

SHEILA MPOFU

Versus

EMMANUEL CHIRWA

And

**THE SECRETARY FOR MINES AND
MINING DEVELOPMENT
(Represented by its Provincial Mining Director,
Matabeleland South)**

And

**THE OFFICER IN-CHARGE
Zimbabwe Republic Police
Filabusi**

IN THE HIGH COURT OF ZIMBABWE
NDLOVU J
BULAWAYO 20 AND 23 DECEMBER 2021 AND 6 JANUARY N2022

Urgent Chamber Application

N Sithole, for the applicant
M Mahaso, for the 1st respondent
Ms N Dube, for the 2nd respondent

NDLOVU J: This is an urgent chamber application lodged in this court on 10 December 2021. It was placed before KABASA J who on 13 December 2021 directed that the applicant serve the urgent chamber application on the respondents together with the Notice of Set Down for Tuesday 16 December 2021 at 12 noon. On 16 December 2021 the matter although ready to be argued, could not be argued as the Legal Practitioner for the 1st respondent was indisposed and by consent of the parties the matter was post-poned to Monday 20 December 2021. With KABASA J's duty ending on 17 December 2021 and the matter had to be placed before me on Monday 20 December 2021.

On Monday 20 December 2021, the parties requested that the matter be moved to 23 December 2021 to enable the parties to engage out of court and possibly settle. On 23

December 2021 when the parties appeared before me, they indicated that attempts to find each other had failed.

In the resultant arguments the 1st respondent raised 3 (three) points *in limine*, 2 (two) of those points *in limine* had already been raised in the 1st respondent's notice of opposition and 1 (one) was additional to the 2 (two). While reserving ruling on the points *in limine*, I allowed arguments on the merits as well.

THE APPLICATION

The applicant is seeking an urgent interim interdict, pending the determination of action proceedings filed by her undercover of case number HC 1908/21 in which action proceedings, the applicant is seeking an order confirming the retirement of the 1st respondent from a mining Partnership between applicant and 1st respondent and the consequential dissolution of the said Partnership because of alleged serious breach by the 1st respondent. The summons in case number 1908/21 were issued out of this court on the 6th of December 2021.

To that end, in the interim the applicant's prayer is that 1st respondent be interdicted from continuing to excavate or mine or collect or remove any ore or rubble from Herbenia Mine registration number 31578 or from transporting or milling such gold ore or rubble for disposal to the 1st respondent's sole and exclusive benefit.

The final order sought is that:-

1. Pending the determination of action proceedings filed undercover of case number HC 1908/21, a moratorium on any and all mining activities, whatsoever at Herbenia Mine registration number 31578, be and is hereby ordered.
2. 3rd respondent be and is hereby ordered to ensure the parties' strict compliance with the order given in (1) above.
3. 1st respondent be and is hereby ordered to pay costs of this application on a client and attorney scale.

It suffices to note and mention that the parties have been dragging each other in turns to this court. The critical occasion being the one undercover of case number HC 1217/21 which culminated in judgment number HB 185-21 as shall morefully appear hereinunder.

POINTS IN LIMINE

1. Dirty Hands

The 1st respondent indicated to the applicant that they will be raising this point in his notice of opposition filed on 14 December 2021. It is worth noting that in her Heads of Argument filed on 16 December 2021 the applicant did not address this point.

In oral arguments 1st respondent reiterated his argument that, applicant has approached this court with the proverbial dirty hands in that she has to that date failed to comply with the judgment of this court rendered under case number HC 1217/21 by DUBE-BANDA J on 30 September 2021 ordering the applicant to restore to 1st respondent 7 (seven) tonnes of gold ore.

1st respondent told the court that he has since that apparent contempt of court reported the matter to the Zimbabwe Republic Police under CR 26/10/21 Filabusi and the matter was currently receiving the attention of the National Prosecuting Authority.

Mr Sithole for the applicant told the court that applicant has complied with the order of DUBE-BANDA J and the dispute has just been on tonnage and if there was contempt, 1st respondent should have approached the court.

Mr Sithole could not give the date of the compliance and neither could he dispute that the matter was being considered for prosecution.

It is a principle of our law that people are not allowed to come to court seeking the court's protection if they are guilty of lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court.

See Nhapata v Maswi & Another SC 38-16

Econet Wireless (Private) Limited v The Minister of Public Service Labour and Social Welfare and Others SC 31-2016.

The failure by the applicant to address this point on papers coupled with her failure to give better particulars of the alleged compliance taken together with her failure to negative the assertion that the docket is now with the National Prosecuting Authority serve to corroborate 1st respondent's position that applicant has not complied with an extant order of this court. She has approached this court with dirty hands. I thus uphold the point *in limine* raised.

2. URGENCY

Both on papers and orally, 1st respondent argued that this matter is not urgent. His thrust was that the fall-out between the parties arose sometime in June 2021. He went on to argue that in particular the need to act arose on 29 October 2021 when the 3rd respondent uplifted the suspension of mining operations at the claims he had hitherto imposed, and 1st respondent resumed operations. He argued that the need to act did not arise with the filing of case number HC 1908/21.

Applicant retorted by saying the need to act did not arise on 29 October 2021 but on 26 November 2021 when applicant wrote to 1st respondent retiring him from the partnership.

The argument by the applicant is untenable in that, on 8 October 2021, long before 29 October 2021 and 26 November 2021, 1st respondent wrote to the applicant cancelling their partnership. Not only that, but when applicant filed HC 1462/21 on 10 October 2021 and withdrew it on 18 October 2021 applicant was in that application complaining of the same conduct as she is doing in this application against the 1st respondent. The relief sought in HC 1462/21 and in this application is substantial the same.

I am convinced that this matter fails the test for urgency. I therefore uphold the point *in limine* raised.

3. INTERNAL REMEDIES

It admits to no argument that section 346 of the Mines and Minerals Act Chapter 21:05 gives judicial powers to the Mining Commissioner, however section 345 of the same Act re-affirms this court's inherent jurisdiction over mining disputes except where the disputants have agreed otherwise.

There is therefore no merit in the 3rd point *in limine* raised by the 1st respondent and I duly dismiss it.

Having upheld two (2) of the 3 (three) points *in limine* raised by the 1st respondent it is in the result ordered as follows:

1. Points (1) and (2) raised *in limine* by the 1st respondent are hereby upheld.
2. Point (3) raised *in limine* by the 1st respondent is hereby dismissed.
3. The urgent chamber application be and is hereby struck off the roll with costs.

Ncube Attorneys, applicant's legal practitioners
Tanaka Law Chambers, 1st respondent's legal practitioners