CAROL AND TATENDA MINING SYNDICATE
versus
THE MINISTER OF MINES AND MINING DEVELOPMENT N.O.
and
THE PROVINCIAL MINING DIRECTOR CHINHOYI N.O.
and
MILCAH MASHIRI
and
SIMBARASHE GERALD MASHIRI

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 7 & 13 October 2022

Urgent Chamber Application- Interdict

Mr *G Maseko*, for the applicant
Mr *T Marira*, for the 1st & 2nd respondents
Mr *T Nyahuma*, for the 3rd & 4th respondents

MUSITHU J:

The applicant and the third and fourth respondents are embroiled in a mining dispute, which involves a mining claim known as Victory 100 "A", Registration Number 42 931, Banket, Mashonaland West (the mine). The applicant holds a certificate of registration in respect of the said mine, which was issued on 20 July 2012. The third respondent on the other hand holds an offer letter in respect of a farm known as Subdivision 2 of Verblyden of Dunphaile in the Zvimba District of Mashonaland West Province (the farm). The offer letter was issued on 10 February 2020 and measures 87.50 hectares in extent. The disturbances between the applicant and the third and fourth respondents sucked in the first respondent who determined that the mine was pegged on the third respondent's farm in violation of the law. That determination was upheld by the second respondent. The applicant was dissatisfied with the manner in which the dispute was resolved by

the first and second respondents. It approached this court on a certificate of urgency seeking 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. The disposition of mining location registration no. 42931 named Victory 'A' shall be finalized upon the application for contempt of court filed under HC
> 2. That the first and second respondents shall pay the costs of this application on the legal practitioner client scale in their personal capacities.
>
> **INTERIM RELIEF GRANTED**
> **That pending the outcome of the Contempt of Court under HC:**
> The Applicant is granted the following relief-
> 1. The notice of the second respondent dated 20 September 2022 be and is hereby suspended.
> 2. The determination of the first respondent dated 25 July 2022 be and is hereby suspended.
> 3. The applicant is granted leave to resume its mining activities at Victory 100 'A' Mine registration no. 42931 forthwith upon the granting of this order.
> 4. That the third and fourth respondent and all those claiming rights and interest through them be and are hereby ordered to withdraw from the vicinity of the applicant's mining claim with immediate effect upon the granting of this order.
>
> **SERVICE OF PROVISIONAL ORDER**
> A copy of this application together with the Provisional Order shall be served upon the respondents by the applicant's legal practitioners or an officer in their employment."

The application was opposed by all the respondents, although no opposing papers were filed on behalf of the first and second respondents.

Applicant's Case

A farmer-miner dispute has been raging on between the applicant and the third and fourth respondents since 2020, when the third respondent received an offer letter for the farm. The dispute was referred to the second respondent for determination. A meeting which involved all interested parties was held before the second respondent. A survey of the mine and the farm was also carried out. Sometime in September 2021, the second respondent made a determination in favour of the third respondent. The second respondent determined that the mine was pegged in contravention of s 31(1)(g) of the Mines and Minerals[1] (the Act), as it was pegged on a farm that was less than one hundred heactares without the owner's written consent. Section 31(1)(g) of the Act provides that no person shall be entitled to exercise any of his rights under any prospecting licence or any

[1] [*Chapter 21:05*]

special grant to carry out prospecting operations or any exclusive prospecting order, except with the written consent of the owner if the farm in question does not exceed one hundred hectares in extent.

The second respondent established that the original offer letter of the land was issued to Sainet Stanlous Mashiri, the third respondent's late husband on 12 January 2005. The second respondent also established that the mine was initially pegged as Victory 67A under registration number 41823 on 9 December 2011. It was later readjusted and reissued a new Certificate of Registration as Victory 100A Mine Registration number 42931 on 20 July 2012. In view of those findings, the second respondent proposed the cancellation of Victory 100 A registration number 42931 held by the applicant in terms of s 50(1)(g)(i) of the Act. The applicant was also barred from exercising any mining rights on the claim in terms of s 354(5) of the Act.

The applicant appealed against the decision of the second respondent to the third respondent by way of letter dated 28 September 2021. A stamp impression on the letter from the first respondent's office shows that the letter was received by the first respondent on 30 September 2001. It appears the letter did not elicit any reaction from the first respondent. The applicant's legal practitioners wrote a follow up letter, this time to the first respondent's permanent secretary on 13 October 2021. The letter highlighted the disturbances that were occurring at the mine involving the third respondent and the applicant and its employees. Police had been roped in but they could not assist in the absence of a confirmation by the first respondent on the status of the appeal before him. A period of five months lapsed before the first respondent had acted on the appeal. The applicant approached this court to compel the first respondent to set the appeal down for hearing. On 11 May 2022, this court per CHINAMORA J, granted the following order in HC 1528/22 in default:

> "IT IS ORDERED THAT:
> 1. The first and second respondent be and are hereby directed to convene a meeting and give a determination on the applicant's appeal dated 28 September 2021 within 5 working days from the receipt of this order.
> 2. If the first and second respondent fail to convene the said meeting stated in paragraph 1 within the stipulated time period the applicant is granted leave immediately to resume its mining activities on its mining site namely Victory 100A Mine registration number 42931.
> 3. There shall be no order as to costs unless this matter is opposed."

The first and second respondents were the Minister and the Provincial Mining Director, the first and second respondents herein. The order was served on the first respondent through a letter from the applicant's legal practitioners dated 6 June 2022.

The first respondent did not comply with the time frames stipulated in the said order. In view of that non-compliance, the applicant on its part resumed mining activities in terms of paragraph 2 of the order. The first respondent eventually convened a meeting for the parties on 10 June 2022. The applicant claims that at the meeting, it informed the first respondent of the resumption of its mining activities in line with order by CHINAMORA J. It further claims that the first respondent took note of the order and accepted it.

The applicant claims that on 22 September 2022, it was shocked to receive a letter dated 20 September 2022 from the second respondent advising it of: the cancellation of its mining certificate and ordering a cessation of all mining operations, and closing of all mining shafts within 14 days of that letter. The letter was also copied to the Police, the third respondent and the Environmental Management Agency amongst other key stakeholders. Further investigations by the applicant revealed that the first respondent had actually made a determination on the applicant's appeal. That determination upheld the second respondent's decision on the dispute between the parties. The applicant claims that the first respondent's determination of 25 July 2022, was never served on it.

Shocked by the turn of events, the applicant reacted by filing a chamber application for contempt of court against the first and second respondents on 3 October 2022, under HC 6630/22. In that application, the applicant seeks an order that the first and second respondents be held to be in contempt of para 2 of the order by CHINAMORA J. It also seeks an order that the two respondents be committed to goal for a period of thirty days, or until such time they comply with para 2 of the said order. The last paragraph of the order directs the Sheriff or his lawful deputy to seize the persons of the first and second respondents and deliver them to the keeper of the goal.

The urgency of the matter is tied to the decision of the letter from the second respondent giving the applicant 14 days' notice to wind up operations. The applicant contends that both the first and second respondents' decisions were unlawful as they were made in violation of an extant order of this court. Further, the determination of the first respondent was also defective as it cited

a wrong mining location. The first respondent cancelled certificate of registration number 42913 instead of 42931, which the applicant holds.

It was in view of the foregoing that the applicant approached the court for an interim relief pending the outcome of the contempt of court proceedings aforementioned.

First and Second Respondents' Case

The first and second respondents did not file opposing papers. Their counsel, Mr Marira appeared at the hearing and made oral submissions in opposition. In his oral submissions, Mr *Marira* argued that the application was devoid of merit. The first and second respondents were never served with a copy of the order by CHINAMORA J. If service was effected by way of a letter, then that service was irregular. Orders of court were not served in that manner. Accordingly, the applicant had no rights worth preserving pending the return date.

Third and fourth respondents' case

The main opposing affidavit was deposed to by the third respondent, with the fourth respondent deposing to his own affidavit in which he associated himself with the deposition by the third respondent.

In her opposing affidavit, the third respondent raised issues with the urgency of the matter at the outset. The legal practitioner who signed the certificate of urgency had not been candid in his assessment of urgency. In HC6354/22, a previous matter involving the same parties and touching on the same issues, MHURI J had struck off the matter for want of urgency. The court determined that the failure by the certificate of urgency to state when the cause of action arose made it defective.

The third respondent also averred that a court order could only be served by the Sheriff in terms of the rules of this court. The first respondent was therefore under no obligation to comply with an order that was not properly served on him. There was therefore no urgency to the extent that the question of urgency was tied to the non-compliance with the terms of an order that was improperly served. The first and second respondents could not be held to be in contempt of a court order that was never served upon them. It was further contended that the cause of action arose on 10 June 2022, being the date that the first respondent met the parties. On that date it became clear

that the first respondent was not going to comply with the said order, assuming it was brought to his attention as alleged.

Submissions and Analysis

The issue of the manner of service of the court order by CHINAMORA J is central to the determination of the question of urgency. This is because the applicant seeks interim relief pending the outcome of the contempt of court proceedings against the first and second respondent. In his submissions, Mr *Maseko* argued that the urgency of the matter was founded on the impending eviction of the applicant from the mine, based on the letter from the second respondent. He further submitted that the decisions by the both the first and second respondents were defective in light of the court order by CHINAMORA J, which remained extant. Counsel further submitted that the first respondent was aware of the existence of the order since it was brought to his attention through a letter served at his offices on 3 June 2022. The same court order was also brought to his attention during the meeting held on 10 June 2022.

In his brief exchange with the court on whether the court order was served in terms of the rules of court, Mr *Maseko* submitted that there was substantial compliance with the rules since the order was brought to the Minister's attention by the applicant's counsel. He urged the court not to get bogged down by technicalities, but instead to exercise its discretion in terms of rule 7 and find that there was substantial compliance with the rules of court in the service of that court order. He also averred that the first respondent's determination was null and void to the extent that it cancelled a wrong mining claim altogether.

In response, Mr *Nyahuma* maintained that the applicant ought to have approached the court on 10 June 2022 when it became clear that the first respondent was proceeding to determine the applicant's appeal in violation of the said court order. Instead, the applicant chose to wait for the day of reckoning which appeared to have been triggered by the second respondent's letter. Mr *Nyahuma* further submitted that rule 7 did not apply to the circumstances of this case. It was couched in peremptory terms which effectively eliminated the exercise of discretion by the court.

I will deal with the question of urgency in the context of the service of the court order granted by CHINAMORA J and the interim relief sought by the applicant herein. I must state at the outset that the relief sought by the applicant is somewhat convoluted and all muddled up. The

cover page of the application states that it is one for "stay of execution pending application for contempt of court in terms of rule 60 of the High Court Rules 2021". The issue of the stay of execution pending the determination of the said application for contempt of court is a matter for the return date. It is the relief that the applicant ought to have sought as part of the terms of the final order sought. This is because once the court grants the stay of execution pending the determination of the said application, then there would be nothing for the court to confirm on the return date. The court would have effectively granted a final order on the basis of a *prima facie* case. The applicant ought to have sought the suspension of execution pending the return date, and not pending the determination of the application for contempt of court.

Service of court orders is regulated by r 15 (4) of the High Court rules. It states as follows:

> "(4) Service of a summons, all notices of set down, writ, warrant or court order shall be effected by the sheriff:
> Provided that the court or a judge may, in deserving cases authorise service of a notice of set down, or court order to be effected by a party or his or her representative." (Underlining for emphasis)

It is clear from the above provision that a court order is one of the processes that must be served by the Sheriff. The court or a judge may however authorise service to be carried out by a party or their legal practitioners. The manner in which r 15 (4) is constructed is such that the exercise of the discretion by the court or a judge can only be done at the time that the order is granted. That discretion cannot be exercised after the order has already been granted, as suggested by Mr *Maseko*. The draft provisional order captured above is a very good example. In the last paragraph, the applicant seeks the court's authority to serve the provisional order through its legal practitioners in the event that it is granted. That is how such authority is granted by the court. The court must consider the request at the time that it is being asked to grant the interim relief sought. It is for that reason that r 7 cannot be invoked at the stage in order for the court to overlook what is patently a defective service of process.

Although at this stage the court is not required to determine the merits of the application for contempt of court, seeing as that application is not before this court, this court cannot ignore the substance and cause of action in that matter. This is because in order for the applicant to succeed in the instant application, it must establish a *prima facie* case in that matter which justifies some protection through the granting of the interim relief. The application for contempt of court alleges

that the conduct of the first and second respondents was in contempt of the order granted by CHINAMORA J. The first and second respondents have argued that they were never served with a copy of the said order. On its part the applicant does not deny that the order was not served by the Sheriff, and neither does it allege that it was granted leave to dispense with service by the Sheriff.

There cannot be a *prima facie* case of contempt where the person alleged to be in contempt denies that there were never served with a copy of the court order as required by the law. There is clearly no *prima facie* right which is worth protecting under the circumstances. Counsel for the applicant fell short of admitting that there was no proper service, by seeking to invoke the principle of substantial compliance with rules of court, which principle is alien to service of process in this jurisdiction. As already noted, the rules of court clearly specify the accepted modes of service of process in this jurisdiction. One cannot simply invent their own mode of service of process outside of the legislated position. That position is legislated through the rules of court.

The urgency of the application was premised on the argument that both the first and second respondents' letters communicating the first respondent's decision on the appeal were defective since they were made in violation of an extant order of this court. More importantly, it was alleged that the second respondent's letter of 20 September 2022, which gave the applicant 14 days within which to wind up operations was null and void as it was also written in violation of an extant court order. It stands to reason therefore that if the first and second respondent were never served with a copy of the court order as required by the law, then the urgency of the matter, to the extent that it is predicated on the alleged violation of that court order falls away. The matter cannot be held to be urgent. The cause of action could not have arisen by reason of the second respondent's letter of 22 September 2022. The cause of action arose the moment it became clear that the first respondent was going to determine the appeal regardless of the order by CHINAMORA J, which the applicant was in possession of but had not served in terms of the rules of court.

For the foregoing reasons the court finds that the application is not urgent, and it is therefore improperly before the court.

DISPOSITION

Resultantly it is ordered that:

1. The application be and is hereby struck off the roll of urgent matters.
2. The applicant shall pay the third and fourth respondents' costs of suit.

Maseko Law Chambers, legal practitioners for the applicant
Civil Division of the Attorney General's Office, legal practitioners for first and second respondents
Nyahuma's Law, legal practitioners for the third and fourth respondents