T & J RORKE GOLD (PRIVATE) LIMITED
versus
FUNGAI GWANZURA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 5 & 25 October 2017

Opposed Application

T Mahaso, representing applicant
Fungai Gwanzura in person

TSANGA J: On 5 October 2017 I dismissed an urgent application filed under Case No. HC 101/10 for want of prosecution and gave my oral reasons for doing so. I indicated that I would give written reasons for doing so for a fuller appreciation by the parties of those oral reasons.

On 14 January 2010 a provisional order pursuant to an urgent chamber application was obtained by the respondent barring all parties to the dispute from continuing mining operations at the disputed location at or near Victory 92 mine. The first respondent in that matter was one Brighton Nhungwe who together with the T and J Rorke Gold (Private) Limited were also ordered in the provisional order to forthwith vacate the disputed location at or near Victory 92 mine.

The final order that was to be sought was to show cause why Fungai Gwanzura, the then applicant, should not be granted an order declaring him to be the lawful registered holder of the block consisting of 8 G/Reef claims named Victory 92 mine. It would have further sought to set aside the proclamation by Mining Commissioner that the mine belonged to T and J Rourke Gold (Private) Limited.

It is not in dispute that more than seven years later that the final order has not been sought. Instead the respondent is said to have taken occupation of the mine despite the order

that all were to vacate that mine pending determination of the final order. This was therefore the background against which the dismissal of the application was sought.

The applicant argued that seeking dismissal for want of prosecution was akin to a discharge of that order. The gist of applicant's argument was that it was immaterial that the application, which had not been prosecuted to its logical conclusion, had its genesis as a provisional order under an urgent chamber application.

The respondent argued that what applicant ought to have done was to seek a dismissal of the provisional order instead of applying for a dismissal for want of prosecution. He also argued that there cannot be a dismissal of an urgent application which has already been granted. The essence of his argument on paper was that r 236(b) does not apply to the dismissal of a provisional order that has already been granted by the court and that it would be erroneous for the court to do so. It was also argued on the papers that the applicant being a company had no right to represent itself. *Lees Import & Export (Private) Limited* v *Zimbank* 1999 (2) ZLR 36 was drawn on for this common law position. This is indeed the case but that case also makes it clear that there may be limited exceptions to that hard and fast rule where the company is small and the costs of legal representation are not justified. The applicant argued that it has not been able to operate effectively because of limitations of the provisional order granted in favour of applicant. Moreover the papers show that even at the time the provisional order was granted its address was simply care of an entity called Citizen's Legal Aid Society and Advisory Trust. In other words, it appeared to have been allowed to self-represent when the provisional order was granted. Against this backdrop and of the facts as whole, I allowed the application to proceed with Mr Mahaso as director standing in for the applicant. I turn now to the merits of the application.

First of all it is an abuse of court process to seek an urgent chamber application and then fail to seek its confirmation when that provisional order is granted. A provisional order is by its very nature a temporary order to the dispute in question and failure to seek confirmation of the final order is tantamount to treating the provisional order as final. The court will not countenance this as it is clearly to the disadvantage of the other party. The respondent as applicant in that matter remained with an obligation to pursue the matter to finality particularly as it was then applicant seeking a declaration in his favour. Moreover the opposing affidavit had been filed on 29 January 2010. As stated in the case of *Permanent*

Secretary, Ministry of Higher & Tertiary Education v *College Lecturers Association and 18 Ors* HH 628 /15 :

> "It is unthinkable that the drafters of the rules may have intended that an opposed application brought as a chamber application would be allowed to remain pending *ad infinitum* without any recourse to the remedy provided for in r236 (4) (b) or that an applicant in that matter has a discretion not to file heads of argument when represented by a legal practitioner or not other setting the matter down".

Likewise the respondent *in casu* was obliged to pursue his application in terms of the rules relating to court applications once the notice of opposition had been filed by the present applicant. With the filing of a notice of opposition within the stipulated time frame by the respondent in that matter, it became an opposed court application in which the final order could only be granted in the determination of that matter as an opposed application.

Secondly, in determining whether an application for dismissal should be granted the factors which the court looks at include:

- The delay in the prosecution of the matter
- Whether the delay is inexcusable
- Whether there is prejudice to the other side occasioned by the delay.

There is no doubt that a period of seven years is a very lengthy delay before seeking confirmation of an order. The respondent as then applicant was legally represented at the time and his counsel would have been fully cognisant of the fact that what they had obtained was a provisional order. The respondent's reason for not seeking confirmation was that he was waiting for the Ministry of Mines to peg the mine. This is not a valid excuse as he could have chased up the pegging. As such there is no valid defence for the delay. The applicant has been prejudiced in that it has stayed away from the mine as per order whilst the respondent has surreptiously located himself back on the mine with no intention of seeking a final order. By his own admission he has in fact set up home. This kind of self-help cannot be countenanced.

It was for the above reasons that I indicated to the parties that the applicant had a valid point at law and that indeed the respondent had failed to prosecute the matter to its logical conclusion. I note that the case number in the order that was placed before the court which I granted has a typographical error in that the case sought to be dismissed was captured in the draft order as HC 101/01 instead of HC 101/10.

Accordingly, relying on r 449 which allows the court to correct an error, the order granted on the 5th of October 2017 is accordingly corrected as follows:

1. The respondent's urgent chamber application in case number HC 101/10 be and is hereby dismissed for want of prosecution.
2. Respondent to pay costs of suit.