

SHURUGWI DEVELOPMENT TRUST  
versus  
VURAYAYI MARIMA

HIGH COURT OF ZIMBABWE  
WAMAMBO J  
MASVINGO, 27 July, 2021 and 5 August, 2021

**Urgent Chamber Application**

*C. Makwara* with him *O. Mafa* for the applicant  
*D. Mujaya* for respondent

WAMAMBO J: This is an Urgent Chamber Application wherein applicant seeks the following relief:-

*“TERMS OF THE FINAL ORDER SOUGHT*

*That you show cause to this Honourable Court why a final order should not be made in the following terms:-.*

- (a) That the provisional order be and is hereby confirmed.*
- (b) That the termination of the mining agreement between the applicant and respondent be and is hereby confirmed.*
- (c) That the respondent be ordered to pay costs of suit on an attorney and client scale.*

*TERMS OF THE INTERIM RELIEF GRANTED*

*Pending the finalisation of the matter, applicant is granted the following relief:-*

- (a) That the respondent be and is hereby interdicted from entering into and accessing B & B 4 Mine, Shurugwi for purposes of conducting any mining operations and/or collecting any mining ores therefrom forthwith.*
- (b) The respondent be and is hereby interdicted from interfering with and/or disturbing applicant's mining operations at B & B 4 Mine, Shurugwi or that of any of its lawful contractors without any lawful authority or order.*

(c) *The Zimbabwe Republic Police be and is hereby authorised to assist the applicant to enforce the order.*

(d) *Costs of this order to be in the main cause.*

*SERVICE OF THIS PROVISIONAL ORDER*

(a) *Service of this Provisional Order shall be effected by any duty attested member of the Zimbabwe Republic Police, Deputy Sheriff, the applicant's legal practitioners or the applicant upon the respondent."*

The brief background is that applicant has a tribute agreement with Falcon Gold Zimbabwe extending from 1 April 2009 to 31 March 2022 subject to extension upon satisfaction of some conditions. Pursuant to this agreement applicant entered into an agreement with respondent valid from 1 June, 2019 to 31 December, 2021 which agreement is also renewable after satisfaction of some conditions.

Applicant alleges that respondent has breached terms of the agreement resulting in the termination of the agreement. Further but inspite of the termination of the agreement respondent continuous to conduct mining operations on B & B 4 Mine. Thus the launching of this application wherein applicant seeks relief as mentioned earlier.

The respondent raised a number of points *in limine*.

Respondent avers that the date when the need to act arose is not mentioned. That the certificate of urgency was prepared before the founding affidavit and that the date when the alleged illegal mining operations commenced is not mentioned. Further that no explanation is given on why it is believed there is no other remedy. Applicant avers that the fact that the certificate of urgency does not bear a date does not mean it was executed before the founding affidavit.

I take note that the certificate of urgency does not reflect the date on which the deponent signed it. It also does not reflect the background and basis of the application. It tabulates the scant background to the matter in point form. It does not reflect the date when the need to act arose. It does not reflect when the agreement between the parties was signed when it breached and how it was breached.

The certificate of urgency boldly avers that applicant has no other remedy but to approach the court on an urgent basis. It does not clarify why applicant has no other remedy.

In *Martin Sibindi vs Ian Musango & Others* HH 170-19 MUSAKWA J (as he then was) stated as follows at pages 4 – 5.

*“Concerning what should be contained in a certificate of urgency, in the case of Oliver Mandishona Chidawu (2) Broadway Investments (Pvt) Ltd (3) Danoct Investments (Pty) Ltd (4) Dannoy Investments (Pty) Ltd v (1) Jayesh Shah (2) TN Asset Management (Pvt) Ltd (3) ISB Securities (Pvt) Ltd (4) Zimbabwe Stock Exchange (5) Conserve (Pvt) Ltd supra GOWORA JA had this to say at page 6.*

*In certifying the matter as urgent the legal practitioner is required to apply his or her own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not supposed to take verbatim what his or her client says regarding perceived urgency and put it in the certificate of urgency.*

*I accept the contention by the first respondent that it is a condition precedent to the validity of the certificate of urgency that a legal practitioner applies his mind to the facts. GILLESPIE J had occasion to discuss the duty that lies upon a legal practitioner who certifies that a matter is urgent in General Transport Engineering (Pvt) Ltd & Ors v Zimbabwe Corp (Pvt) Ltd 1998 (2) ZLB 301 where he stated;*

*“Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter that invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in which he is unable to conscientiously concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only on the strength of this arguments but on his own honour and name.”*

The founding affidavit reflects that it was signed on 21 July, 2021. The certificate of urgency however bears no date on which it was signed.

The certificate of urgency makes no reference whatsoever to the founding affidavit on which it is supposed to be based. It delves straight into averments reflecting that respondent has acted unlawfully.

Instead of the certificate of urgency being based on the founding affidavit in this case it appears to be the other way round.

At page 12 of the application the founding affidavit refers to the certificate of urgency as follows;-

*“14. As it more fully appears from the certificate of urgency attached to this application, I submit that this matter is urgent.”*

The very reliance in the founding affidavit of issues raised in the certificate of urgency resulted in the founding affidavit not tackling the issue of urgency in detail. The fact that the founding affidavit refers to an undated certificate of urgency suggests that the certificate of urgency was prepared before the founding affidavit. I find that in the circumstances the certificate of urgency predated the founding affidavit.

The other disturbing features of the certificate of urgency are referred to earlier.

In *Mlundurago Investments (Pvt) Ltd t/a Mbada Diamonds v Mutual Finance (Private) Limited* HH 630-15 BHUNU J (as he then was) after finding that the certificate of urgency predated the founding affidavit, delved into the relevant provisions of the High Court Rules and case law dealing with the issue at hand and concluded that the application was unsustainable.

BHUNU J (as he then was) said at page 4 of the above judgment.

*“As we have already seen in this case a vital essential element for a valid certificate of urgency is missing in that the certificate of urgency was prepared without recourse to a valid founding affidavit as it predated the affidavit.”*

*That being the case, the certifying lawyer could not have properly applied his mind to the facts arising from a non-existent founding affidavit. For that reason alone I come to the conclusion that the urgent chamber application is fatally defective for want of an essential element of such an application. The urgent chamber application is therefore unsustainable.”*

On a parity of reasoning I find that following the finding I made that the certificate of urgency predated the founding affidavit the above findings of BHUNU J (as he then was) apply with equal force to the instant matter.

With the findings I have made on the issue revolving around the certificate of urgency which effectively put the matter to rest, I will not deal with the other points in limine.

I order as follows:-

The application be and is hereby dismissed with costs.

*Mutatu & Mandipa Legal Practice*, applicant’s legal practitioners  
*Mawadze & Mujaya Legal Practitioners*, respondent’s legal practitioners