LOREEN MASHANGWA
versus
CHRISPEN BHADHI
and
TICHA DARANGWA
and
THE MINING COMMISSIONER GWERU

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 15 December 2011 and 10 January 2012

Urgent Chamber Application

M D Hungwe, for the applicant
H Garikayi, for the 1st and 2nd respondents
No appearance for the 3rd respondent

MAWADZ E J: This is an urgent chamber application for a provisional order whose interim relief sought is stated as follows:

> "INTERIM RELIEF GRANTED
>
> Pending determination of the lawful owner of ANSH NORTH situated on the following map coordinates;
>
> | | |
> |---|---|
> | Point A | 0187976 |
> | | 7820147 |
> | Point B | 0188251 |
> | | 7820232 |
> | Point C | 0188307 |
> | | 7820018 |
> | Point D | 0188139 |
> | | 7820018 |
>
> The first and second respondents be and are hereby barred and interdicted from carrying out any mining operations on ANSH NORTH and coming within one hundred metres of the coordinates stated above.

SERVICE

Service of this provisional order to be effected by a clerk in the employ of Messrs Chinyama and Partners Legal Practitioners."

The terms of the final order sought are in the following terms;

"TERMS OF FINAL ORDER SOUGHT

1. The applicant be and is hereby declared the sole and lawful holder of title over six gold reef claims knows as ANSH NORTH situated on the following map coordinates:

Point A	0187976
	7820147
Point B	0188251
	7820232
Point C	0188307
	7820018
Point D	0188139
	7820018

2. The first and second respondents be and are hereby barred and interdicted from entering and mining on ANSH NORTH on the map coordinates stated in (1) above.
3. The first and second respondents to pay the cost of suit on a legal practitioner to client scale."

Before I proceed to deal with this matter I wish to comment on the undue haste with which the applicant handled this urgent application. The urgent chamber application was filed with this court on 9 December 2011 and I was allocated the matter on 12 December 2011. This is so on account of the fact that 9 December 2011 was a Friday. I perused the record on the same day and noted a number of anomalies which are as follows;

i) the urgent chamber application was not complete as Annexure B referred to in the applicant's founding affidavit was not attached;

ii) annexure A referred to in the applicant's founding affidavit was not marked as such; and

iii) The application was not paginated and properly indexed.

I was of the view that that the matter could have been urgent hence I instructed the applicant to correct the anomalies before I could set the matter down. This was done on 13 December 2011 and I proceeded to set the matter down for hearing on 15 December 2011. The point is made that urgent applications by their nature demand that legal practitioners apply their minds not only to the facts of the matter but in the drafting and preparation of the papers filed. Valuable time of the court is lost perusing papers which are not in order and are referred back to the applicant before a proper determination is made. There was no plausible explanation for this negligent approach on such mundane issues by the applicant's counsel. Such conduct is inexcusable and in a proper case the court may refuse to hear the applicant on an urgent basis.

I turn to the facts of the matter giving rise to this application.

It is common cause that the applicant and the first respondent are registered owners of mining claims in the Midlands Province being ANSH NORTH 28896 for the applicant and ANSH BLUE 4 29220 for the first respondent. Both the applicant and the respondent have attached their respective registration licences or certificates. The applicant's claim was registered on 10 December 2010 and there is also the applicant's inspection certificate indicating that the next inspection is due on 10 December 2012. The first respondent's certificate of registration of ten (10) good reefs is dated 7 July 2011. The first respondent has also attached Annexure D to the notice of opposition which shows the map of the first respondent's claim ANSH NORTH BLUE 4.

The map coordinates for the claims for both the applicant and the first respondent are not in issue and can be illustrated as tabulated hereunder;

	Applicant	**1st Respondent**
Point A	0187976	0188899
	7820147	7820142
Point B	0188251	01889302
	7820232	7820441
Point C	0188307	0189378

	7820018	7820263
Point D	0188139	0188957
	7820018	7819944

The applicant in her founding affidavit stated that she has been carrying out mining operations on her claims since December 2010. According to the applicant what has led to this urgent application for an interdict is that on or about 20 November 2011 the first and second respondents both residents of number 6120 Gwee Street, South Downs, Gweru descended on or invaded the applicant's claim ANSH NORTH and started to mine gold ore to the exclusive benefit of the first and second respondents. According to the applicant she protested against this blatant disregard of her mining rights and produced her certificates of registration for the six (6) gold reefs ANSH NORTH claim and the inspection certificates to the first and second respondents. The applicant stated that the first respondent countered this by producing his own certificate of registration dated 7 July 2011 but was unable to produce the map coordinates for their alleged claims. The second respondent had no certificate of registration. The applicant alleges therefore that the first and second respondents are mining within the applicant's map coordinates illegally.

It is the applicant's contention that the certificates of registration bestows upon her the legal right to be at ANSH NORTH gold claims in terms of the Mines and Minerals Act [*Cap 21*:*05*] (hereinafter the Act). The applicant avers in her founding affidavit that she has been carrying out mining operations lawfully, in a peaceful and undisturbed manner from December 2010 until about 20 November 2011 when the first and second respondents unlawfully came on to her claims thereby taking the law into their own hands and imposing themselves on the applicant's mining claims. The basis for the urgent application according to the applicant is that the unlawful conduct by the first and second respondent is on-going and that there is no other remedy available to the applicant as the first and second respondents are not accounting for the gold mined at the applicant's claims hence the applicant would not be able to sue for damages. It is the applicant's belief that since the injury perpetrated by the first and second respondents is on-going in nature, this matter cannot await the normal court processes to be heard as irreparable harm would be occasioned to the applicant.

It is trite law that the requirements for an interdict are as follows;

i) a *prima facie* right even if it is open to doubt;

ii) an infringement of such right by the respondent or a well-grounded apprehension of such infringement;

iii) well-grounded apprehension of irreparable harm to the applicant, if the interlocutory interdict should not be granted and if he should ultimately succeed in establishing his right finally;

iv) the absence of any satisfactory remedy and; and

v) that the balance of convenience favours the granting of an interlocutory interdict. See *Bozimo Trade & Development Company* (*Pvt*) *Ltd* v *First Merchant Bank of Zimbabwe Limited & Ors* 2000 (1) ZLR 1 (H) at p 10.

The applicant's contention is that she meets all the above requirements. The certificate of registration of her claim ANSH NORTH confers upon her a *prima facie* right. Her view is that the injury caused to her by the first and second respondents is clear as the first and second respondents are infringing upon her right to own the mining claims by extracting gold ore on her claim in quantities unknown to her, illegally and to the sole benefit of the first and second respondents. The applicant's view is that her fear of irreparable harm is well grounded as the gold is extracted by the first and second respondents is not quantifiable and proceeds thereof remain unaccounted for. This would make it difficult if not impossible for the applicant to claim for damages. As a result applicant strongly feels that there is no other satisfactory remedy available to her save to seek the protection of the law through the interlocutory interdict. Lastly, the applicant contends that the balance of convenience favours the granting of an interlocutory interdict on the basis that she was granted the certificate of registration in December 2010 ahead of the first respondent who was granted his certificate of registration in July 2011, that she has been on site earlier than the first and second respondents and is unable to quantify the loss occasioned to her by the first and second respondents even if she would opt to sue for damages.

Mr *Garikayi* for the first and second respondents did not seek to challenge the applicant's perception of the law as already articulated. Instead the first and second respondents opposed this application on basically two grounds. Firstly that this matter is not urgent as the applicant has not been able to explain why this application was not timeously made on 20 November 2011 or soon thereafter, which is the period within which the alleged dispute arose. It is not in issue that this application was only made on 9 December 2011. The applicant in her founding affidavit has not proffered any explanation as to why the applicant

failed to act when the need to act arose on 20 November 2011 or soon thereafter. The second basis upon which the argument by the first and second respondent is premised is that the applicant's request for an interlocutory interdict lacks merit and is based on false allegations of facts. The first and second respondents averred in their respective opposing affidavits that the applicant's founding affidavit if fraught with material omissions which borders on deliberate misrepresentation of facts and falsehoods.

The question of what constitutes urgency in my view is now no longer an issue for debate in our law. See *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188.

In the case of *Mathias Madzivanzira & 2 Ors* v *Dexprint Investments* (*Pvt*) *Ltd Anor* HH 145-2005 at pp 2 – 3 NDOU J made reference to remarks by PARADZA J in the case of *Dexprint Investments* (*Pvt*) *Ltd* v *Ace Property & Investment Company* HH 120-2002 in discussing what constitutes urgency in an application of this nature as follows:

> "For a court to deal with a matter on an urgent basis it must be satisfied of a number of important aspects. The court has laid down the guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with that on an urgent basis. Further, it must also be clear that the applicant did on his own part treat the matter as urgent. In other words if the applicant does not act immediately and awaits for doomsday to arrive and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed on that warrants to be dealt with on an urgent basis."

See also the apt remarks by KUDYA J in the *Gifford* v *Muzire & Ors* 2007 (2) ZLR 131 (H) at 134 H – 135 A in which the learned judge had this to say:

> "All that the applicant has to show is that the matter cannot wait the observance of normal procedures and time frames set by the rules of the court for ordinary applications without rendering nugatory the relief that he seeks."

According to the applicant the first and second respondents invaded her mining claims on 20 November 2011 but she only filed this application on 9 December 2011, after about a period of 18 days. As already stated there is no explanation by the applicant for this delay of 18 days in the applicant's founding affidavit which is quite lengthy (it covers five printed pages and thirteen paragraphs). On that account alone the applicant's case should fail. The inference which can be drawn in the absence of a plausible explanation for such a delay of about eighteen days is that the matter is not urgent.

I am also inclined to dismiss this application for not only the lack of merit but that the applicant has not been candid with the court.

In the case of *Graspeak Investments* (*Pvt*) *Ltd* v *Delta Corporation* (*Pvt*) *Ltd & Anor* 2001 (2) ZLR 551 at 555 D NDOU J dealt with the question of material non-disclosure, *mala fides* or dishonesty in urgent applications and how this should impact upon the case of the offending litigant. The learned judge had this to say:

> "The courts should, in my view, discourage urgent applications, whether ex parte or not, which are characterised by material non disclosures, *mala fides* or dishonesty.
>
> Depending on the circumstances of the case, the court may make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants. In this case the applicant attempted to mislead the court by not only with holding material information but also by making untruthful statements in the founding affidavit. The applicant's non-disclosure relates to the question of urgency. In the circumstances, I find that the application is not urgent and dismiss the application on that basis."

In *casu*, the applicant has withheld material information in the founding affidavit both in relation to the question of urgency and the merits of the matter. Mr *Hungwe* for the applicant could not make meaningful submissions in that regard.

Let me deal with the material non-disclosure by the applicant which only became apparent after the first and second respondents had filed opposing affidavits and relevant annexures.

The applicant did not disclose that when this dispute arose between the applicant and the first and second respondent she referred the dispute to the mining commissioner, Gweru, Midlands possibly in terms of the Mines and Mineral Act [*Cap 21*:*05*] (hereafter the Act). The Act provides various remedies in ss 345, 346, 348, 353 and 354. I find no cause to refer in any detail to these provisions – suffice to state that some of the provisions relate to jurisdiction of the mining commissioner to investigate and determine complaints, the judicial powers bestowed upon mining commissioners, the procedure in summary hearing of complaints by mining commissioner, powers of the mining commissioner to deal with disputes relating to encroachment and the power to grant injunctions in appropriate cases. The Act therefore provides various domestic remedies which an aggrieved party may elect to pursue before approaching this court.

The applicant, in a very dishonest manner has decided to approach both the mining commissioner and this court with the same dispute without making/noting that disclosure to

this court, a phenomenon generally described as double dipping or forum shopping. When the mining commissioner received the applicant's complaint a letter was written by the mining commissioner to the officer in charge, CID Minerals Gweru on 2 December 2011 which letter was copied to the applicant and the first respondent. The letter acknowledges the receipt by the mining commission of the complaint by the applicant that the first and second respondent were mining gold ore on the applicant's claim ANSH NORTH and that the mining commissioner was in the process of examining all relevant documents pertaining to the claims owned by the applicant and the first respondent and to also visit the disputed area to ascertain physically the location of the claims. Lastly the mining commissioner requested the police to stop mining operations at the disputed site until the matter is finalised and that anyone claiming the area must approach the mining commissioner first for verification and clearance. All this material information was not disclosed by the applicant and no explanation was proffered for that. If indeed the mining commissioner is seized with the matter and had stopped mining operations at the disputed site until further notice, what would be the basis for the applicant to seek an interlocutory interdict? My view is that the applicant decided not to reveal this vital information in order to create the urgency now averred in the application and justify the basis to seek the provisional order. This letter was written eight days before the applicant approached this court. The applicant did not even deem it proper to refer to or attach a copy of the complaint she referred to the mining commissioner.

The mining commissioner three days later on 5 December 2011 well before this application wrote another letter to officer in charge CID mineral Shurugwi making reference to the letter dated 2 December 2011 written to CID minerals Gweru. The contents of the letter are self-explanatory and are as follows:

> "Be advised that there should be no dispute on these mines at all as according to records in this office 28896 ANSH NORTH is to the east of the Shurugwi Zvishavane highway and 299220 ANSH BLUE 4 is to the west of the same highway. Whoever is mining on the wrong side of the highway must be stopped."

This letter is copied to the applicant, the first respondent and officer in charge, CID Minerals Gweru. Again the applicant chose not to refer to this vital information in her founding affidavit. Such disclosure would have compelled the applicant to explain the current situation obtaining on the site.

In a letter dated 14 December 2011 the mining commissioner advised the first and second respondents counsel of the coordinates for corner beacons for the first respondent's

claim 29220 ANSH BLUE 4 as already explained. The *mala fides* on the part of the applicant is also apparent in this letter to which a copy of the map of the first respondent's claim was attached. The relevant part reads as follows:

> "Loreen Mushangwa (applicant) refused to produce the plan endorsed by this office. However her 28896 (ANSH NORTH) is approximately 800 metres south west of homestead PL 4 – Shurugwi and falls east of Shurugwi Zvishavane highway while Bhadhi (first respondent claim) falls west of the same highway."

The effect of the non disclosure of this material information by the applicant is that the applicant has not explained in the founding affidavit the current nature of the dispute warranting the granting of the relief sought in view of the explicit explanations and orders issued by the mining commissioner. The applicant did not even disclose the outcome of findings, if any, made by the mining commissioner. The urgency referred to by the applicant is therefore perjured and self-created as there is no evidence that the first and second respondent have defied the instructions by the mining commissioner and the police.

Further, on the facts before me there is no basis for the claim or remedy sought. I am therefore inclined to make an adverse finding in relation to the applicant's cause as a seal of my disapproval of her *mala fides*, material non-disclosure and apparent dishonesty.

Lastly I now deal with the issue of costs. Mr *Garikayi* for the applicant sought an order for costs on a higher scale and Mr *Hungwe* was of the view that there is no basis for punitive costs. My view is that the manner in which the applicant has conducted herself shows a wanton abuse of the court process. This application is not informed by the applicant's genuine desire to enforce her rights but rather to mislead the court and possibly win at all costs. The relief sought was apparently granted by the third respondent at the behest of the applicant. There is no evidence that the order or directive given by the third respondent is no longer in force. In fact the applicant chose to conceal all these facts from the court. There is therefore no need for this application besides wasting the court's valuable time and compelling the first and second respondents to defend themselves in this court. All in all the applicant has not been open, candid, honest and sincere with the court. The decision by the court to set a matter down on an urgent basis is informed mostly by the applicant's founding affidavit. In my view it is high time that litigants should be made aware that they should not abuse this procedure and that such conduct would invariably be visited with a punitive order of costs.

Accordingly, the application is dismissed with costs on a legal practitioner and client scale.

Chinyama & Partners, applicant's legal practitioners
Garikayi & Company, 1st and 2nd respondents' legal practitioners