DS MINING SYNDICATE
versus
SPENCER TSHUMA
and
MINISTER OF MINES AND MINING DEVELOPMENT NO

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 18 March & 1 April 2021

URGENT CHAMBER APPLICATION

G Chitsaka, for the applicant
G Madzoka with *B Chideme*, for the 1st respondent

MANZUNZU J: This is an application filed on urgency by a self-actor seeking an order in the following terms;

> "INTERIM RELIEF:
>
> a) An order barring and interdicting the respondents from disturbing or interfering with the applicant's right to prospect minerals at Queensdale Farm in Kadoma.
> b) An order directing the respondents to observe peace at the applicant and its assignees.
>
> TERMS OF FINAL ORDER SOUGHT
>
> 1. It is hereby declared that the actions by the 1st respondent to disturb applicant from exercising its right to prospect and search for minerals at Queensdale in Kadoma is hereby declared unlawful.
> 2. 1st respondent to pay costs of this suit."

The 1st respondent (the respondent) has filed a notice of opposition and has raised four points *in limine* which are the subject of this ruling. The fourth point *in limine* was abandoned. I will now deal with the three points *in limine* in turn:

APPLICANT'S LEGAL PERSONA

Mr *Madzoka* argued for the respondent that applicant is not a legal person capable of suing and as such the application must be dismissed. It is trite that an application is valid only if instituted by an existent person, natural or juristic, against an equally existent legal or natural person. If the application is issued by or against a non-existent person then it is *null and void ab initio*. See. *Steward Scottt Kennedy* v *Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 565 (S) at 572D; *Gariya Safaris (Pvt) Ltd* v *van Wyk* 1996 (2) ZLR 246 (H) at 252G.

Where the court finds that there is a non-existent applicant, the proper course to take is to strike the matter off the roll and not to dismiss the application as urged by Mr *Madzoka*. This is for the simple reason that the court cannot dismiss a nullity.

Ms *Chitsaka* who appeared for the applicant said the applicant is a legal persona regard being to the provisions of section 61 of the Mines and Minerals Act, [*Chapter 21:05*]. A reading of that section which deals with obligations of partnerships and companies, comes nowhere near establishing a mining syndicate as a legal persona. However, rule 8 of the High Court Rules, 1971 provides that; "***8. Proceedings by or against associations:*** Subject to this Order, associates may sue and be sued in the name of their association." Rule 7 proceeds to define 'association' to include—

> "(*a*) a trust; and
> (*b*) a partnership, a syndicate, a club or any other association of persons which is not a body corporate."

This means a mining syndicate can sue or be sued, see *Roselex Mining Syndicate* v *Gavi & 5 Others* HH 680/20.

The point *in limine* fails.

URGENCY:

It was alleged that the matter is not urgent. The requirements of urgency are settled. In *Kuvarega* v *Registrar-general & Anor* 1998 (1) ZLR 188 (HC) it was stated "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." In *Boniface Denenga & Anor* v *Ecobank Zimbabwe (Pvt) Ltd & 2 Others* HH 177-14 MAWADZE J identified a common thread in the cases which dealt with the issue of urgency. At page 4 of the cyclostyled judgment he stated that; "The general thread which runs through all these cases is that a matter is urgent if,

> "(a) It cannot wait the observance of the normal procedural and time frames set by the rules of the court in ordinary applications as to do so would render negatively the relief sought
> (b) There is no other alternative remedy.
> (c) The applicant treated the matter as urgent by acting timeously and if there is a delay to give good or a sufficient reason for such a delay.
> (d) The relief sought should be of an interim nature and proper at law."

The applicant alleges that this chamber application is urgent for the reason that on 7 March 2021 the 1st respondent interfered with its prospecting operations. This application was filed on 15 March 2021. Efforts to get assistance from the Police between the 7th and 15th March

2021 failed. The respondent challenged the urgency of the matter on the basis that applicant failed to disclose as to when the need to act arose. Contrary to this assertion by the respondent, applicant's papers are clear in that the cause of action arose on 7th March 2021. Applicant did not sit on its laurels as the matter was initially complained to the Police who later advised applicant to approach the courts.

This matter is therefore urgent.

ISSUE OF FORM:

Rule 241 (1) of the High Court Rules provides that; "(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29B duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies.

Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications."

The 1st respondent's position was that the application is not on the proper form which is Form 29. That position is correct and is not contested because the application was intended to be served on the other parties and indeed it was served. It was not disputed that applicant did not use form 29 instead it was a plea that the applicant was a self-actor then. It is clear from the applicant's papers that form 29 B was used instead of Form 29 as required by rule 241. None compliance with rule 241 is fatal to an application. I associate myself with the remarks of MAFUSIRE J in *Marick Trading (Pvt) Ltd* v *Old Mutual Life Assurance Co. of Zimbabwe (Pvt) Ltd & Anor* HH 667-15 where he had this to say; "The point *in limine* by the respondent was that there was nothing before me to determine because the applicant's application was neither in Form No. 29 nor Form 29B as required by r 241 (1) of the Rules of this Court….

In casu, the applicant's urgent chamber application was one to be served. Indeed, it was served. So it had to be in Form No. 29. But it was not…

But all that is required of litigants is simply to copy and paste either Form 29B or Form 29, the latter with appropriate modifications if the application is a chamber application that needs to be served on interested parties.

Form 29 is for use in ordinary court applications, or those chamber applications that require to be served. One of its most important features is that it sets out a plethora of procedural rights. It alerts the respondent to those rights. For example, in notifying the respondent of the court application, the form also notifies the respondent of his right to oppose the application and warns him of the consequences of failure to file opposing papers timeously.

On the other hand, Form 29B, for simple chamber applications, requires that the substantive grounds for the application be stated, in summary fashion, on the face of that form…

The courts, both in this jurisdiction and elsewhere, have repeatedly drawn attention to the need to follow the rules on this. It is not a "***sterile***" argument about forms."

In *Richard Itayi Jambo* v *Church of the Province of Central Africa & Ors*, HH 329-13 GUVAVA J, as she then was, said:

> "This court has stated in a number of judgments … that parties are obliged to comply with the rules. Where there is a non-compliance the applicant must apply for condonation and give reasons for such failure to comply with the rules. (See also *Jensen* v *Avacalos* 1993 (1) ZLR 216 (SC)."

In *casu,* despite clear admission that Form 29 was not used, there was no application for condonation. This means there is no proper application before me. Its fate is to be struck off the roll for non-compliance with the rules. On costs, the applicant and 1st respondent partially succeeded hence each party must meet its own costs.

Disposition:

1. The preliminary points challenging the applicant's legal persona and urgency of the matter be and are hereby dismissed.
2. The preliminary point on the use of improper form is upheld.
3. The matter is struck off the roll.
4. Each party to meet its own costs.

Bherebende Law Chambers, applicant's legal practitioners
Mavhunga & Associates, 1st respondent's legal practitioners