KUBATSIRANA MINING SYNDICATE
versus
M AND C ESTATE (PVT) LTD
and
STEDAN INVESTMENTS (PVT) LTD
and
THE MINISTER OF MINES MINING DEVELOPMENT
and
ENVIRONMENTAL MANAGEMENT AUTHORITY
and
THE DEPUTY SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 14 June & 23 September 2024

Urgent chamber Application

Ms T Masaka, for applicant
Mr J Makanda, for 1st respondent
Ms A Zikiti, for 3rd respondent
No appearance for 2nd,4th & 5th respondents

MUCHAWA J: This is an urgent chamber application for stay of execution, declaratory order and consequential relief made in terms of r 60 of the High Court Rules 2021 as read with s 14 of the High Court Act. The terms of the order sought are as follows:

"TERMS OF THE FINAL ORDER SOUGHT

1. The application and second respondent are declared to be separate and distinct entities

Consequently

2. The impending execution of the court order issued by this Court per MUCHAWA J on the 17th May 2024 as against the applicant is hereby declared invalid.
3. The fifth respondent be and is hereby interdicted from carrying out execution of the Court Order stated in para 2 above as against the applicant.
4. The first respondent shall pay costs of this application on an attorney and client scale.

INTERIM RELIEF GRANTED

Pending determination of this matter and on the return day the applicant be and is hereby granted the following relief:

(a) Execution of the order of this Court per MUCHAWA J of the 17th of May 2024 under case number HCH 2128/24 be and is hereby suspended as against the applicant."

BACKGROUND FACTS

On the 17th of May 2024 in another urgent chamber application lodged by the now first respondent against the now second, third and fourth respondents. The order which I granted was to the following effect.

"1. The application be and is hereby granted.

2. The first respondent and all other persons acting through it or on its instruction, be and are hereby ordered to restore to the applicant the undisturbed and peaceful possession of Kwarate Ranch, Lalapanzi.

3. In the event that first respondent does not comply with this order within 48 hours of being served with a copy thereof, at first respondent's expense, the Sheriff of the High Court shall remove the first respondent and may in such removal enlist the services of the Zimbabwe Republic police and remove first respondent, its equipment and everyone claiming occupation through them from Kwarate Ranch. The Sheriff shall attach the first respondent's wash plant for purposes of securing his costs and costs of this application.

5. First respondent shall pay costs of suit on an ordinary scale."

The first respondent is the owner of a certain piece of land called Kwarate Ranch, Lalapanzi held under a Deed of Transfer. It claims to be carrying on the business of farming, being cattle ranching and cropping. When it approached the court under case number HCH 2128/24, it alleged that it had been in peaceful and undisturbed possession of its property until March 2024 when the second respondent had taken occupation of the land. It is explained that the first respondent initially thought it was one of the mining companies which have chrome claims on the farm. However, upon inquiry, they were advised that these were representatives of the second respondent.

The first respondent is quick to state that Kwarate Ranch holds mining claims, and two sites have been authorized for wash plants by the first, third and fourth respondents and the place occupied by the second respondent is not one of those sites. The second respondent's representatives are said to have claimed to hold mining rights to conduct mining activities, but no proof was availed.

The first respondent's urgent chamber application was granted in its favour on account of there being no special grant to carry out alluvial mining near a river, with their wash plant being less than 200 metres from the river banks and in a wet land. There was no Environmental Impact Assessment certificate especially as the Second respondent was using a mechanical and highly powered wash plant. Their activities were therefore in contravention of

the provisions of the Environmental Management (Control of Alluvial Mining) (Amendment) Regulations) Regulations SI 104/2021.

The applicant claims to have been carrying out mining operations on Kwarate Ranch, Lalapanzi on the strength of a special grant issued on 17 May 2024 under SG 9715. The applicant was served with a writ of ejectment, writ of execution, notice of removal and notice of seizure and attachment in relation to case number HCH 2128/ 24 through its security personnel on 29 May 2024. The applicant's members became aware of this on 30 May 2024. The applicant was not a party under case number HCH 2128/24 but avers that the fifth respondent sought to evict it and attach its property. This is the basis upon which this application is brought, for the granting of the relief stated above.

Points *in limine* were raised by the first respondent. These were they:

1. That the matter is not urgent
2. That the applicant has used an irregular procedure.
3. That the relief sought is incompetent.

I heard the parties on these and reserved my ruling. This is it and I deal with each point, in turn, below

Whether the matter is urgent

Mr. *Makanda* submitted that this matter is not urgent and should be removed from the roll of urgent matters. This is because the applicant has admitted that it was not a party to proceedings under HCH 2128/24. Consequently, the Court order, writ of execution, writ of eviction, writ of eviction, notice of eviction and notice of seizure are all against the second respondent and not itself

The applicant's unequivocal averment that it is a distinct and separate entity from the second respondent is considered as proof that the applicant is not affected by the impending execution of the court order under HCH 2128/24.

Because of the above factors, it is argued that the applicant does not meet the requirements of an urgent application as no imminent harm is pending against it and it will not suffer any losses if the property of the second respondent is removed and executed against.

It is prayed that the application be struck off the roll with costs on a higher scale.

All that Ms. *Masaka* said was to affirm that the order to be executed does not relate to the applicant but says that the applicant cannot sit and watch execution happening unlawfully

simply because it is not a party. All they seek is for the court to stay execution as against it as it was not a party to the order to be executed.

I rely on the case of *Mushor*e v *Mbanga N.O &ORS* HH 381/16 which cites the cases of *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 (H) & *Kuvarega* v *Registrar General & Anor* 1988 (1) ZLR 188 (H) with approval. It states,

> "On urgency the parties seemed *ad idem* that the court looks at the issue objectively, rather than subjectively. They are *ad idem* that the two paramount considerations were [i] "time and [ii] "consequences".
> By "time" was meant the need to act promptly where there has been an apprehension of harm. One cannot wait for the day of reckoning to arrive before he takes action……
> By "consequences" was meant the effect of a failure to act promptly when harm is apprehended. It was also meant the effect of, or the consequences that would be suffered if a court declined to hear the matter on an urgent basis. If the prejudice would be irreplaceable, then the matter should be deemed urgent. Put another way, if the remedy that the court could eventually grant, possibly in ordinary motion proceedings, woold effectively be a *brutum fulmen* because it was too late, then the matter could be urgent."

In Gwarada v *Johnson* 2009 (2) ZLR 159 the court had this to say

> "Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The applicant must exhibit urgency in the manner in which he has reacted to the event or threat."

In casu there appears to be some material non-disclosure by the applicant. The applicant states that it only got a special grant to start conducting mining activities, on 17 May 2024. This was the date of the order of this court in HCH 2128/24.

Indeed, the current application bears testimony to this. The order granted on 17 May 20024 was based on activities allegedly conducted by the second respondent prior to the granting of the special grant to the applicant. The applicant is mum on its relationship to the second respondent.

Given that the applicant and second respondent are distinct and separate legal entities, the applicant fails the test of urgency on the rung of "consequences". It is not the party sought to have execution conducted against it. There can be no harm apprehended by it as it was not a party to the conduct that the first respondent complained of and secured the order under HCH 2128/24.

One can only conclude that the applicant is seeking to frustrate the execution of an order lawfully granted against the second respondent.

The return of service on p 23 of the record shows that service of writs of execution was effected on a responsible person for the second respondent. There is therefore no impending execution against the applicant. Consequently, I find that the matter is not urgent.

Costs were prayed for on a higher scale. Costs on a higher scale should only be awarded in exceptional circumstances. In *Chioza v Sawyer* 1997 (2) ZLR 178 (SC) it was held that dishonestly in litigation is certainly a ground for an order of costs on a higher scale. In *Davidson* v *Standard Finance Ltd* 1985 (1) ZLR 173 (HC) it was held that where a party's conduct is mischievous and objectionable and the cause of the costs, then costs on a higher scale may be so awarded.

In casu, I have already pointed to the non-disclosure of seeming material facts borne out by the date of the special grant to the applicant being the same date of the order sought to be executed upon. The applicant's conduct is mischievous and objectionable and the cause of the costs the first respondent has had to incur. Costs on a higher scale are justified.

There is no need to consider the other points *in limine.*

Accordingly, I order as follows:

1. The matter not being urgent, it be and is hereby struck off the roll of urgent matters in terms of r 60 (18) of the High Court Rules, 2021.
2. The applicant to pay costs on a legal practitioner- client scale.

Farai & Associates, applicant's legal practitioners
Kantor & Immerman, first respondent's legal practitioner