CHENAI MUNYORO
and
DEANS MUNYORO
and
DAINAH MANDISEKA
versus
MINERALS IDENTITY (PRIVATE) LIMITED
and
MINISTER OF MINES AND MINING DEVELOPMENT
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 19 February &7 June 2024

Urgent Chamber Application

K. Gama for the applicants
D Chinawa for the 1st respondent
N L. Mabasa for the 2nd respondent

ZHOU J: This is an urgent chamber application for an order staying the execution of the writ issued pursuant to the order granted in Case No. HC 3805/23. The writ of ejectment to which the application relates was issued on 30 January 2024. On the return date the applicants seek the setting aside of the writ and a declaration that the first and third respondents are not entitled to evict the applicants from Koo Doo Reg. No. 42792, whose coordinates are stated as A-0461428 8088194, B-0461876 8088047, C-0461816 8087852, D-0461320 8088019 and from their homes and fields.

The application is opposed by the first respondent. The second respondent informed through counsel that he will abide the decision of the court and would make no submissions on the matter.

In addition to contesting the matter on the merits, the first respondent objected to the urgent hearing of the application on the grounds that this is in substance the very same dispute in

respect of which the applicants previously filed an urgent chamber application that was held not to be urgent and was struck off the roll of urgent matters.

The material facts which gave rise to the instant application are as follows: the parties are involved in a dispute relating to a mining area. The first respondent obtained a default judgment against the applicants herein in Case No. HCH3805/23 on 8 August 2023. The applicants instituted an application for the setting aside of the default judgment, which application is still pending. An application for stay of execution of that judgment was struck off the roll of urgent matters.

In paragraph 10 of the founding affidavit the applicants state that for the avoidance of doubt the application is not for the stay of execution of the default judgment that is stated in the writ of ejectment. The judgment referred to in the writ is case number HCH 3805/23. This is the very same judgment in respect of which the writ which is referred to in para. 8 of the founding affidavit was issued. Quite clearly, there is an inherent contradiction in the averments made by the applicants in the founding affidavit. The applicants make an averment that they are seeking stay of execution "of a writ" as if the writ concerned is not related to the judgment stated therein as the one being enforced.

Urgency

In objecting to the urgent hearing of the application the first respondent submitted that the substance of the instant application is the same as the chamber application instituted by the applicants under case number HC 6160/23 in October 2023. That application was struck off the roll of urgent matters. The submission made on behalf of the first respondent is that the instant application which was filed on 14 February 2024 cannot be urgent.

A matter is urgent if it cannot wait to be dealt with as an ordinary court application. *Pickering v Zimbabwe Newspapers (1980) Ltd* 1991 (1) ZLR 71(H) at 93; *Dilwin Investments (Pvt) Ltd t/a Formscaff* v *Jopa Engineering Company (Pvt) Ltd* HH 116-98. In the case of *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 232(H) at 244C-D MAKARAU JP (as she then was) explained urgency as follows:

> "In my view, urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."

In the celebrated dictum in *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188(H), CHATIKOBO J stated thus:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait."

In the same judgment the learned judge stated that urgency which arises from deliberate inaction until the eleventh hour is not the type of urgency that is envisaged by the rules of court. These authorities and many others not cited herein emphasise the need to act when the cause of complaint arises. In this case the order the execution of which the applicant seeks to stop was granted in August 2023. An urgent application instituted in October 2023 to stay its execution was held not to be urgent. The relief that is being sought *in casu* is not different from that which is being sought in an application which this court has already found not to be urgent. Both applications seek stay of execution. The substance of the relief seeking stay of execution cannot change merely because the applicants have decided to address it as stay of "execution of the writ". Clearly, the writ is issued pursuant to a judgment.

The applicants complain that the writ is being used to evict them from their Koo Doo mining location and from their homesteads and fields. The writ is clear as to the area to which it relates. If the applicants' complaint is that the writ is being executed upon areas or an area to which it does not relate or upon areas to which they have rights then the applicants' remedy is not to seek stay of execution. Stay of execution assumes that the execution is taking place at the right place and in respect of the correct property but that owing to alleged facts real and substantial justice demands that such execution be stayed. In this case the applicants are seeking not an interdict but stay of execution. This court having found that such relief cannot be granted urgently in the circumstances of this case, the matter cannot become urgent now merely because the facts upon which stay of execution is being sought have been reconfigured in light of the issuing of the writ of execution. The cause of action remains the same, namely, stay of execution.

In any event, the allegation that the applicants are being evicted from their homesteads and fields is being disputed, just as the applicants' claim of title to the mining site alleged is also being disputed. Such a dispute of fact cannot be resolved on the papers. Urgency which is

founded upon a disputed fact cannot succeed because the basis of the urgency has not been established by evidence.

In all the circumstances, the applicants have failed to establish their entitlement to have the matter heard urgently

In the result, IT IS ORDERED THAT:

1. The application be and is struck off the roll of urgent matters.
2. Applicants shall pay costs.

Gama & Partners, applicant's legal practitioners
Chinawa Law Chambers, first respondent's legal practitioners