THEMBA SIBANDA

Versus

G & G PRESERVES (PVT) LTD

And

SHERIFF OF THE HIGH COURT N.O

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 15 DECEMBER 2021 & 20 JANUARY 2022

Urgent Chamber Application

T. Tavengwa for the applicant
Ms. M. Sibanda for 1st respondent
No appearance for the 2nd respondent

KABASA J: This is an urgent chamber application wherein the applicant seeks the following interim relief:

"Pending the return date, the applicant is granted the following relief:

1. The execution of the writ of execution under HC 1430/17 issued on 2nd December 2021 by the Registrar of the High Court be and is hereby stayed.
2. The 2nd respondent be and is hereby interdicted from ejecting applicant from remaining extent Lot B Lower Rangemore, Umguza as per Notice of Removal dated 7th December 2021.

The final order sought should the interim relief be granted is:

1. The Certificate of Registration issued by the Ministry of Mines and Mining Development on 29th November 2021 under licence number 025192 BA, registration number 17408 BM in favour of the applicant be and is hereby declared to be valid and binding.
2. The writ of execution under HC 1430/17 issued by the Registrar of the High Court on 2nd December 2021 be and is hereby suspended until such time that applicant's existing mining rights are lawfully impeached.
3. 1st respondent to pay costs of suit on attorney-client scale."

The background facts to the matter are these:

The applicant was in occupation of a piece of land known as remaining extent of Lot "B" Lower Rangemore, Umguza, a property owned by the respondent. The applicant was conducting mining operations thereat.

The respondent then brought an action seeking to evict the applicant from the property and this action was brought under HC 1430/17. The applicant defended the matter and sought to argue that he was in lawful occupation of the property.

In a judgment handed down on 21 May 2020 MABHIKWA J held that the applicant had no lawful authority to be on these premises, the documents from the Ministry of Mines which he believed authorized him to be on these premises did not so authorize him and the description of the property on these documents did not relate to the respondent's property.

The court's order in HC 1430/17 is couched as follows:

> "1. That the defendant shall immediately vacate the remaining extent of Lot "B" Lower Rangemore, Umguza.
> 2. Failing the above, the Sheriff of Zimbabwe or his lawful deputy shall evict the defendant from the remaining extent of Lot "B" Lower Rangemore, Umguza."

The applicant appealed against this judgment and on the date of hearing sought to withdraw the appeal. The withdrawal was premised on the realization that the judgment in HC 1430/17 was unassailable as the applicant, with hindsight, appreciated that the documents he possessed did not authorize him to occupy the land from which he was to be evicted.

The appeal was subsequently dismissed after the Supreme Court held that it was already seized with the matter and so declined to dispose of it on the basis of a withdrawal. The dismissal was on 17th November 2021.

The applicant had, in the meantime, sought to regularize his occupation of the piece of land and under HC 571/21 obtained the following order from TAKUVA J.

> "1. The respondent be and is hereby ordered to immediately furnish applicant with a certificate of registration for 1 x 150 blocks of quarry at the remaining extent Lot "B" Rangemore, Umguza, over the area specified on the survey report dated 30th November 2016.
> 2. The applicant, after receipt of the certificate of registration referred to in (1) above, be and is hereby authorized to resume mining activities on the 1 x 150 block of quarry at the remaining extent Lot "B" Rangemore, Umguza on the area specified on the survey report dated 30th November 2016.
> 3. No order as to costs."

This order was granted against the Provincial Mining Director and effectively addressed the issue which had led to the decision in HC 1430/17. The applicant upon granting of the certificate of registration, would now have the authority which he hitherto did not have resulting in his eviction under HC 1430/17.

The Provincial Mining Director, in compliance with the order in HC 571/21 proceeded to grant the applicant the certificate of registration 025192BA on 29 November 2021.

Following the granting of this certificate of registration, applicant's legal practitioners wrote to the respondent's legal practitioners advising them of this development and further drawing their attention to the fact that, that which the applicant did not have at the time an order for his eviction was granted in HC 1430/17 he now had. This letter is dated 30th November 2021. On receipt of that letter the respondent obtained a writ of ejectment on 2nd December 2021 seeking to have the applicant evicted in terms of the order in HC 1430/17.

The applicant subsequently filed an urgent chamber application under HC 1925/21 in which he sought an interdict against his eviction pending the determination of the matter

relating to his authority to be on the land in question. The gist of that application was that the order in HC 1430/17 was a *brutum fulmen* as it had been overtaken by events and the final order sought to declare it so.

The application was placed before MOYO J who raised the following as a query.

> "I decline to hear the matter on the basis of urgency because the execution of an extant order of court cannot be interfered with except if the order is being challenged either by a rescission or an appeal. I cannot stop the execution of a lawful order of court which applicant calls a *brutum fulmen* as that order stands until set aside by a competent court."

At the time of the hearing of this current application this query had not been communicated to the parties.

Counsel for the respondent proceeded to submit that the applicant had filed a similar application and had failed to disclose material facts in the current application and so the application should be struck off the roll as an earlier similar application had been heard and dismissed. Counsel did not have a copy of the judgment nor the order.

Mr. Tavengwa, for the applicant, expressed ignorance of that development and an adjournment was granted so the correct position could be verified. It was then that it turned out that the judge had not granted an order but raised a query which was yet to be communicated to the parties. The file was not with Registry but with the secretaries who were yet to type the judge's handwritten query which was stapled on the inside cover of the file. It became clear that the application had not been heard and the parties had not appeared before the judge.

In the meantime a notice of withdrawal had been filed on 13th December 2021. Based on the handwritten query by the judge and the date on the typed query, such withdrawal appears to have been made before the judge's query was communicated to the parties.

In her response to the application I am seized with, *Ms. Sibanda* submitted that the High Court judgment under HC 1430/17 became a Supreme Court judgment upon the dismissal of the appeal on 17th November 2021.

Counsel further submitted that applicant must first have HC 1430/17 vacated as it is extant and further that in HC 1925/21 MOYO J heard and dismissed a similar application based on same facts. The applicant could therefore not seek to bring the same application back before a different judge.

Before I called for HC 1925/21 I was of the view that the applicant was seeking to have the same matter adjudicated over by a different judge in the hope that he would get a different outcome.

However, a reading of HC 1925/21 showed that no hearing was conducted and before the judge's query was communicated to the parties, the applicant withdrew the application. I must say I find nothing amiss with an applicant who withdraws a matter before a determination is made.

The learned judge in HC 1925/21 appears to have invoked rule 60 subrule 15 of the High Court Rules, SI 202 of 2021 which provide that:

> "In determining the fate of a chamber application, a judge may raise such queries as he or she may consider pertinent to the disposal of the application."

The rules do not preclude the withdrawal of a matter where a query has been raised and a party in addressing such query decides to withdraw the matter. There is also no legal impediment to a filing of a fresh application attending to or addressing the queries so raised.

I am of the view that no determination was made in HC1925/21 because there is no court order. There was no definitive order made, either striking the matter off the roll or dismissing it as had been submitted by counsel for the respondent. I am fortified in saying so because the Registrar eventually communicated with the parties and such communication was couched as follows:

"I refer to your chamber application which was placed before the Honourable Justice Moyo who commented as follows……..."

The comment is as already captured elsewhere in this judgment.

It is therefore not correct that the application in HC 1925/21 was heard and dismissed. The argument that the current application should therefore suffer a still birth is, in the circumstances, misplaced.

The following facts are therefore not in dispute:

1. Under HC 1430/17 the applicant did not have the requisite authority to be on the respondent's land.
2. The applicant was ordered to vacate the respondent's property by a judgment handed down on 21 May 2020.
3. An appeal was noted against this judgment which counsel with hindsight sought to withdraw but was however dismissed by the Supreme Court on 17 November 2021.

4. Both HC 1430/17 and the Supreme Court decision were not concerned with the certificate of registration subsequently obtained by the applicant post these decisions.
5. HC 527/21 compelled the Provincial Mining Director to grant the applicant authority to be on the land and upon such issuance of the requisite authority, allowed applicant to resume mining operations on that land.
6. HC 527/21 is extant and the certificate of registration issued in compliance with the order in HC 527/21 has not been impugned.
7. The respondent did not seek the eviction of the applicant until after the applicant had regularized his occupation of the land in question by virtue of the certificate of registration issued by the Provincial Mining Director.
8. The present application seeks to stop the eviction pending the return date when the issue of the certificate of registration and its validity will be ventilated.

From the foregoing the point *in limine* raised by counsel for the respondent has no merit.

This application was lodged on 13th December 2021 after the withdrawal of the one lodged on 8th December 2021. The applicant came to know of the impending eviction on 7th December 2021. There is no doubt the application to halt the impending eviction was made without undue delay. When the need to act arose, the applicant promptly acted *(Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188).

A failure by the court to act would justify the applicant dismissively suggesting "… that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant." (*Documents Support Centre P/L* v *Mapuvire* 2006 (2) ZLR 240)

The basis for this application is hinged on the acquisition of the requisite authority to occupy the land which was obtained following the order granted under HC 527/21. It therefore cannot be said the gist and argument *in casu* is the same as in HC 1925/21, which application was, in any event, withdrawn.

Counsel for the respondent did not address the court on the merits of the matter. An invitation to counsel to address the court on the merits was turned down. It follows therefore that the submissions made on the merits were not challenged. There is therefore nothing to controvert the applicant's averment that the Registration Certificate granted on 29 November 2021 authorises him to occupy the land in question, for mining purposes.

The applicant managed to establish a prima facie right which was about to be infringed by the impending eviction. The applicant submitted that he has heavy machinery on the land which cannot be easily moved and stored elsewhere. He has nowhere to keep that machinery and he has invested in this mining operation with families eking out a living from such operation. Eviction by its very nature is disruptive and may also result in damage to property. It therefore cannot be disputed that the fear of irreparable harm is real. More so as this eviction would seek to dismantle operations that have been in existence since 2017, albeit without authority, before the granting of the order in HC 527/21.

The applicant sought to engage the respondent so they could find common ground but such overtures were seemingly spurned as the response came in the form of a warrant of ejectment.

There is therefore no other alternative remedy available to the applicant except the granting of the interim relief so as to halt the eviction.

The balance of convenience favours the granting of the interim relief. The facts already canvassed are supportive of this finding as the applicant is likely to be prejudiced if evicted whereas the respondent had the judgment in HC 1430/17 for more than a year and had not sought to execute it until receipt of the letter dated 30th November 2021.

The requirements for an interim interdict were therefore met (*Gold Reef Mining (Pty) Ltd* v *Mnjiva Consulting Engineers (Pty) Ltd & Anor* HH-631-15)

In the result I make the following order:

"1. Pending the return date, the execution of the writ of eviction under HC 1430/17 issued on 2nd December 2021 by the Registrar of the High Court be and is hereby stayed.

2.The 2nd respondent be and is hereby interdicted from ejecting the applicant from remaining extent Lot "B" Lower Rangemore, Umguza as per the notice of removal dated 7th December 2021."

Mutuso, Taruvinga & Mhiribidi, applicant's legal practitioners
Messrs. Vundhla-Phulu & Partners, respondent's legal practitioners