

**FLORENCE MBIZO N.O**  
**(In her capacity as Executrix Dative**  
**Of Estate Late Nicholas Mudzengi**  
**DR 980/18)**

**Versus**

**TICHAONA DARANGWA**

**And**

**ANDERSON MUCHENJE**

**And**

**THE OFFICER IN CHARGE**

**SHURUGWI POLICE STATION N.O**

**And**

**THE PROVINCIAL MINING DIRECTOR**

**MIDLANDS PROVINCE N.O**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 1 AND 10 JUNE 2021

**Urgent Chamber Application**

*Advocate L Nkomo with M Mapfumo*, for the plaintiff

*W Davira with Miss F Mrewa*, for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

*P Kunaka*, for the 3<sup>rd</sup> and 4<sup>th</sup> respondents

**MAKONESE J:** This is an urgent chamber application for an interdict. The Draft Order is couched in the following terms:

**“INTERIM RELIEF SOUGHT**

1. That 1<sup>st</sup> and 2<sup>nd</sup> respondents, their associates, agents, assignees, partners, and all those claiming mining rights through them, be and are hereby ordered to forthwith cease all mining activities at Ansh 267 gold mine, registration number 27857, situate at Selukwe Peak Farm, Shurugwi.
2. That 4<sup>th</sup> respondent be and is hereby directed and ordered to carry out a survey on the ground and compile and file with the court a survey report within 21 days of service of this order, verifying the position of the beacons and boundaries of Ansh 267 mine, registration number 27857 situate at Selukwe Peak Farm, Shurugwi and the 2<sup>nd</sup> respondent’s Ansh Red Mine.

**TERMS OF FINAL ORDER SOUGHT**

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

1. That 1<sup>st</sup> and 2<sup>nd</sup> respondents, their associates, agents, assignees, partners and all those claiming mining rights through them, be and are hereby permanently interdicted, barred, and restrained from trespassing into, encroaching or in any way interfering with the applicant’s possession of, and mining operations at Ansh

267 gold mine, registration number 27857, situate at Selukwe Peak Farm, Shurugwi.

2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents to pay the costs of this application at an attorney client scale.”

The matter is opposed by 1<sup>st</sup> and 2<sup>nd</sup> respondents. The 3<sup>rd</sup> and 4<sup>th</sup> respondents did not file any papers. They indicated they would abide by the order of the court.

### **Factual Background**

The applicant is the widow of the late Nicholas Mudzengi who died at Shurugwi on the 30<sup>th</sup> of January 2012. His estate was registered with the Master of the High Court at Harare in 2018. The applicant is the executrix dative in the estate with Letters of Administration duly issued on 8<sup>th</sup> May 2018. During his lifetime, applicant’s husband was the holder of a registered gold mining claim known as Ansh 267 gold mine. The mining claim was registered on 29 February 2008 and is situate at Selukwe Peak Farm, Shurugwi. The applicant as the executrix of the estate of the late Mudzengi is the holder of Ansh 267 gold mine as defined in section 5(1) of the Mine and Minerals Act (Chapter 21:05). Applicant currently employs about thirty workers at the mine. The mine has been fairly productive with alluvial gold deposits being mined at shallow depths. On the 28<sup>th</sup> April 2021 2<sup>nd</sup> respondent approached the applicant at Ansh 267 mine to verify the beacons of her mining claims. 1<sup>st</sup> respondent is the holder of adjacent mining claims at Ansh Red gold mine. Applicant alleges that on 30<sup>th</sup> April 2021 1<sup>st</sup> and 2<sup>nd</sup> respondents and various other persons under the control of 1<sup>st</sup> respondent invaded Ansh 267 mining claims. Applicant further avers that 1<sup>st</sup> respondent is currently prospecting for gold deposits within her mining claim. Applicant avers further that on the same date there were violent confrontations between her employees and 1<sup>st</sup> respondent’s agents. The incident was referred to Shurugwi Police. The matters involving the parties are pending at Shurugwi Magistrates Courts.

On the 3<sup>rd</sup> of May 2021 applicant’s legal practitioners wrote a letter to the Police complaining about the conduct of the police officers stationed at Shurugwi. The letter reads in part as follows:

“...

*Our clients have instructed us to note a complaint with your august office in respect of unprofessional and biased treatment that they have been subjected to by police officers at Shurugwi Police Station. Although they have borne the brunt of this treatment for a long time, things came to a head on 30<sup>th</sup> April 2021.*

*On the fateful day, in the morning of around 10:00 am, one Tichaona Darangwa, armed with a revolver, loaded with live rounds of ammunition, which was openly brandishing, led five other men to unlawfully enter Ansh 267 mine. Amongst the five, our clients managed to identify Saidi Saidi (aka Sasa). These other 5 men were armed with machetes and knives, and also had in their possession detectors.*

*The intruders started conducting mining operations at the said mine ...*

*It is under this background that our clients are calling for the urgent intervention of your office to stop real accused persons from acting as big cousins of the Police ... ”*

On the 14<sup>th</sup> of May 2021 the applicant wrote to the 4<sup>th</sup> respondent complaining of the events which took place on 30<sup>th</sup> April 2021.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents have raised two preliminary objections which I must deal with before going into the merits

### ***LIS PENDENS***

The respondents contend that the issues raised by the applicant relate to the same subject matter and the same parties are involved. The dispute referred to 4<sup>th</sup> respondent relates to the same dispute regarding the boundaries at Ansh 267 gold mine and Ansh Red mine. Respondents point out that the applicant has sought a site verification exercise to be done. This has not yet been done. Respondents contend therefore, that this application is premature and predicated upon the same subject matter with which 4<sup>th</sup> respondent is seized. Respondents argue that 4<sup>th</sup> respondent is empowered by the Mines and Minerals Act to deal with boundary disputes and is capable of providing satisfactory relief for the parties.

At the hearing *Advocate L. Nkomo*, appearing for the applicant tendered a letter dated 26 May 2021 authored by 4<sup>th</sup> respondent. The letter is worded as follows:

*“... we have no objection to the request. However, under normal circumstances, we expect the court to instruct the Provincial Mining Office to conduct such exercises otherwise we would be accused of imposing ourselves on the matter before we are invited. In the event that you insist we go to the ground without the instruction of the court we need to officially inform the other disputing party and the police to attend.*

*In our view, there is no other way except for the court to instruct us to do the ground verification exercise. This explains why we thought we have been prematurely invited in the matter.”*

In my view, the wording of the letter from the 4<sup>th</sup> respondent shows clearly that 4<sup>th</sup> respondent was awaiting a court order to deal with the dispute between the parties. I am not

convinced that the matter is *lis pendens*. *Mr Davira*, appearing for the respondents grudgingly conceded that there was no dispute pending before 4<sup>th</sup> respondent. This court is well equipped to deal with the dispute at this stage. The parties are before the court, they have made detailed submissions regarding their respective positions. The parties are entitled to an outcome. In the circumstances, the first preliminary objection has no merit and must be dismissed.

### **LACK OF URGENCY**

The 1<sup>st</sup> and 2<sup>nd</sup> respondents have forcefully argued that a narration of the events leading to this application indicate that the matter is not urgent. Respondents aver that the applicant did not treat the matter with urgency when the need to act arose. It is clear that the events that led to this application occurred on the 30<sup>th</sup> April 2021. This is the day applicant alleges the respondents invaded their mining claims. This fact is supported by applicant's letter to the police dated 3<sup>rd</sup> May 2021. In that complaint to the police applicants refer to conduct that occurred on 30<sup>th</sup> April 2021. Applicant did not act and did not seek relief from this court. Applicant waited until the 14<sup>th</sup> May 2021 when she invited 4<sup>th</sup> respondent to conduct a ground verification exercise at Ansh 267 mine. The purpose of the involvement of 4<sup>th</sup> respondent was to verify the locations of the beacons and to settle the boundary dispute if any was found to exist. It is clear that applicant's complaint to the police revolved around the alleged bias of the police officers based at Shurugwi. No explanation is given in the Certificate of Urgency and Founding Affidavit why the applicant chose to wait from the 30<sup>th</sup> April 2021 when the need to act arose. The applicant appears to have taken a somewhat casual approach to the matter. On 14<sup>th</sup> May 2021 applicant wrote to 4<sup>th</sup> respondent requesting a ground verification exercise. Again no explanation appears in the Certificate of Urgency as to why no action was taken back then on 14<sup>th</sup> May 2021. If the events that triggered this urgent application took place on the 30<sup>th</sup> April 2021 then wonders why no urgent and immediate action was taken at that time. Applicant only acted for the first time in respect of the relief she now seeks when she filed the present application on 27<sup>th</sup> May 2021, a period close to a calendar month. Applicant gives no explanation whatsoever as to why she failed to act within a reasonable time to assert her rights.

The law is now well settled on what constitutes urgency. In *Kuwarega v Registrar General and Another* 1998 (1) ZLR 188 (H), the learned Judge held as follows:

*“...what constitutes urgency is not only the imminent arrival of the day 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 absence from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the Certificate of Urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been a delay ...”*

In that matter there was a delay of 7 days before the urgent application was filed. Such a delay called for an explanation. The court indicated that in the absence of an explanation why action was not taken earlier, the matter did not qualify to be treated as an urgent matter.

See also: *Khumalo v Ndlovu and Others* HB 143-16.

Litigants are reminded to heed that the preferential treatment of allowing a matter to be dealt with urgently is only to be extended where good cause is shown for treating the litigant in question differently from other litigants.

In *Econet Wireless (Pvt) Ltd v Postal and Telecommunications Regulatory Authority of Zimbabwe* 2014 (2) ZLR 693 (H) the principle was restated that a certificate of urgency and founding affidavit must set out in full the reasons why a matter which is brought on an urgent basis cannot wait to be enrolled on the ordinary roll.

In the present matter, the applicant has not explained why it took her close to a month to bring this application. In the first instance, the applicant complained to the police. She waited. She then chose to seek relief from 4<sup>th</sup> respondent. When she did not get the relief she was seeking, and before the matter of boundary disputes had been ascertained by the 4<sup>th</sup> respondent she filed this urgent chamber application.

It is my view that the applicant herself did not treat the matter with the urgency it deserved. The applicant failed to act when the need to act arose.

For these reasons, it shall not be necessary to deal with the merits of the matter.

The following order is made:

1. The matter is not urgent.
2. The matter is removed from the roll of urgent matters.

3. The applicant shall pay the costs of suit.

*Mapfumo Mavese & Associates c/o Liberty Mcijo & Associates*, applicant's legal practitioners  
*Gundu, Dube & Pamacheche c/o Dube-Tachiona and Tsvangirai*, 1<sup>st</sup> and 2<sup>nd</sup> respondents' legal practitioners