

ICON ALLOYS [PVT] LTD
and
TEID HARDWARE [PVT] LTD
versus
ARAFAS MTAUSI GWARADZIMBA N.O.
and
SMM HOLDINGS [PVT] LTD
and
MASVINGO RURAL DISTRICT COUNCIL
and
SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 13 March 2017 & 20 June 2017

Urgent chamber application

Mr *C. Ndlovu*, for the applicants
Mr *T. Zvobgo*, for the first and second respondents
Ms *G. Bwanya*, for the third respondent
No appearance for the fourth respondent

MAFUSIRE J: On 13 March 2017, soon after oral submissions, I dismissed for want of urgency, the applicants' urgent chamber application. It was for an interdict, precisely, a stay of execution pending the determination of some application that was pending before this court under HC 67/17. I gave my reasons *ex tempore*. But the lawyers for the first and second respondents want them in writing. These are they.

The dispute centred on a cluster of some mining claims at Mashava in Masvingo Province. They are chrome mines. The fourth respondent, the Sheriff, through a writ issued by the second respondent [*"SMM Holdings"*], was evicting the applicants from those claims. The writ was against one Takunda Mujumi [*"Mujumi"*] in case no HC 2721/09. It was that eviction by the Sheriff that the applicants wanted stopped in the urgent application.

The applicants did not explain who Mujumi was. They did not explain how he might have been linked to the applicants. They also did not explain what HC 2721/09 might have been all about. This was a material omission. It was not a very clever thing to do. The respondents forcefully made the point and supplied the details. They explained who Mujumi was; how he was directly and materially linked to the applicants; and what HC 2721/09 had

been all about. That did not leave the applicants in very good light. Among other things, their sincerity was put into question. However, this was besides the point. The non-disclosure did not decide the case. The lack of urgency, or rather the failure by the applicants to act when the need to do so had arisen, did.

The facts were these.

At all relevant times SMM Holdings was the registered owner/holder of six of those mining claims, and the lessee in respect of the seventh one. In 2004 it was placed under a reconstruction order in terms of the Reconstruction of State-Indebted Insolvent Companies Act, *Cap 24:27* [***the Reconstruction Act***].

A reconstruction order is issued by Government, through the Minister of Justice, against a company that is indebted to the State, or to a statutory corporation, or to a State-controlled company. Once under a reconstruction order, among other things, the company is placed under the directorship and management of an administrator, the equivalent of a judicial manager in a company under judicial management. The administrator must strive to nurse the State-indebted company back to profitability so that, among other things, it can pay back the Government funds.

The Reconstruction Act, *inter alia*, voids every disposition of the property of the company under a reconstruction order made without the approval of the administrator.

In August 2007 SMM Holdings, allegedly without the approval of its administrator, the first respondent herein, purported to abandon three of its mining claims in terms of the procedure for abandonment of mining claims set out in the Mines and Minerals Act, *Cap 21:05*.

The applicants said the abandoned portions opened the areas to prospecting by third parties. They said in 2009 they applied to the third respondent, the local authority, for a lease over the abandoned claims. They said the lease was approved and granted. But they did not produce a copy, or a more credible document in lieu of it. Instead, they produced, as proof of the lease, some sketch drawing or map of the mining site, dated 9 June 2008, but with no name on it. They also produced, as proof of their lease, an invoice for a mineral milling licence issued by the third respondent and dated 28 October 2016; two receipts, also by the third respondent: one for some small-scale land levy, also dated 28 October 2016, and the other for some mining levy. This latter receipt was dated 17 February 2017. It was from this date that the applicants argued that their clock for urgency had begun to tick. They were

wrong. It had begun to tick much earlier. But I shall come back to this aspect later and deal with it in greater detail.

The third and final document produced by the applicants as proof of their lease with the third respondent, or of their entitlement to the abandoned claims, was some point of sale bank transfer, also on 28 October 2016. It only had the third respondent's name on it.

The first and second respondents said that the purported abandonment by SMM Holdings of its claims, without the first respondent's approval, amounted to a disposal of the assets of a State-indebted company. As such, it was null and void. They also said they had no idea why the applicants could have been making payments to the third respondent, but that whatever those payments were for, they could not possibly have been for any colour of right over the mines.

The third respondent filed no papers. But Ms *Bwanya*, on its behalf, said that every person carrying out any kind of mining activity under its jurisdiction is liable for these levies. She said because the applicants were occupying, mining and milling chrome ore at those sites, the third respondent would bill them for mining levies and land levies, even if their title was under contest.

In 2008 the first respondent approached the Ministry of Mines to have the purported abandonment revoked. He succeeded. But Mujumi had already acquired, in his own name, an interest in some of the mines. So in August 2008 the mining commissioner gave him written notice of the intention to cancel his interest. This was followed, a month later, by publication by the mining commissioner, of a general notice cancelling Mujumi's certificate of registration.

That the applicants had obtained a lease or permit over the purportedly abandoned mines was hotly contested by the first and second respondents. They said the applicants had never acquired a lease or any other form of entitlement over those claims. It was pointed out that, firstly, Mujumi, in person, and not the applicants, had been the one featuring on the relevant documents for the relevant period. Secondly, as proof that the applicants had never acquired a right over the mines, the first and second respondents produced a letter from the third respondent. In that letter the third respondent denied that it had issued any permit to the applicants in respect of the mines. From this premise, the first and second respondents argued that the applicants' continued occupation of the mines had only been through Mujumi's cancelled certificate of registration.

It turned out that Mujumi was a director and principal officer of both applicants. The second applicant had been floated in 1998, and the first applicant in 2003.

Litigation between the parties seems to have begun in earnest in July 2008. Mujumi did not recognise the revocation of the purported abandonment of SMM Holdings' claims. He continued to mine, mill and process the ore. SMM Holdings went to court. Under case no HC 2721/08 aforesaid, and at Harare, it obtained, in July 2009, a comprehensive provisional order barring Mujumi, and anyone else claiming any rights through him, from carrying out any mining operations at the sites. This was pending determination of the claim for a declaratory order sought by SMM Holdings to the effect that Mujumi had no interest of any sort over the mines; and a final interdict barring him from carrying out any mining operations at the sites. Two months later, i.e. in September 2009, the provisional order was confirmed. Another two months later, i.e. on 9 November 2009, SMM Holdings issued a writ to enforce the order. Mujumi, and all persons claiming rights through him, would be ejected from the sites.

The applicants complained that the respondents' employees were interfering with the general operations at the acquired mines, including blocking trucks from leaving the site. Under HC 1908/09, at Bulawayo, they applied for an interdict to restrain the first and second respondents from interfering. But the respondents claimed Mujumi had merely stopped fronting himself. He had just switched over to using the two applicants. They said he was their *alter ego*. The applicants themselves had no lease, permit or any colour of right over the mines.

As a result, SMM Holdings contested the applicants' claim for an interdict. It raised a preliminary point on the basis of the provisions of the Reconstruction Act.

Paragraph [b] of s 6 of the Reconstruction Act provides that no action or proceeding shall proceed or commence against a company that is subject to a reconstruction order, except by leave of the administrator, and subject to such terms as he may impose. The respondents' point was that the applicants had not sought, and therefore did not have, the leave of the first respondent to institute HC 1908/09.

For seven years HC 1908/09 remained outstanding. I was not told of the efforts, if any, that the applicants might have made to have the matter determined expeditiously.

In 2010 the fourth respondent began to enforce the writ issued against Mujumi under HC 2721/09 aforesaid. The applicants rushed to court. On 22 April 2010, at Bulawayo, under HC 721/10, they obtained a provisional order for an interdict against all the respondents

herein, and the Ministry of Mines. Effectively, it was a final order. Among other things, the final relief to be sought on the return day was almost identical to the interim order granted. The evictions were stayed. The provisional order remained *extant* for more than six years. It was not confirmed or discharged. Again the applicants did not say what efforts, if any, they had taken to have it confirmed.

Armed with that provisional order, the applicants went back to the mines. They resumed operations.

The first and second respondents alleged the applicants' application for an interdict under HC 721/10 was heard without them having been served. As a result, they had not immediately become aware of the provisional order. When they did, they sought to have it discharged. But they faced enormous problems. The court record kept disappearing. Their lawyers ended up supplying duplicate papers to have the record reconstructed.

The applicants' long outstanding application under HC 1908/09, the one for an interdict to restrain SMM Holdings from interfering with their operations at the mines, and against which the first and second respondents had raised a preliminary point about the absence of leave to sue, was dismissed on 14 October 2016. It was dismissed on the basis that the applicants did indeed require the first respondent's leave to sue and that they did not have it. Also discharged automatically, by operation of the law, was the provisional order under HC 721/10 staying eviction.

The first and second respondents argued that when HC 1908/09 and HC 721/10 aforesaid were finally dismissed and discharged, the applicants had become exposed to eviction. They ought to have appreciated that SMM Holdings would now come for them. At the very least, the clock for urgency had begun to tick from this time. It was at this juncture that they ought to have taken steps to restore their right, if any, to the occupation, possession, use and enjoyment of the mines. They had not done so. They had been content to carry on mining, but without any legal right or any form of legal cover. It was only in March 2017, following the Sheriff's move to evict them, that they had then rushed back to court with the current urgent chamber application.

The applicants denied they had been sluggard. They said on 2 November 2016 they had written to the first respondent to seek his leave to sue SMM Holdings. They maintained they had a lease over the mines or seeking his leave to sue.

The leave was refused on 21 November 2016. In his lawyers' letter to the applicants' lawyers, the first respondent denied that the applicants had any lease or permit over the mines and said that therefore they had no business being at the mines.

On the following day, 22 November 2016, the first and second respondents unleashed the Sheriff to evict the applicants on the basis of the old writ against Mujumi. The date for the evictions was set for 28 November 2016.

The applicants said in 2017 [the precise date was not given] they approached the third respondent to clear the issue since they thought they did have a permit over the mines. They claimed the third respondent did assure them that their operations were within the ambit of the law. They said they were allowed to renew their lease. It was then that they made the payment [for \$300] in respect of which they were issued with that receipt dated 17 February 2017. It was the one endorsed "*Mining Levy*".

On 22 February 2017, at Masvingo, the applicants filed the aforesaid court application under HC 67/17. Curiously, the founding affidavit had been executed way back on 28 November 2016.

HC 67/17 was pending at the time of the hearing of this urgent chamber application. In it, the applicants sought an order to set aside the first respondent's refusal to grant the leave to sue. They also sought to have this court issue the leave instead.

I dismissed the urgent chamber application for want of urgency because the applicants had been lackadaisical. They had not themselves treated their matter as urgent. For more than six years they had been content to carry out mining operations on the basis of the 2010 provisional order which they had obtained without serving papers on the respondents. The provisional order, which in effect was a final order in both form and substance, had remained unconfirmed. The applicants knew that their right to the mines was under severe contest. They had taken no steps to have the provisional order confirmed. It had been left to the first and second respondents to run around. Further, the applicants had taken no steps to have HC 1908/09 resolved expeditiously.

When HC 1908/09 and HC 721/10 were dismissed on 14 October 2016, alarm bells should have begun to ring for the applicants. The legal shield that had protected them all this while had disappeared. But they did nothing. That was not all.

When the first respondent dismissed their request for leave on 21 November 2016 they did nothing effectual. The affidavit for the application under HC 67/17 to reverse the

first respondent's refusal of leave was commissioned on 28 November 2016. But incredibly, the application was not filed until a whopping three months later.

In Latin, it is said "*vigilantibus non dormientibus jura subveniunt*". The English equivalent is "the law helps the vigilant but not the sluggard" see: *Ndebele v Ncube* 1992 [1] ZLR 288 [SC], at p 290; *Masama v Borehole Drilling [Private] Limited* 1993 [1] ZLR 288 [SC]; *Mubvimbi v Maringa & Anor* 1993 [2] ZLR 24 [HC]; *Maravanyika v Hove* 1997 [2] ZLR 88 [HC]; *Beitbridge Rural District Council v Russel Construction Co [Private] Limited* 1998 [2] ZLR 190 [SC] and *Kodzwa v Secretary for Health & Anor* 1999 [1] ZLR 313 [SC].

SMM Holdings' writ against Mujumi was served on the applicants on 22 November 2016. The Sheriff would come back to evict on 28 November 2016. There could have been no clearer demonstration of the respondents' singular intention to reclaim the mines than this. If this could not spur the applicants into action, nothing else could. They were not spurred.

The applicants' reliance on 17 February 2017 as the trigger date for the urgent chamber application was, at best tenuous, and at worst, irrational. This was the date they said they had paid the mining levy. To them, this was proof that they had a permit or lease to remain on the mines. But this is weird. They did not need a receipt for a mining levy to trigger an urgent chamber application. They claimed they had the necessary authority to be occupying the mines and exploiting whatever else was found there. All they needed to do was to produce the proof and assert their right.

Even though the merits were not argued and therefore undecided, manifestly it was going to be a mountain to climb for the applicants to prove their title to remain at the mines. But for purposes of urgency, the 17 of February 2017 had absolutely no significance in the whole matrix. As demonstrated, there had been various landmarks before which should have triggered the urgent application. For reasons known to them, the applicants had ignored or missed all of them.

The law on urgency is well settled. The principles now sound like a broken record. But it pays to keep repeating them.

In *Kuvarega v Registrar-General & Anor* 1998 [1] ZLR 188 [H] CHATIKOBO J said, at p 193 F -G:

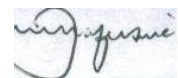
"What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of

urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.”

In *Main Road Motors v Commissioner – General, ZIMRA, Choruwa v Commissioner – General, ZIMRA* HMA 17-17, I said “... [t]he need to act ...” timeously, is not just to take any type of action. It is to take action that is effectual in protecting one’s rights or averting impending peril. In that case, out of ignorance of the law, the applicants’ lawyers had wasted time mounting a challenge that was manifestly misconceived. In the present case, the applicants were wasting time writing ineffective and incompetent letters to the Sheriff to issue an interpleader against a writ of eviction; writing letters to the respondents’ lawyers, demanding a copy of the letter from the third respondent that had denied their claim to the mines and which the respondents lawyers had omitted from their own response to the applicants’ request for leave to sue; writing and visiting the offices of the third respondent, allegedly for confirmation of their title to the mines; paying levies that did nothing to enhance their impeached title, and so on. Plainly, they were lackadaisical.

When I ruled that the application was not urgent, the applicants readily tendered the wasted costs, but on a party and party scale. The respondents readily accepted the tender. Therefore, the matter was removed from the roll with costs.

20 June 2017



Ndlovu & Hwacha, legal practitioners for the applicants

Dube, Manikai & Hwacha, legal practitioners for the first and second respondents

Chihambakwe Law Chambers, legal practitioners for the third respondent