

**UBUTH BETHU (PVT) LTD**

**Versus**

**TOTAMALE (PVT) LTD**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 6 & 12 NOVEMBER 2012

*Ms N. Ndlovu* for the applicant  
*T. Muganyi* for the respondent

Judgment

**NDOU J:** The applicant seeks an order against the respondent in the following terms:

“Terms of the final order sought

That you show cause to this honourable court why a final order should not be made against you in the following terms:

1. The interim order is confirmed.
2. The respondent be and is hereby ordered to pay the applicant a sum of \$100 per day being holder [sic] damages for the compressor and Jack Hammer as from the 9<sup>th</sup> of October 2012 until the release of the compressor.
3. The respondent pays costs of suit on an attorney – client scale.

Interim relief granted

Pending the finalization of the matter, the applicant be and is hereby granted the following relief.

1. The respondent, its directors, employees, agents and all those purporting to act on its behalf or anyone and everyone deriving authority from respondent, its directors, employees and agent be and are hereby ordered within 12 hours of service of this order, upon the respondent.
  - (a) To release the entirety of applicant’s equipment listed on annexure AA and deliver the said equipment to ZRP Central Police Station, Bulawayo, under whose custody and care the equipment should remain till the confirmation of the order.

2. (a) should the respondent, its directors, employees, agents and all those purporting to act on its behalf or anyone and everyone deriving authority from respondent, its directors, employees and agent, on expiration of the 12 hours period referred to paragraph 1 above, refuse, fail or neglect to comply with paragraph 1(a) above its directors, employees, agents and all those purporting to act on its behalf or anyone and everyone deriving authority from respondent, its directors, employees and agent be and are hereby deemed to be in contempt of court.  
(b) Should the respondent, its directors, employees, agents and all those purporting to act on its behalf or anyone and everyone deriving authority from respondent, its directors, employees and agent particularly satisfy the provisions of paragraph 1(a) above, by failing to release the entirety of the equipment listed in annexure AA, respondent, its directors, employees, agents and all those purporting to act on its behalf or anyone and everyone deriving authority from respondent, its directors, employees and agent be deemed to be in contempt of court.
3. In the event that respondent is held to be in contempt as per paragraph 2 above the Deputy Sheriff [sic], Bulawayo or her lawful assistant be and is hereby ordered to arrest either the respondent's directors, employees, agent or any person purporting to be acting on its behalf or anyone and everyone deriving authority from respondent its directors, employees and agent deliver him/her to Grey Prison, Bulawayo where he/she shall be imprisonment [sic] for a period not exceeding 90 days or until she/he abide by the court order, which ever happens first."

It is advisable for the draft order to be brief and to the point. This one is with respect, clumsy. Legal practitioners should be discouraged from using such grandiloquent language in court papers.

The salient facts of the case are the following. The applicant and the respondent entered into a partnership agreement on 3 September 2012. The terms of the agreement were that the respondent would bring in a mining claim and handle the mining operations. The applicant would bring in mining equipment to be used in the claim. The objective of the partnership was to mine gold. This relationship did not last long because the month following their signatures the parties' relationship became so acrimonious to such an extent that the applicant terminated the agreement. The applicant seeks the return of the equipment it had brought into the mining venture. This is the source of this application. The respondent is said to be refusing to let go the equipment.

The respondent has raised four points *in limine* which I propose to consider in turn.

The first one is that the applicant has not established urgency in this matter. The basis of urgency in the certificate of urgency by a legal practitioner is captured as follows:-

- “2. The respondent has further threatened to dispose the equipment.
3. The applicant will suffer irreparable harm if the respondent is allowed to control and dispose the applicant’s equipment.”

*In casu*, the applicant is saying it spent a lot of money on the equipment subject matter of these proceedings. The partnership agreement has been terminated in terms of the provisions of the agreement. The agreement in clause 5.2 and 5.3 states that the applicant shall retain the equipment and the respondent Thorn West Mine. The respondent has refused to comply with the provisions of clause 5.2 without legal cause for doing so. The applicant’s case is that it stands to suffer irreparable harm as the equipment may be damaged or depreciated without recourse as the respondent is financially unstable and will not be in a position to pay damages in the event that it is ordered to do so. In the opposing affidavit filed on its behalf the respondent has not commented on the averment that it is penurious to the extent that it cannot pay damages. I hold that a case has been made for the case to be heard on an urgent basis. I will accordingly hear the parties’ submissions on the merits on an urgent basis. The second point raised is that the parties have been involved in litigation before the Magistrates’ Court arising from the same cause of action. The matter before the Magistrates’ Court was withdrawn apparently for lack of jurisdiction by that court and fresh proceedings were instituted forming the subject matter of this matter. It is beyond dispute that this aspect was not disclosed by the applicant in its papers. The respondent was aware of the withdrawal and reasons for such withdrawal all along. There is no prejudice that it suffers from such non-disclosure.

It is trite that not every non-disclosure of facts will result in the dismissal of the application. The court has a discretion even if the non-disclosure is material, to grant or dismiss the application – *Venter v Van Graan* 1929 TPD 435 and *Graspeak Investments P/L v Delta Corporation P/L & Anor* 2001 (2) ZLR 551 (H) at 555B-C. As alluded to above, the non-disclosure of previous proceedings does not prejudice the respondent as it was aware all along. I will exercise my discretion in favour of hearing the application on its merits. The question of *mala fides* cannot be determined without hearing the parties. Final point is whether there are material disputes of fact which cannot be resolved on the papers. In my view the main issue is whether the respondent has the right to retain the equipment on the mine. This is primarily a legal issue which can be resolved by the construction of the agreement of lease entered into by the parties. In the circumstances, all the points *in limine* have no merit and I exercise my discretion to hear the application on its merits.

*Advocate S K M Sibanda & Partners*, applicant’s legal practitioners  
*Dube-Banda, Nzarayapenga & Partners*, respondent’s legal practitioners