an ethical question of how a legal practitioner must conduct himself or herself when the conduct of a party they represent is the subject of pending litigation. Put differently, should a legal practitioner conduct himself or herself in a manner that vitiates a pending litigation in which their client's conduct is the subject of litigation that they are aware of? Usually, as a matter of professionally courtesy, an undertaking is given by counsel on the opposite side to suspend further action until the court determines that matter. This application was served on the 1st respondent on 10 June 2021 at 0821 hours. This was a day before the alleged disciplinary hearing. The notice of set down was served on the first respondent on the date of hearing at 1045 hours, about four hours before the time the matter was scheduled to be heard.

The 1st respondent is a senior legal practitioner and an officer of this court. He was represented by a legal practitioner from his law firm. On 10 June 2021, 1st respondent and the legal practitioner representing him became aware that 1st respondent's actions, as communicated in his letter of 7 June 2021 to the applicant were now the subject of litigation, an urgent one for that matter. They were aware that the applicant sought the suspension of the disciplinary hearing scheduled for 11 June 2021. 1st respondent proceeded with the disciplinary hearing nevertheless.

Ms *Stone* made an undertaking before the court that the acts complained of by the applicant would be suspended pending my hearing of the matter. It was one of the issues the court was required to deal with. To construe the words, *"to preserve the status quo ante"* as implying that the disciplinary hearing could be proceeded with when it was the 1st respondent that sought a postponement of the matter is not only alarming, but it is preposterous. What the court meant by those words was that the 1st respondent was to freeze all acts that were now the subject of litigation pending the hearing of the application that was challenging them. The application before the court was filed by an applicant who had just been suspended. He had not yet been dismissed. As at the time the matter was postponed, he was still a suspended employee. He was within his rights to seek a suspension of the disciplinary hearing that would determine his fate. The preservation of the *status quo* meant that the applicant was expected to return to court as a suspended employee and not a dismissed one.

The court would not have taken a selective approach regarding the grant of the prayer of any of the interim relief sought pending the hearing of the application. No submissions had been advanced pertaining to the propriety of proceeding with the disciplinary hearing. No separate order was made in regard to that hearing. The court postponed the matter on the understanding that the hearing stood suspended. No submissions were made as to whether the disciplinary hearing had commenced, and at what stage it was at the time the parties appeared before the court. The applicant's counsel told the court that they had informed the 1st respondent that the applicant was not going to attend that disciplinary hearing, as it was the subject of pending litigation. The court was sold a dummy so to speak. The court realizes now that it was requested to postpone the matter to allow the 1st respondent to proceed with what was essentially the substance of the dispute before it. The outcome of that disciplinary hearing, which was held while the court was postponing the application to enable 1st respondent to file his opposition, obviously changed the complexion of the matter before the court. The conduct of the 1st respondent and his counsel was tantamount to an insult to the integrity of the court and its processes.

The court would not have postponed the matter had it been aware that the 1st respondent's counsel sought to pull the rug from under its feet. While the court is constrained to comment on the rectitude of the disciplinary proceedings leading to the dismissal of the applicant, coming as they did on the backdrop of service of the urgent chamber application seeking their suspension and

the undertaking made to suspend them as well, this court can conclude that the postponement was meant to afford the 1st respondent an opportunity to circumvent the determination of an issue that was before it. The postponement was merely a ruse to achieve the desired end of sabotaging a matter that was pending before the court.

Curiously, on 15 June 2021, the 1st respondent filed his own urgent chamber application against the applicant herein under HC 3084/21. The other respondents are the Sheriff of the High Court and the Zimbabwe Republic Police. The application seeks the following interim relief:

> "Pending determination of this matter the Applicant is granted the following relief;
> (1) Pending resolution of the labour disciplinary proceedings against the 1st Respondent, the 1st Respondent be and is hereby interdicted from exercising any managing or any functions in the name of or on behalf of the Company known as Rolldice, which is under judicial management, and from accessing the Company's premises or using any of the Company's assets or properties or in any way holding himself out as a duly authorized officer of the Company.
> (2) 1st Respondent be and is hereby ordered to surrender all records, books of account, which are in his possession, and which are in the name of the Company or which he got custody of while acting in any capacity on behalf of the Company within forty-eight (48) hours of this order."

The final order sought the eviction of the applicant from the premises known as Gloy Mine, Mt Darwin, Zimbabwe, and that he returns all assets including funds and gold that belong to the company. The same issues raised in the application before this court were the same issues raised in the 1st respondent's urgent chamber application which was obviously filed after the conclusion of the disciplinary hearing against the applicant herein. At the time the urgent chamber application under HC3084/21 was filed, the 1st respondent and his counsel were obviously aware, or ought to have been aware that the applicant had been dismissed pursuant to the alleged 11 June 2021 disciplinary hearing. The dismissal letter is also dated 15 June 2021, the same day that the urgent chamber application was filed. That clearly smacks of chicanery.

The founding affidavit under HC3084/21 was deposed to by one Robertson Chinyengetere acting on the basis of a power of attorney granted to him by the 1st respondent herein. Paragraph 17 of the founding affidavit states that the urgent chamber application sought a prohibitory interdict *"pending the outcome and finalisation of applicant's investigations surrounding the allegations made against 1st respondent and the disciplinary hearing"*. Paragraph 26 states that *"it will be extremely difficult for applicant to fulfill his role as Judicial Manager if this Honourable Court does not come to his assistance and order that the 1st Respondent be prohibited from coming*

to work on the mine until the disciplinary inquiry into the allegations made against him has been prosecuted to finality."

The disciplinary hearing was held and concluded on 11 June 2021. It was uncontested. This was obviously known to the 1st respondent. Yet he proceeded to seek an interdict pending the conclusion of a disciplinary process that had been completed at the time that his application was filed. It only confirms that by proceeding with the disciplinary process on 11 June 2021, 1st respondent was intent on frustrating the applicant's application under HC2961/21. The disciplinary hearing was clearly farcical. Be that as it may, this court cannot proceed to deal with this matter as it has been overtaken by events. Whether or not the disciplinary hearing held in the circumstances I have outlined is valid will have to be dealt with as a separate issue, and I give no determination on it.

CONCLUSION

Although there is no substantive rule of law that obliges legal practitioners to keep in abeyance the execution of acts that are the subject of pending litigation as *in casu*, legal practitioners must, out of respect of due process of the law, accord the court an opportunity to pronounce on the propriety of the very acts that are complained of. Legal practitioners are expected to act in a professional and honourable manner, befitting their status as officers of the court.[1]

A litigant who approaches the court on an urgent basis is making an important statement of intent. The litigant is submitting himself/herself before the court, so that the court can interrogate the perceived harm on an urgent basis. As officers of the same court to which an applicant has sought refuge, a legal practitioner representing a respondent in such matter must not act in a manner that defeats or frustrates the determination of the application before the court, especially so where the matter has already commenced as was the case herein. Such conduct makes fun of the justice delivery system.

DISPOSITION

Resultantly it is ordered that:

The urgent chamber application is hereby removed from the roll of urgent matters with no order as to costs.

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[1] See *Maphosa v Maseko* HB-164/16 at page 3 of the judgment. See also *Blooming Lilly Investments (Pvt) Ltd & Another v Ontage Resources (Pvt) Ltd & 3 Others* HH/1/21 at page 3.

T. Pfigu Legal Practitioners, applicant's legal practitioners
Matizanadzo & Warhurst, 1st respondent's legal practitioners