TWIN CASTLE RESOURCES (PVT) LTD
versus
PAARI MINING SYNDICATE
and
PROVINCIAL MINING DIRECTOR (MANICALAND) N.O
and
MINISTER OF MINES AND MINING DEVELOPMENT N.O
and
THE OFFICER IN-CHARGE ODZI POLICE STATION N.O

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 26 and 31 March 2021 & 6 April 2021

Urgent chamber application

Mr *G Chihuta* with Mr *N.P Chinzou* ,for the applicant
Mr *M Muzaza,* for the 1st respondent
Mr *C Chitekuteku* for the 2nd, 3rd and 4th respondents

TSANGA J: The applicant filed an urgent chamber application seeking a provisional order which in effect sought execution of a specific clause from an earlier provisional order granted to it. This was in light of an appeal of that order by the first respondent to the Supreme Court despite not having opposed the provisional order when it was sought.

The background to the matter is pertinent. On the 19th of February 2021 the same applicant Twin Castle Resources Private Limited, lodged an urgent chamber application under HC 129/21 for an interdict and compelling order against the first respondent Paari Mining Syndicate Private Limited. The applicant averred that it was the registered owner of Snipe B46 Odzi with pending registration notices no 19994AA and 019995AA. The first respondent, a mining syndicate, was said to be denying the applicant's employees entry into the said mining locations despite a clear ruling by the Minister of Mines and Mining Development (the 2nd respondent herein) that the applicant had stronger rights to the mining locations having been the first to peg there. The dispute between the applicant and the first respondent had been resolved by the Minister of Mines on the 15th of February 2021 according to the application filed. In defiance of the ruling, the first respondent was said to have continued extracting gold ore and to have also unlawfully secured the mining site using

armed and un-uniformed guards. What applicant essentially sought was an anti-dissipation interdict. In light of the Minister's ruling, the applicant averred that it had a right to the locations. Moreover, the harm was palpable in view of minerals being finite and also the fact that it relies on proceeds to pay its employees. It was further averred that it had no other remedy but to seek the interdict as it had already exhausted local remedies by approaching the Minister. The balance of convenience was said to favour the applicant.

That urgent application came during the lock down when urgent matters could be heard on the papers filed by all parties. Upon receipt of this urgent application the following instructions where accordingly given through an email to the Registrar regarding the matter:

> *Registrar*
> *Applicant to notify the respondents to serve their notices of opposition if any by close of business on the 25th of February 2021. Parties may file heads of argument as well if deemed necessary by the same date. Matter will be dealt with on papers.*

This method of disposing of the matter under the coved restrictions was in line with Practice Direction 2 of 2021 which permitted urgent applications to be disposed of on papers filed by the parties instead of hearing them orally and physically.

It was my assumption that the above instructions were communicated to all the respondents in particular that the matter would be dealt with on papers hence the need to file any opposing papers. Equally, the understanding was that if there were no papers filed in opposition since the matter was being be heard on papers, the provisional order sought was not being objected to as the final order was yet to be sought.

There was no response from the first respondent on the 25th of February 2021 or thereafter and even until court resumed on the 2nd of March 2021. The certificates of service on all respondents were on file which showed that the respondents had been served with the application. In particular, the first respondent had been served on the 24th of February at 12 noon by affixing the application onto the front gate in the presence of one Henry Marimba, a security guard under the employ of the first respondent. Certificates of service for 3rd and 4th respondents cited in their official capacity also showed they had been served on the 24th of February 2021.

In addition to providing proof of service, the applicant also drew my attention to a letter written to Maunga Manda and Associates detailing the service of the application on one Henry Matimba and asking them to confirm that they as legal practitioners, were no longer

acting on of the first respondent. This was in view of the applicant having been referred to them by one of the employees. There was no response to that letter either. On the 2nd of March 2021 when courts resumed there was still no response from any of the respondents. Against the background of what had been averred in the founding affidavit, I was satisfied that the applicant had made out a prima facie case for the granting of the provisional order. I treated the application as unopposed and gave the provisional order in question with the following interim relief:

Pending the determination of this matter, the applicant is hereby granted the following relief:

1. 1st respondent and anyone acting on its behalf be and are hereby interdicted from mining, extracting or processing any mineral ore or carrying out any other mining activities within Snipe B46 Mine and prospecting rights within the pending applications registration notice 01999AA and 019995AA.
2. 1st respondent be and is hereby interdicted to desist from denying applicant's employees entry into B46 Mine and interfering with applicant's mining activities within Snipe B46 Mine and prospecting rights within the pending applications registration notice 01999AA and 019995AA.
3. In the event that first respondent or its agents continue to deny the applicant access to the mining location, the 4th respondent be and is hereby ordered to assist the applicant to access and gain entry to the mining location Snipe B46 and pending registration notices 01999AA and 019995AA.
4. Alternatively, in the event that first respondent has appealed against the determination by the 2nd respondent to 3rd respondent, it is ordered that both parties must stop mining at the disputed mining location pending the finalisation of such appeal and each party shall secure the mining location through the service of three guards from a registered private security company pending such appeal.

The first respondent has filed an appeal to the Supreme despite full knowledge that it did not bother to file any papers to the provisional order that was sought and despite being served. The appeal was filed on the 15th of March 2021 whilst the appeal to the Minister of Mines was filed on the 16th of March 2021. Applicant has now filed an urgent chamber application seeking to stop all mining by both parties specifically pending the appeal given that an appeal suspends the order appealed against save with the leave of the court.

The order sought is in the following terms:

PENDING determination of the matter the applicant is hereby granted the following relief:

1. The execution of the judgment in the Honourable Court in HC 129/21 on the 2nd of March 2021 be and is hereby granted pending the final determination of the appeal to the Supreme Court in SC 28/21.
2. All parties are ordered to stop mining operations at the disputed mining area, that is at Snipe B46 and area covered by pending registration 019994AA and 019995AA.

3. Each party is ordered to secure the disputed mining area that is, Snipe B46 and area covered by pending registration 019994AA and 019995AA through services of three guards from a registered security company pending the determination of appeal to the 3rd Respondent.
4. The order shall not be suspended by any appeal by either party and shall remain in force notwithstanding such any appeal.
5. In the event that part 2 and 3 of this interim order is not complied with the deputy sheriff with the assistance of 4th Respondent is authorised to ensure compliance.

This application was placed before me on the 24th of March and I directed that it be set down on the 26th of March 2021. A few minutes before the matter was to be heard at 12 noon on the 26th of March, a fairly thick document constituting the notice of position by the first respondent was placed before me. My initial suggestion was that as this was an urgent application the first respondent could take me through the document. Mr Uriri who appeared on behalf of the first respondent indicated that it would be preferable to allow me time to go through it. The matter was postponed to the 1st of April at 2pm as I had motion court preparations for the following Thursday morning.

However, when it emerged that Thursday the 1st of April would be a half day due to the Easter break, on Monday the 29th of March, I instructed my assistant to call the parties to advise that the matter was being moved to Wednesday 31st of March at 2pm instead of Thursday 1st of April 2021 at 2pm. Advocate Uriri indicated his unavailability on this new date. Instead of making arrangements for the hearing of the matter on this new date, the first respondent's lawyer Mr Muzaza chose to write what appeared to be a foot stomping letter that if the judge is to insist on the matter being heard on Wednesday the 31st of March, they would appear to make an application that the matter be heard on the 1st of April as had been agreed. This was despite the explanation having been relayed as to why the matter had been moved. In any event, an urgent application is to be heard expeditiously and is not dictated by the availability or non-availability of an advocate of choice.

By this date, the first respondent had in any event filed additional documents which included a purported supplementary notice of opposition, a supporting affidavit from the erstwhile lawyers as well as heads of argument. As this was an urgent chamber application and as the instructing attorneys were present and therefore represented, there was no reason why the urgent matter could not proceed even though Mr Muzaza maintained that he was merely there to seek a postponement. Since I insisted that the matter should proceed, Mr Muzaza stood by the documents filed on record.

Applicant's lawyer, Mr Chiuta, raised a point *in limine* regarding the defective nature of the notice of opposition as well as the supplementary affidavit and supporting affidavit that had been filed by the first respondent. The supplementary notice of opposition was said to have been attested to for the purpose of introducing an affidavit by first respondent's erstwhile lawyer. The point was that the supporting affidavit was a misleading affidavit, purporting to have been made after reading the supplementary affidavit yet this could not have been the case as there the dates showed that there was no supplementary affidavit read by the deponent as it was not in existence at the time. The supporting affidavit by one Passmore Nyakureba had in fact been written before the supplementary affidavit by Luxton Mawanga. In other words, the supporting affidavit was not supporting anything as it had been written on the 27th of March prior to the supplementary affidavit written on the 29th of March.

But that was not the only defect. Neither of the two affidavits had been properly attested by any commissioner of oaths. The purported affidavits merely had a signature with no indication of who had signed it as a Commissioner of Oaths or where and when they had been attested to.

The main notice of opposition itself was equally said to be defective. Whilst the main notice of opposition bore a stamp by the Commissioner of Oaths, it was silent as to when Luxton Mawanga who swore to the affidavit, had appeared before the Commissioner of Oaths. It merely had one computer generated date as to when the deponent had signed. It was therefore argued that effectively there was no notice of opposition before me. Applicant's lawyer Mr Chiuta, drew on the case of *Mike Mandishayika v Maria Sithole* HH 798/15 to bolster this point wherein it was stated that:

> An affidavit is a written statement made on oath before a commissioner of oaths or other person authorised to administer oaths. The deponent to the statement must take the oath in the presence of the commissioner of oaths and must append his or her signature to the document in the presence of such commissioner. Equally the commissioner must administer the oath in accordance with the law and thereafter must append his or her signature onto the statement in the presence of the deponent. **The commissioner must also endorse the date on which the oath was so administered. These acts must occur contemporaneously.**

See also *S v Hurle & Others (2) 1998(2) ZLR 42 and Firstel Cellular (Pvt) Ltd v NetOne Cellular (Pvt) Ltd S-1-15*.

The notice of opposition most certainly did not have the date on which the oath was administered. The supplementary documents were even more defective as illustrated. Clearly,

in light of the *Mandishika* case, the affidavits were indeed defective for the reasons outlined. The point *in limine* regarding the defective affidavits and that there was no valid notice of opposition before me is upheld.

Suffice it point out that as justification for granting of the order, the applicant emphasised that the resource being depleted is finite and that the provisional order being sought is necessary in view of the appeal to the Supreme Court having suspended the provisional order that was granted on the 2nd of March 2021. Applicant further emphasised and outlined how the first respondent was served and how the first respondent failed to comply with directive to file any papers by a given date if opposed. Applicant equally highlighted why the appeal itself is merely dilatory given that the first provisional order was in default of their failure to file any papers of opposition as instructed. Indeed as the applicant pointed out, instead of appealing, the first respondent ought to have applied for rescission of judgment if it was erroneously granted or alternatively opposed the confirmation of the final order by setting the matter down for a return date. None of these viable alternatives were pursued. Applicant also emphasised that the interim order in this case is not the same as the final order in that the final order seeks costs on a higher scale given the first respondent's needless recklessness in approaching the Supreme Court on appeal.

Mr Chitekuteku for the second, third fourth respondents agreed to be bound by the findings of this court. I am in agreement with the totality of these arguments by the applicant. There is no reason why the appeal filed ought to suspend the order. The order sought seeks to bar both parties from mining until the appeal to the Supreme Court is finalised. It only makes sense that both parties cease to benefit until the dispute is finalised. The first provisional order already addresses the eventuality of an appeal to the Minister of Mines. I bars both parties from mining is such an appeal has been lodged. It is the unanticipated appeal to the Supreme Court and its effect which the order sought before me herein seeks to address. In my view, the applicant has made out a compelling case. The provisional order is order is granted as prayed in the following terms:

TERMS OF FINAL ORDER SOUGHT

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

1. The provisional order is hereby confirmed.

2. The first respondent and the 4th respondent is ordered to pay costs of suit on an attorney – client scale.

INTERIM RELIEF GRANTED

PENDING determination of the matter the applicant is hereby granted the following relief:

1. The execution of the judgment in the Honourable Court in HC 129/21 on the 2nd of March 2021 be and is hereby granted pending the final determination of the appeal to the Supreme Court in SC 28/21.
2. All parties are ordered to stop mining operations at the disputed mining area, that is at Snipe B46 and area covered by pending registration 019994AA and 019995AA.
3. Each party is ordered to secure the disputed mining area that is, Snipe B46 and area covered by pending registration 019994AA and 019995AA through services of three guards from a registered security company pending the determination of appeal to the 3rd Respondent.
4. The order shall not be suspended by any appeal by either party and shall remain in force notwithstanding such any appeal.
5. In the event that part 2 and 3 of this interim order is not complied with the Deputy Sheriff with the assistance of 4th Respondent is authorised to ensure compliance.

Gumbo & Associates, applicant's legal practitioners
Wintertons, 1st respondent's legal practitioners
Attorney General's Office, 2nd, 3rd and 4th respondents' legal practitioners