

PICKWICK MINES

Versus

THE SHERIFF OF THE HIGH COURT

And

MR F. MABHENA

And

THOMAS GONO

And

TURFALL MINING

And

RICHARD MOYO-MAJWABU

(In his capacity as executor of estate late Siphwe Dube DRB 966/20)

And

THE MASTER OF THE HIGH COURT

And

ZIMBABWE REPUBLIC POLICE MATABELELAND SOUTH

And

**THE MINING COMMISSIONER FOR THE PROVINCE OF MATABELELAND
SOUTH**

OLIVER MASOMERA

(Executor dative in the estate of the late Clement Dube a.k.a Clement George Dube)

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J

BULAWAYO 6, 10 & 27 July 2023

Urgent application

D. Dube, for the applicant
Ms. V. Chikomo, for the 3rd & 4th respondents
L.T. Muradzikwa, for the 7th and 8th respondents
B. Maruva, for the 9th respondent

DUBE-BANDA J:

[1] This is an urgent chamber application seeking to interdict the first, second, third and fourth respondents from executing a court order. The order sought is couched in the following terms:

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:

- i. 1st, 2nd, 3rd, 4th, and 8th respondents be and are hereby permanently barred from enforcing the court order under cover of case number HC 1067/20 at applicant's mining claims and mining location being Pickwick C GA 2198; Pickwick B GA 2199; Pickwick C GA 2200 and Legion North 4 GA 2666.
- ii. Parties be and are hereby ordered to abide by the decision of the court in the matter under cover of case number HC 1408/22.
- iii. 2nd, 3rd and 4th respondents be and are hereby ordered to bear costs of suit on an attorney-client scale.

Interim relief granted

Pending the finalisation of this matter, the applicants (*sic*) be and are hereby granted the following relief:

The execution of the court order under cover of case number HC 1067/20 is hereby temporarily suspended pending the finalisation of HC 1408/22.

Service of the provisional order

That this provisional order and the urgent application shall be served upon the respondents by the applicants (*sic*) legal practitioners / Sheriff of the High Court.

[2] The application is opposed by the third and fourth respondents. At the commencement of the hearing Mr *Maruva* made an application for the joinder of Clement Masomera (Masomera)

the executor of the estate of the late Clement Dube *a.k.a* Clement George Dube. The application was not opposed and was accordingly granted. Masomera was accordingly joined as the ninth respondent. The fifth, seventh, eighth and ninth respondents did not oppose this application. The second and sixth respondents did not participate in these proceedings, and I take the view that they elected to abide by the decision of this court. For ease of reference and where the contexts permit the parties will be referred to by their names as they appear in this application.

Background facts

[3] This application will be better understood against the background that follows. On 27 April 2017 the fourth respondent (Turfwall Mining) obtained a provisional order against one Sipiwe Dube (Dube), interdicting her and all her employees from conducting all forms of mining on the five disputed claims pending confirmation or discharge of the provisional order. The disputed claims are the following: - Legion C claim number 102224BM; Legion D claim number 10225BM; Legion F claim number 10226BM; Legion 13 claim number 33216 and Legion 14 claim number 33217. Dube appealed the provisional order to the Supreme Court, and in *Dube v Turfwall & Ors* SC 10/17 the court found that she lied when she claimed to be the owner of the disputed claims or tributor granted by Falcon Gold. The appeal was dismissed with costs on attorney and client scale.

[4] On 30 July 2020 in case number HC 1067/20 Turfwall Mining obtained an order against Sipiwe Dube. The order is couched as follows:

It is ordered that:

By consent an order is entered for the plaintiff as prayed for in the summons as follows:

- i. Eviction of the defendant and anyone who claims occupation through her on the following of the plaintiff's claims: -
 - Legion C under claim number 102224BM
 - Legion D under claim number 10225BM
 - Legion F under claim number 10226BM
 - Legion 13 under claim number 33216

Legion 14 under claim number 33217

- ii. Payment in the sum of US\$18 000.00 being royalties due and payable at 5% to the plaintiff for the period October 2016 to December 2016.
- iii. Payment in the sum of US\$6 000.00 per month effective from February 2017 to date of eviction being holdover damages due and payable to the plaintiff.
- iv. Costs of suit on attorney-client scale.

[5] Turfwall Mining sued out a writ and instructed the Sheriff to execute the above order. The execution was aborted following the refusal of the police to provide security during the execution of the order. On 25 July 2022 Turfwall Mining obtained an order amending the order in HC 1067/20 by the inclusion of an order directing the police to provide the Sheriff with security during the execution of the order.

[6] On 11 December 2020 Pickwick Mines in case number HC 2075/20 obtained a provisional order couched as follows:

Terms of the final relief sought

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

- i. The 1st, 2nd, and 3rd respondents (Mr. F. Mabhena, Thomas Gono, Turfwall Mining) and all those claiming through them be and hereby permanently barred from interfering with applicant's (Pickwick Mines) mining activities on Pick Wick A, Pick Wick B, Pick Wick C, Legion 42 and Legion 4 claims.
- ii. The 1st, 2nd and 3rd respondents to bear costs of suit on an attorney client scale.

Interim relief granted (by consent)

Pending the confirmation or discharge of this provisional order, the applicant is granted the following relief: -

- iii. That the applicant shall be allowed unhindered access to the mines known as Pick Wick A, Pick Wick B, Pick Wick C, Legion 42 and Legion North 4.

- i. The 1st, 2nd, and 3rd respondents and any other person acting through them be and hereby interdicted with immediate effect from conducting any mining activities, operations, works, surveys, prospecting and pegging on Pick Wick A, Pick Wick B, Pick Wick C, Legion 42 and Legion 4 North 4. Pick Wick A, Pick Wick B, Pick Wick C, Legion 42 and Legion North 4 validly held by applicant.
- ii. The applicant's agents, assignees and/or employees shall accompany the Sheriff, Messenger of Court, Bulawayo and members of the 5th respondent and Ministry of Mines to identify mining claims and shafts referred to in paragraph (1) above.
- iii. The application against the 2nd respondent (Thomas Gono) be and is hereby withdrawn by the applicant.
- iv. The applicant and is hereby ordered to pay 2nd respondent's wasted costs.

[7] The provisional order in HC 2075/20 was confirmed on 1 July 2021. It was confirmed in the following terms: -

- i. The 1st and 3rd respondents (Mr. F. Mabhena, Thomas Gone, Turfwall Mining) and all those claiming through them be and hereby permanently barred from interfering with applicant's (Pickwick Mines) mining activities on Pick Wick A, Pick Wick B, Pick Wick C, Legion 42 and Legion 4 claims.
- ii. The 1st and 3rd respondents to bear costs of suit on an attorney client scale.

[8] Now Turfwall Mining has sued out a writ of eviction of Dube and anyone claiming through her from Legion C claim number 102224BM; Legion D claim number 10225BM; Legion F claim number 10226BM; Legion 13 claim number 33216; and Legion 14 claim number 33217. Turfwall Mining is executing the order in HC 1067/20 as amended on 25 July 2022. As stated above, the order in HC 1067/20 was amended by the inclusion of an order directing the police to provide the Sheriff with security during the execution of the order. On 26 June 2023 Pickwick Mines' legal practitioners wrote a letter to the Sheriff protesting the intended eviction. In its reply the Sheriff stated that it shall proceed to evict Pickwick Mines on mining claims stated in the order in HC 25 July 2022, i.e., the order amending HC 1067/20.

[9] On 25 July 2023 Pickwick Mines sued out a court application (HC 1408/22) for a declaratory order, seeking an order that it be declared the registered holder of mining claims called Pick Wick A; Pick Wick B; Pick Wick C; Legion 42 and Legion North; Legion North 4; Legion West; Pickwick West 4; Legion 46,47, 25, 42, 43, Legion A; Legion 55; Legion 54; Legion 52; Legion North. It claims it registered these mining claims in 2001. The respondent in HC 1408/23 is the Provincial Mining Director, Matabeleland South Province. HC 1408/22 is still pending.

[10] It is clear that Turfwall Mining has no court order against Pickwick Mines. The order in HC 1076/20 as amended on 25 July 2022 is against Dube and all those claiming through her. This is the order that Turfwall Mining is threatening to execute at the mining claims listed in the order. It is apparent that whosoever is at the mining claims listed in HC 1067/20 is targeted for eviction. Pickwick Mining contends that the eviction is targeting it, although it identifies the claims by a deferent name. The net effect of it all is that the eviction of Pickwick Mines from Legion C under claim number 102224BM; Legion D under claim number 10225BM; Legion F under claim number 10226BM; Legion 13 under claim number 33216; and Legion 14 under claim number 33217 is imminent. It is against this background that the applicant launched this application seeking the relief mentioned above.

Points *in limine*

[11] Turfwall Mining raised two points *in limine*, viz that this matter is not urgent and that this application has no legal basis as the parties in HC 1067/20 are different from the parties in HC 2075. Ms *Chikomo* counsel for the third and fourth respondents abandoned the second point *in limine*, as it became apparent that its answer would require a determination of the merits of the matter. A point *in limine* is a point of law dispositive of the matter without a consideration of the merits, once the answer to a point raised require the court to delve deep into the merits, it seizes to be point *in limine*. Therefore, no further reference shall be made to this abandoned point. However, counsel persisted with the point viz urgency. The third respondent, i.e., Thomas Gono (Gono) raised a point that he was wrongly joined to these proceedings. Therefore, this attack by Gono needs to be considered as a preliminary point.

[12] At the commencement of the hearing, I informed the parties that I shall adopt a holistic approach to avoid a piece-meal treatment of the matter. Wherein the points *in limine* are argued together with the merits, but when the court retires to consider the matter, it may dispose of the matter solely on the points *in limine* despite that they were argued together with the merits. If the court finds that the points *in limine* have not been properly taken, it shall then determine the matter on the merits.

Ad mis-joinder of 3rd respondent

[13] I now turn to the point taken by Gono that he was inappropriately joined to these proceedings. In his opposing affidavit Gono avers that he is a director and shareholder at Beenset Investments t/a Turfwall Mining. He is not involved in the management of Turfwall Mining, and that no allegation is made in the founding affidavit that he contributed to the alleged actions complained of by Pickwick Mining. Ms *Chikomo* argued that Gono was improperly joined to these proceedings, and therefore the case against him must be dismissed with costs *de bonis propriis* as against Mr *Dube*, counsel for the applicant.

[14] In the founding affidavit it is averred that “the third respondent is Thomas Gono a male adult whose address of service is care of Turfwall Mining, Maphisa.” No more is said about the factual or legal basis of the joinder of Gono as a respondent to this application. In his oral submissions Mr *Dube* contended that Gono is a director and shareholder of the Turfwall Mining and is interfering with the operations of the Pickwick Mining. The details of the alleged interference were not provided. Even if Mr *Dube* had in his oral submissions provided the factual basis of the alleged interference, such could not have carried any weight at all. I say so because an application stands or falls on the averments made in the founding affidavit. See: *Muchini v Adams & Ors* SC 47/13 at p 4; *Chigovera v Minister of Energy and Power Development* SC 115/21. The founding affidavit says nothing about the alleged interference of Gono with the operations of Pickwick Mining.

[15] It is not enough that one is a director to be joined personally in legal proceedings. Joining a director in his or her personal capacity in a legal suit must be founded in the law, or must have a legal basis. In *Zimbabwe Tourism Authority v Ringsilver Enterprises (Pvt) Ltd* 2019(3) ZLR 1205 H @ 1208 the court said:

“There is jurisprudence in this jurisdiction which underscores the corporate personality of a company. The concept of legal persona is the cornerstone of our company law. See: *Modcraft Engineering (Pvt) Ltd v Tenda Buses (Pvt) Limited & another* HH 207/13 @ 7. In giving credit to a company a creditor should know that as a general rule, its remedy is confined to the assets of the company and no more. As a general rule if the assets of the company are insufficient to liquidate its debt, the creditor cannot cast its eyes on the assets of the shareholders and directors. This general rule is not cast in stone, there are various exceptions, I will consider in this judgment.”

[16] The joining of a director to legal proceedings must be located either in the ambit of the common law exceptions and /or statutory exceptions provided in s 197 of the Companies and Other Business Entities Act [Chapter 24:31]. In *casu* no attempt has been made to bring the joining of Gono to this application within the common law or statutory exceptions. The joining of Gono to these proceedings was improper and not in terms of the law. It is for this reason that his citation as the third respondent was erroneous, and his name as a respondent is expunged from this application.

[17] Ms *Chikomo* sought costs *de bonis propriis* against Mr *Dube* for this misjoinder. Counsel argued that in HC 2075/20 Gono was joined in his personal capacity, and Mr. *Dube* conceded that the joinder was improper and consented to the withdrawal of the matter as against Gono. It was submitted that again in this matter, without any factual or legal basis Gono has been joined in his personal capacity. Counsel argued that this speaks to negligence on the part of Mr *Dube* a legal practitioner of this court. To ward off costs *de bonis propriis* Mr *Dube* submitted that he is merely executing his client’s instructions. And cannot be ordered to pay costs for doing his job.

[18] An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court’s displeasure. An attorney is an officer of the court and owes a court an

appropriate level of professionalism and courtesy. See *SA liquor Traders 'Association and Others v Chairperson, Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC) at para 54; *Matamisa v Mutare City Council (Attorney-General intervening)* 1998 (2) ZLR 439; *Gapare & Anor v Mushipe & Anor* HB 17/11; *O-marshah v Kasara* 1996(1) ZLR 584(H) at 591 F; *Masama v Borehole Drilling (Pvt) Ltd* 1993 (1) ZLR 116 (S) at 120G; *Multi-Links Telecommunications Limited v Africa Prepaid Services Nigeria Limited* 2013 (4) ALL SA 346 GNP at para 34.

[19] I agree that there has been some measure of negligence on the part of Mr *Dube*. Joining a company director in legal proceedings is not for the mere asking. There must be a factual and legal basis for such joinder. Just to say “the third respondent is Thomas Gono a male adult whose address of service is care of Turfwall Mining, Maphisa” is unhelpful and speaks to negligence. However, I take the view that it is not the negligence of a serious degree to cause counsel to be mulct with costs *de bonis propriis*.

[20] I now turn to the point *in limine*, viz urgency.

Ad Urgency

[21] Turfwall Mining contends that this matter is not urgent and must not be accorded a hearing on the roll of urgent matters. It was submitted that the order (HC 1067/20) Turfwall Mining seeks to execute was granted on 30 July 2020, and was amended on 25 July 2022. Ms *Chikomo* submitted that Pickwick Mining did not act when the need to act arose in 2020, or soon after the order was amended in 2022. Counsel argued that the point *in limine* on urgency has merit and must be upheld.

[22] The certificate of urgency covers three pages, and is almost a duplication of the founding affidavit. It is not for the Judge to page through several paragraphs and pages in order to locate the alleged trigger to the urgency. The trigger to the urgency must be clearly set in the certificate of urgency. Because it is upon this certificate that the Judge then formulates an opinion as to whether or not the matter is urgent. I flag this issue so that it be taken note of in drafting a

certificate of urgency. In *casu* the certificate is deficient in this regard, however I do not deem it fatally defective.

[23] Cut to the bone, Pickwick Mining's claim on urgency is anchored on the contention that after it obtained an order in HC 2075/20 it was lulled into believing that Turfwall Mining had abandoned the order in HC 1067/20 and would not execute it. And it only became aware on 26 June 2023 that Turfwall Mining was seeking to execute the order. It then wrote a letter to the Sheriff protesting the intended execution, and the Sheriff in his reply made it clear that he was proceeding to execute on mining claims owned by Turfwall Mining. This application was filed on 30 June 2023.

[24] The jurisprudence is that what constitutes urgency is not 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. See *Kuvarenga v Registrar-General* 1988(2) ZLR 189. On the facts of this case, I accept that the need to act arose on 26 June 2023, and that the applicant acted when the need to act arose. Further, a writ of eviction is on the verge of being executed on what applicant considers to be its mining claims. Whether the applicant is correct or not that it is about to be evicted from its own mining claims, is an issue that can only be answered in the determination of the merits of the matter. It is an inquiry that turns on the merits. I take the view that this application passes the test of urgency and deserves to be heard on the roll of urgent matters. In the circumstances the point *in limine* attacking the urgency of this matter has no merit and is refused.

[25] Finally on the preliminary issues, at the hearing of this matter I drew the attention of Mr *Dube* to the fact that the interim relief sought seeks the suspension of the execution of the order in HC 1076/20 pending the finalisation of the application for a declaratur in HC 1408/22. And that generally such cannot be granted as an interim relief because there would be no incentive for the applicant to seek to come to court on a return date as it would have been granted a final relief disguised as an interim relief. An interim relief cannot be granted pending the conclusion of other cases with their own processes and procedures. See *Movement for Democratic Change (Tsvangirai) v Timveos* SC 9/22; *Blue Rangers Estate (Pvt) Ltd v Muduwiri* SC 29/09; *Registrar General of Elections v Combined Harare Residents Association & Anor* SC 7/02 at page 10.

An interim relief may be granted pending the return date of “this matter” not some other matter with its own processes. Counsel then applied for an amendment of the interim relief sought, whose import was to seek the suspension of the execution “pending the finalisation of this matter.” The amendment was not opposed and was accordingly granted.

[26] I now turn to the merits of the matter.

Ad Merits

[27] The applicant seeks an interim interdict. The requirements for an interim interdict were aptly stated in *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511(S). The Court cited with approval the case of *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F, CORBETT J (as he then was) wherein the court said an applicant for such temporary relief must show: that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt; that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right; that the balance of convenience favors the granting of interim relief; and that the applicant has no other satisfactory remedy.

[28] The first question to be answered is whether the applicant has established a *prima facie* right. The applicant is not party to the application in HC 1067/20, which yielded the order that is sought to be executed. Notwithstanding the contention that the order affects its interests it has not done anything to have it rescinded or set aside. The order is extant, and there is no bar to its execution. See *Manning v Manning* 1986(2) ZLR 1 (SC); *Mauritius and Another v Versapak Holdings (Private) Limited and Another* SC 2 / 2022. Again, it is important to note that Siphwe Dube, and now late and represented in these proceedings by executor Mr Richard Moyo-Majwabu consented to the order (HC 1067/20) that is sought to be executed. Further, to date the executor has not sought the setting aside of the order or its rescission. It is an extant order that is executable.

[29] Further the order in HC 1067/20 as amended is sought to be executed at Legion C claim number 102224BM; Legion D claim number 10225BM; Legion F claim number 10226BM; Legion 13 claim number 33216; and Legion 14 claim number 33217. On the other hand, Pickwick Mining seeks to interdict the execution of the order at Pickwick C GA 2198; Pickwick B GA 2199; Pickwick C GA 2200 and Legion North 4 GA 2666. First, on paper the mines at which the writ is sought to be executed are different from those the applicant seeks protection by way of an interdict.

[30] Pickwick Mining contends that although the names of the mining claims are different but the ground locations are the same. However, it provides no *aorta* of evidence in support of this contention. Except to submit that in HC 2075/20 Turfwall Mining was interdicted from interfering with Pickwick Mines at Pickwick C GA 2198; Pickwick B GA 2199; Pickwick C GA 2200 and Legion North 4 GA 2666, as if these are the claims at the centre of the dispute, they are not. Further it claims that the police declined to assist the Sheriff in evicting Pickwick Mines from its claims, and therefore it is contended that this shows that the ground locations of the Pickwick Mines and those from where it is sought to be evicted are the same. This is no evidence that the claims from which the eviction is sought to be executed are on the same ground locations with the claims referred to in HC 2075/20.

[31] On the other hand, Turfwall Mining filed a report produced by the surveyors at the Ministry of Mines. It is clear from the report that the ground locations of the Turfwall mines and Pickwick mines are not at the same ground location. The report concludes that the mining claims under dispute as at registration do not overlap, and Pickwick A (owned by Pickwick Mining) and Legion C (owned by Turfwall Mining) share a common boundary. Further the report shows that the workings and infrastructure belonging to Pickwick Mines fall outside their Pickwick A-C and Legion North 4 mining claims boundaries and are within Turfwall Mining's Legion C, D, 13, and 14 mining claims boundaries. It states further that on the ground Pickwick Mines has shafts outside Pickwick A-C and Legion 4 mines claims boundaries, which shafts fall within Turfwall Mining's Legion C, D, 13, and 14 mine claims boundaries. This is evidence that shows that the eviction is not sought to be executed at Pickwick mining claims.

In turn the eviction is sought to be executed at Turfwall Mining claims i.e., at Legion C claim number 102224BM; Legion D claim number 10225BM; Legion F claim number 10226BM; Legion 13 claim number 33216; and Legion 14 claim number 33217. This is what the order in HC 1067/20 as amended decreed, and it is extant.

[32] An interim interdict is aimed at preserving the *status quo* pending the final adjudication of the matter by the court. In the circumstances, I conclude that the applicant has not met the requirements for an interim interdict. On the evidence before court, the applicant has not made a *prima facie* case for the provisional relief it is seeking. It has not shown that the eviction is sought to be executed at its mining claims. Absent any such a *prima facie* right, there can also be no harm or perceived imminent harm against which an interim interdict should offer protection. It is for these reasons that this application must fail.

[33] The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I therefore intend awarding costs against the applicant, in favour of third and fourth respondents. However, in favour of the third respondent, fairness requires that the applicant pays his costs on a legal practitioner and client scale. I say so because the third respondent should not be put out of pocket by the wholly unacceptable and unjustified conduct of the applicant, i.e., by dragging him to this litigation without justifiable cause.

In the result, it is ordered as follows:

- i. The application be and is hereby dismissed.
- ii. The applicant to pay the third respondent's costs on a legal practitioner and client, and pay the fourth respondent's costs on a party and party scale.

Dube Legal Practice, applicant's legal practitioners

V. Chikomo Law Chambers, 3rd & 4th respondent's legal practitioners
Civil Division of the Attorney General's Office, 7th and 8th respondent's legal practitioners
Zuze Law Chambers, 9th respondent's legal practitioners