CHIVERO QUARRIES (PVT) LTD
versus
VELOCITY MOTORS (PVT) LTD

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE 25, 26 September, 5 & 18 October 2018

Opposed Application

T Zhuwarara, for the applicant
S Hashiti, for the respondent

MUZOFA J: This judgment is in respect of two matters HC 901/18 and HC 4290/18. In HC 901/18 the applicant "Chivero" seeks the eviction of the respondent "Velocity" from a quarry site known as Hunyani 159 Idaho Farm 'the claim'. In HC 4290/18 "Velocity" the respondent filed an application for the dismissal of HC 901/18 for want of prosecution. After hearing the application for dismissal in HC 4290/18 I dismissed it and indicated the reasons would be incorporated in the main judgment herein.

In HC 4290/18 the application for dismissal for want of prosecution, Philimon Machana swore to the founding affidavit on behalf of Velocity. He alleged that on 1 February 2018 Chivero filed an application to evict Velocity. On 12 February 2018 the notice of opposition and the opposing affidavit were filed and served on Chivero. From there on nothing was done to move the matter forward. The application for dismissal was filed after 3 months.

Chivero opposed the application and through an affidavit sworn to by Rodgers Madangure, it was not denied that after receipt of the notice of opposition no answering affidavit was filed neither was the matter set down within the prescribed one month in terms of r 236 (3) of the rules. However he explained that, following the defence raised in Velocity's opposing affidavit, there was need to verify the veracity of Velocity's claim that it had a permit to quarry on the claim. This was all done to ensure that the parties present all the relevant

information before the court for a proper determination of the case. While the verification went on Velocity filed the application for dismissal. Chivero thereafter caused the set down of the main matter. As a result both matters were set down for hearing on the same date.

Mr *Gombiro* for Chivero submitted that the delay of about three months is not inordinate coupled with the explanation given the application should be dismissed. He further submitted that in such an application the court has to exercise its discretion considering the extent of the delay and the explanation thereof, the prospects of success and the balance of convenience with reference to the cases of *Assimjee* v *Minister of Finance* 2014 (3) SA 198 (SCA); *Guard Force (Pvt) Ltd* v *Ndlovu and Others* SC 24/16 for that proposition.

Rule 236 (3) (b) provides one of the remedies available to a litigant who wishes to overcome an abuse of court process by an uninterested applicant. The primary intention is to provide an avenue to ensure finality in litigation to avoid perpetuity. The wording of the rule is indeed such that the court has to exercise its discretion on a consideration of certain factors.

In *Sctofin* v *Mtetwa* 2001 (1) ZLR 249 at 249 D CHINHENGO J aptly noted

> "The rule gives the judge discretion either to dismiss the matter or to make such other order as he may consider to be appropriate in the circumstance…. The intention of the law maker, as I have stated it to be, is to ensure that matters brought to court are dealt with, with due expedition. The order in which the judge may issue, it is one of dismissal, is in effect a default judgment. But in considering the application the judge can only make an order other than dismissal if the respondent has opposed the application and shown good cause why the application should not be dismissed."

In deciding whether good cause exists the court has to consider the factors as correctly referred to by Mr *Gombiro* in the *Guardforce* case *(supra).*The extent of the delay is about two months and not three months. The notice of opposition was filed and served on 12 February 2018. Chivero had one month within which to file an answering affidavit or set the matter down. It was only after the 12th of March 2018 that the case for dismissal was ripe. The application was filed on the 10th of May 2018 two months thereafter. The extent of the delay cannot be said to be inordinate. I accept the explanation proffered by Chivero in respect of the reason for the delay in setting the matter down. Velocity in its opposing papers raised issue that it held a valid permit to quarry on the claim. It became essential for Chivero to respond to that averment and it could only be addressed by the issuing authorities. It is unfortunate that the matter was eventually set down without a clear position from the issuing authorities. I do not construe Chivero's explanation to indicate a rampant disregard for its application or the rules of this court. It is an explanation that indicates its intention to have the matter adjudicated with

all the requisite facts before the court. When served with the application for dismissal, Chivero opposed the application but also set the main matter for hearing.

In casu I may defer the issue on whether there are prospects of success or not because the judgment is incorporated herein. Suffice to say it is apparent that both parties were at some point issued with some documents entitling each to work on the claim. The application in the main has to determine which of the two parties has the right to be on the disputed claim. In my view there is an arguable matter that deserves its day in court.

Considering all the circumstances of this case I was inclined to dismiss the application. In any event no further prejudice can befall Velocity; the main matter has been heard and shall be disposed on the merit. In the circumstances of this case it is in the interest of the parties and even the court to have the matter disposed on the merits than proceed by way of a default judgment. This is because a dismissal for want of prosecution is a default judgment that is susceptible to a rescission.

I now turn to the main matter HC 901/18, the application for eviction. Rodger Madangure deposed to an affidavit on behalf of Chivero and stated that it seeks the eviction of Velocity from a mining claim known as Hunyani 158 on Idaho farm 'the claim'. He stated that Chivero has a Certificate of Registration after transfer 'the certificate' issued by the mining Commissioner on 20 December 2017 which gave it real rights over the claim. Sometime in 2016 Velocity attached in execution a quarry plant on the claim to recover its debt from Chivero's partner. However since 2012 velocity has unlawfully occupied the mine yet it was only entitled to the quarry plant and not the claim. On that basis Velocity should be evicted from the claim.

The application was opposed. Velocity denied the factual background as set out by Chivero. It stated that it purchased the plant in March 2017 which is fixed to the claim. At the time of purchase no one occupied the claim. It then applied for a permit to mine quarry from Chegutu Municipality which permit was granted on 31 March 2017. Velocity did not occupy the site from 2012 and the certificate upon which Chivero founds its claim was obtained fraudulently. Alternatively since the certificate of registration was obtained after Velocity had acquired the permit to quarry on the claim, therefore Velocity as the first right holder cannot be evicted by Chivero.

The background set out by the parties differs. However from the documents it is apparent that Velocity's outline is probably true. Velocity indeed acquired the plant in March

2017 an invoice was attached showing the auction sale transaction by L M Auctioneers. It cannot be correct that Velocity attached the plant in 2016. It is also improbable that Velocity could have occupied the mine from 2012 before purchasing the plant. Chivero's averments can only be incorrect. I also accept as a fact that Chivero is a holder of a certificate of registration over the claim issued in December 2017, and Velocity was a holder of a permit over the mine issued on 31 March 2017 and expiring on 31 December 2017. The permit was not renewed.

Bearing in mind the facts of the case the issue for determination is whether Chivero has the *locus standi* to evict Velocity and if so whether Velocity has a valid defence to resist eviction.

In seeking redress from this court Chivero asserts a right based on the certificate it holds in respect of the property. Velocity has challenged the authenticity of the certificate of registration in that it was fraudulently obtained. However nothing was placed before the court as proof of its invalidity. In any event this court was not seized with a matter on the validity of the certificate. If Velocity indeed believed that the certificate was fraudulently acquired it was for it, if so advised to seek the cancellation of the certificate. In *Indium Investments (Pvt) Ltd v Kingshaven (Pvt) Ltd and two others* SC 40/15 in an application for eviction, the respondent in its plea challenged the legality of the lease agreement that the applicant relied on in seeking the eviction of the respondents. The court had this to say at page 7 of the cyclostyled judgment

> 'If the respondents were under the impression that the underlying agreements which gave rise to the lease agreement were invalid, it behoved them to bring proceedings as a pre-emptive attack on the agreements. This they chose not to do.
> It is common cause that in their plea to the claim for eviction, the respondents raised
> the issue related to the loan between Shah and Shumba and his wife, the agreement for the sale of shares in respect of Indium and the lease agreement in terms of which Kingshaven, and through it, Shumba and his wife occupied the premises. A plea is a defence and as such can be likened to a shield. It is not a weapon or a sword. No relief can attach to a party through a plea. In the same plea the respondents averred that by separate process Shumba and his wife would approach the High Court for a declaration of invalidity of the two Zimbabwean agreements. No such process was ever launched.'

Those sentiments apply equally to this case. Velocity cannot seek to challenge the authenticity of the certificate of registration by way of a plea. It did not even place information as a basis of its allegation. It was through oral submissions that it was alleged that the applicant did not place the requisite documents showing its compliance with the Mines and Minerals Act [*Chapter 21:05*] 'the Act' in order to obtain the certificate. In an application such as this one before the court, the certificate is adequate proof of what is stated therein, it was not necessary for the applicant to produce evidence of the steps it took to acquire the certificate. To that

extent the issue of the fraudulent acquisition of the certificate of registration cannot assist the respondent in this case. In its heads of argument Chivero also alleged that the permit relied upon by Velocity was fraudulently obtained. Apart from that bare allegation nothing was set out to show that the permit was fraudulently obtained. That averment by Chivero does not take its case any further.

A certificate of registration is issued in terms of the Act. In *Graham Appellant* v *Local and Overseas Investments (Pty) Ltd* 1942 AD 95 the court examined the rights held by a registered holder of a mining location and subsequent agreements that the holder can make. The court in that case noted that registration of mining rights is essential for the creation of real rights in the mine. Registration therefore is an announcement to all and sundry that the holder has rights in the mining location. A holder of such a right can enforce it against the world at large.

I was referred to the case of *Gwarada* v *Johnson and Ors* HH 91/09 for the proposition that Chivero has no *locus standi* to evict velocity its recourse is against the issuing authority to give it vacant possession. I compare and distinguish that case from this matter. In that case the applicant's claim to evict the respondent was based on an offer letter, which the applicant sought to equate to a lease agreement. The court discussed the rights of a lessee. The court noted that the law on the rights of a lessee in an ordinary lease agreement has not changed; a lessee to whom possession has not yet been given cannot sue a trespasser for eviction from the leased property, save under a cession of action from the lessor. However on an analysis of the import of an offer letter the Court concluded that an offer letter is not a lease agreement therefore the applicant could not base his claim as a lessee he had no *locus standi* to evict the respondents.

I did not hear Velocity to argue that the certificate of registration endows the applicant rights of a lessee. To that extent since Chivero had not received vacant possession from the issuing authority it cannot evict Velocity. Chivero is a holder of mining rights equitable to real rights in the claim. A holder of a real right can enforce such right against anyone. The principles in that case are therefore not applicable in this case. It is my considered view that Chivero has the *locus standi* to evict Velocity to protect its rights.

It is not in dispute that Velocity was a holder of a quarry mining permit. In terms of s 13 (g) of the second schedule to the Rural District Councils Act [*Chapter 29:13*] Municipalities have the power to grant permits for quarrying of stones. Velocity was therefore lawfully issued

with a permit to quarry by Chegutu Municipality. The permit was valid from 31 March 2017 to 31 December 2017. At the time that Chivero obtained its certificate on 20 December 2017 Velocity was a holder of a valid permit to quarry stone on the claim. A permit has a life span and can be equated to a lease. For Velocity to ground its resistance on the permit it must be in possession of a valid permit. It is not in dispute that Velocity's permit expired on 31 December 2017. Mr *Hashiti* for Velocity argued that despite the expiration of the permit Chegutu Municipality recognised Velocity as the sitting operator. Further on the authority of *N & B Ventures (Pvt) Ltd t/a Nesbitt Castle Hotel* v *Minister of Home Affairs & Another* 2005 (1) ZLR 27 (H) in which CHEDA J ordered the release of liquor which had been forfeited to the state for trading without a licence because the licensing authority had taken 2 years to renew a liquor licence. It was submitted that an expired permit has residual rights giving the holder authority to continue working because the non – renewal was purely due to the inaction by the issuing authority to process the renewal. In this case therefore Velocity tacitly had the right based on the permit to be on the claim.

Mr Zvobgo was called to give evidence on the permit. His evidence was that Velocity was issued with a permit to quarry stones at the time of issuance there was no one on the claim. The permit was subject to renewal. Velocity approached their offices in order to renew the permit; it was advised that the permit could not be renewed since the dispute between the parties was subject of litigation. So no permit was processed. He was of the opinion that the parties could co – exist if they mine different minerals. He said Chivero applied for a quarry mining permit on the claim. They did not grant it but advised Chivero that there was a sitting operator which operator could object to such issuance within a specified time. He said Velocity was advised to exercise this option to object, but it did not object. He did not know whether Velocity did not object because the matter was now pending before the courts. He also said the Ministry of Mines had the power to issue registration certificates to miners but that process should be communicated to their offices. In this case their office was unaware that Chivero was issued with a certificate.

In my view the *N & B Ventures (Pvt) Ltd t/a Nesbitt Castle Hotel* case (*supra*) is clearly distinguishable from the present case in that the Applicant had submitted a formal application for renewal but the liquor licensing Board had taken 2 years to renew the licence. In this case no application for renewal of the permit was made at all until the permit expired. To say that representations made by Velocity after the application for eviction was filed validly

endowed the expired permit residual rights would be incorrect. No residual rights could accrue to Velocity because it had not lodged an application to renew the permit before the 1st of February 2018 when this application was filed. It was not on account of Chegutu Municipality that Velocity did not hold a valid permit. Infact Chegutu Municipality was correct in not to renewing the permit in the face of a court case and a superior right over the claim.

A reading of the Rural and District Councils Act does not show when a permit should be renewed. However it is a reasonable inference that where a permit gives rights to operate, the operations can only be legal if there is a valid permit. Naturally a permit therefore should be renewed before its expiration. Even if Chegutu Municipality recognised Velocity as the sitting operator, who anywhere did not object to the granting of a quarry permit to Chivero, that did not mean Velocity had a legal right to operate. Its rights were extinguished at the time the permit expired and to date Velocity has no permit. Only a valid permit can give Velocity rights over the claim, it does not have. Therefore it has no valid defence to the application.

It is unnecessary to determine the issue raised by Velocity that it was the first to be issued with a permit therefore it is entitled to remain on the claim. This is because at the time of *litis* Velocity's rights over the claim had been terminated by expiration of the permit. Technically speaking there is no right that Velocity can ground its claim to remain on the claim. Secondly the rights that the parties held are not equal Chivero held a superior right.

From the foregoing, the following order is appropriate.

1. The application for dismissal of case HC 4290/18 be and is hereby dismissed with no order as to costs.
2. The application for eviction be and is hereby dismissed with costs.

Mberi Chinwamurombe Legal Practice, applicant's legal practitioners
Nyikadzino, Simnago & Associates, respondent's legal practitioners