

**ALL AFLAME MARKETING (PVT) LTD**

**and**

**COMPETITIVE MARKETING (PVT) LTD**

**Versus**

**JOHN FARLEY PETERSEN**

**And**

**MARK JOHNSTONE**

**IN THE HIGH COURT OF ZIMBABWE**

**MOYO J**

**BULAWAYO 7 SEPTEMBER & 14 OCTOBER 2021**

**Urgent Chamber Application**

*Ms E. Sarimani* for the applicants

*S. Nkomo* for the respondent

**MOYO J:** This is an urgent chamber application wherein the applicant seeks the cessation of mining activities by the respondents and all those claiming through them from plant site 682 and Royal Family Group Mining claims.

The parties herein entered into a joint venture agreement wherein they terminated the previous agreements they had in which both applicants and respondents would have shares in the joint venture. 1<sup>st</sup> respondent then later stated that he intended to set up his own operation and he stated this on 27 April 2021. He announced his intention to set up his own operation as another third party and paying the joint venture 50% from gold produced. On 3 June when applicant's representative visited the Royal Family site he found 1<sup>st</sup> respondent on site overseeing certain works which would eventually result in him conducting gold mining operations. A letter was written on 16 June for 1<sup>st</sup> respondent to submit a proposal to the joint venture to operate as a 3<sup>rd</sup> party. 1<sup>st</sup> respondent had not responded by the time the deponent o the founding affidavit executed it. This application was subsequently filed on 27 August 2021. Applicant explains the delay by stating that due to Covid 19 restrictions and because the deponent to

applicant's affidavit resides in Kwekwe, the application could not be filed timeously. It is further stated that those involved also reside in different parts of the country.

1<sup>st</sup> respondent opposed the application and brought up points *in limine*, one of which they are criticizing the issue of urgency. The 1<sup>st</sup> respondent has attacked the issue of urgency on the basis that the issue being complained of arose in April 2021 about 5 months prior to the launching of this application. 1<sup>st</sup> respondent further avers that the mining sector is exempt from Covid 19 restrictions and that applicant's explanation of failing to act within the time frames and guidelines for urgency is unjustified. 1<sup>st</sup> respondent also raised a point *in limine* in relation to the fact that the deponent to applicant's founding affidavit was a director's authority as opposed to a shareholders' authority.

The problem that the applicant has in my view is on the aspect of urgency as per the founding affidavit, from 27 April 2021, first respondent announced his intention to set up his own operations. He was advised that that had not been approved by the joint venture.

In paragraph 3.15 of the founding affidavit, applicant's representative states that while visiting the Royal Family site on the 3<sup>rd</sup> of June, he found 1<sup>st</sup> respondent on site, overseeing works that would eventually result in him conducting gold mining operations. A demand was then made by the joint venture on 16 June 2021 for the 1<sup>st</sup> respondent to submit a proposal to operate as a 3<sup>rd</sup> party. Up to 26 August 2021, there had been no response from 1<sup>st</sup> respondent. It is my considered view that the need to act on this matter actually arose on the 3<sup>rd</sup> of June 2021 when 1<sup>st</sup> respondent was found on site overseeing works that would eventually result in him conducting gold mining operations. This is so because 1<sup>st</sup> respondent had long advised applicant of his intentions way back on 27 April 2021. Applicant should have acted on or around 3 June 2021 because that is when 1<sup>st</sup> respondent carried out the threat he had made in April. To wait for the whole of June, July and only file an urgent chamber application on 27 August 2021 means that the matter can no longer be treated as urgent. An urgent matter cannot wait. 1<sup>st</sup> respondent's actions were then clear on the 3<sup>rd</sup> of June 2021 and applicant should have sought relief then. The summons that were subsequently issued by the respondents and the events of 12 August 2021 when 1<sup>st</sup> respondent was found having commenced the leading operation do not found urgency because respondents' actions were long made known to applicant and 1<sup>st</sup> respondent did go on the ground as of the beginning of June to commence preparations for the operations. Even if one were to say applicant gave the 1<sup>st</sup>

respondent an ultimatum to apply to the joint venture for permission as of 16 June 2021 still if 1<sup>st</sup> respondent did not make any application up to the time this application was held it would still mean that applicant failed to act within the ambit of the rules of urgency.

Applicant avers that due to Covid 19 restrictions in Kwekwe action, could not be taken early enough. However, this reason does not find favour with the court for the simple reason that Covid 19 restrictions did not block communication channels, and people with essential business like court cases could proceed. In the absence of a detailed explanation as to how the lockdown delayed the commencement of this matter, it is the view of this court that no reasonable explanation has been provided from the long delay. The application can thus not qualify to jump the queue and be treated with urgency when applicant itself did not act when the need to act arose. A delay in acting when the need to act arises in an urgent matter, strips that matter of urgency. It is for these reasons that I uphold the point *in limine vis-à-vis* urgency and I accordingly strike the matter off the roll of urgent matters.

The matter is accordingly struck off the roll of urgent matters with applicant bearing the costs of this application.

*Coghlan & Welsh* applicants' legal practitioners

*Mathonsi Ncube Law Chambers*, 1<sup>st</sup> & 2<sup>nd</sup> respondents' legal practitioners