

SIMALU MINING (PVT) LTD & 4 OTHERS**Versus****ZIBON SIBANDA & 13 OTHERS**IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 13 FEBRUARY & 12 MARCH 2020**Urgent Chamber Application**

T. Muganyi, & M. Mahaso for the applicants
D. Dube for 1st to 9th respondents
Ms B. T. Nyoni for 10th to 13th respondents

MAKONESE J: This urgent application was filed on the 7th February 2020. I heard the parties in chambers on the 13th of February 2020. This is my determination on the chamber application.

The order sought in the draft order is couched in the following terms:

“Terms of Interim Relief sought

Pending the final determination on this matter on the return date applicants are hereby granted the following relief:

1. That respondents are hereby interdicted from executing under the order issued in favour of 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents under case number HC 3013/19 pending finalization of this matter.

“Terms of final order sought

1. The order issued against applicants under HC 3013/19 shall be permanently stayed pending finalisation of the application for rescission of judgment under case number HC 324/20.
2. Applicant be declared to be in lawful occupation of Goldwin N Mining claims consisting 10 Gold Reefs registration number 48981.
3. 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents be and hereby ordered to pay costs of an attorney and client scale, the one paying the other to be absolved.

This application is opposed by the respondents. Several points *in limine* have been raised by the respondents. I shall consider each one of these preliminary points in turn. Before I do so, I shall set out by way of a brief background, the circumstances surrounding this matter.

Background

The respondents are members of a Community Share Ownership Trust, known as Lushonkwe Nqama Small Scale Miners Association. The association is based at Lushonkwe, Ward 4, Gwanda. The association, under the banner of this Community Share Ownership Scheme secured mining claims belonging to Freda Rebecca Mine. The community members with the involvement of the local Chief and the political leadership received a donation of certain mining claims located in the Tuli area, known as Orient 1, 2, Lady Anna 4, Lady Anna 5, Lady Anna 6, Lady Anna 7, Lady Anna 8, Lady Anna 9, Lady Anna 10 and 11, which were registered under registration numbers 37537 – 46. The respondents delegated 2nd, 3rd, 4th and 5th applicants in this matter to oversee legal transfers, logistics, payment of arrear fees at the Ministry of Mines and to have the claims transferred to the community. Unknown to the respondents and the community leaders, 2nd, 3rd, 4th and 5th applicants invited the Zimbabwe Republic Police to evict the community from the claims alleging that these claims belonged to a private company, Simalu Mining (Pvt) Ltd, the 1st applicant. The respondents lodged a complaint with the Minister of State for the Province of Matabeleland South and the Provincial Mining Director. The respondents subsequently filed summons commencing action against the applicants under case number HC 3013/19 for the eviction of the applicants from the mining claims. A default judgment was granted against the applicants on the 3rd of February 2020. The applicants contend that the default judgment was fraudulently obtained and that proceedings to set aside the default judgment have been commenced. That application is yet to be set down and determined. This urgent chamber application is meant to operate as an interdict preventing the operation of the judgment under HC 3013/19 pending the outcome of the application for rescission of judgment. The effect of the order sought is to allow the applicants to resume occupation of the mining

claims which are the subject of the application for rescission of judgment. I shall proceed to deal with the points *in limine*.

Wrong form used

The respondents contend that there is no proper application before this court. The urgent application, it is argued, does not comply with the High Court Civil Rules, 1971. The application should be in Form 29B. The applicants do not deal with this objection at all. They simply state that the use of the wrong form is not fatal to the application. No explanation is given why the wrong form was used. In the event that the court can exercise its discretion in terms of Rule 4C, this should be done where in the interests justice of the case it is prudent to deal with the matter. The applicants cannot avoid the issue. Strict compliance with the rules of this court is fundamental in respect of all applications that are filed in this court. See; *R. M. Mining & Industrial Zimbabwe Ltd v STANBIC Bank* HH-11-15. I would not however, dismiss this application on this alone. The grounds upon which the application has been made are clear from the application and the supporting affidavits.

Defective Certificate of Service

The respondents contend that the certificate of urgency is defective as it does not comply with Rule 244 of the High Court Rules. I do not agree that the certificate of urgency is defective in any manner. The applicants have set out in the certificate of urgency sufficient particulars of the perceived urgency. This point *in limine* is not sustained.

Matter overtaken by events

The respondents allege that the matter has already been overtaken by events. This is so because an order is sought seeking to interdict the execution of an order which was executed by the Sheriff on the 4th of February 2020. It is factually correct that the order granted by this court on the 3rd February 2020 by the Honourable KABASA J had already been executed. For this court to order that the “*respondents are hereby interdicted from executing the order issued in favour of*

1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents under HC 3013/19 pending finalisation of this matter.” may indeed be academic. The order if granted in its present form would be a *brutum fulmen*. See ; *Kashumba v Idehen & 4 Ors* 279/18.

To compound the difficulty for the applicants, the final order seeks an order that the applicants be declared to be in lawful occupation of the premises. The applicants seek to obtain substantive relief on the lawfulness of their occupancy of the claims. That matter is not before the court, in this application. The applicants seek relief which has not been raised in the founding affidavit. This cannot be correct. An applicant may not seek substantive relief which is not canvassed in the application. In response to the submission that the matter has been overtaken by events, the applicants, aver that the court is enjoined to ensure that real and substantial justice is done between the parties. The applicants aver that real and substantial justice can only be achieved if this court intervenes positively. In essence, the applicants assert that real and substantial justice can only be achieved if the matter is decided in their favour. The applicants contend that the default judgment was procured improperly and therefore this court must intervene, and stay the execution of the order which by their own admission has already been executed. On this aspect, I must point out that the applicants must themselves take positive steps to set aside the default judgment. The judgment of the 3rd of February 2020 is still extant. A default judgment cannot be set aside in the manner proposed by the applicant via an urgent chamber application. I have had occasion to peruse the record under case number HC324/20 and observe that no steps have been taken to set down the application for rescission of judgment.

It is my view hat this point *in limine* has merit. The order sought by the applicants if granted, would be a *brutum fulum*.

Material dispute of facts

The respondents contend that there are material disputes of fact which can only be resolved by leading *viva voce* evidence. In the brief background that I gave in this judgment, this is a dispute relating to the occupation and ownership of the mining claims. There are serious and material disputes of fact which cannot be dealt with without hearing oral evidence. I note that an

attempt was made to bring Patrick Dube to appear in chambers to give his version regarding the default judgment allegedly obtained through fraud or misrepresentation. While it is permissible to call parties in chambers to clear issues in dispute, the route has its own hazards. The first problem is that there is no scope for the cross examination of witnesses in chambers, in an urgent chamber application. Where a matter is brought to court on an urgent basis it stands or falls on the founding affidavit. Where there is a material dispute of fact, the matter should be brought by way of action proceedings. See *Mackintosh (Nee Perkinson) v Mackintosh* SC-37-18.

I need not therefore proceed to consider the rest of the preliminary points. I cannot decide this matter on the papers. I cannot grant an order where material and serious disputes of fact abound. I cannot simply ignore such material factual disputes. The respondents' opposing papers have annexures of minutes of meetings between the parties clearly indicating that the applicants and respondents have disagreements regarding the manner in which the applicants allegedly went behind the Community Share Ownership Scheme to set up a private limited company to work upon the mining claims in dispute. I cannot decide that dispute. It is not before me. I am satisfied that the applicants have chosen this procedure well aware of the existence of these disputes of fact. It is important to note that the applicants have sought to suppress the background to this matter by simply asserting that they are the registered owners of the mining claims in dispute. The applicants contend forcefully that they are the title holders in respect of the mining claims. The entire background in this matter must, in my view, be taken into account in deciding whether this is an appropriate case to grant the order sought. I reiterate that there is a material dispute of fact, which is not capable of resolution on the papers. In the circumstances, the last two preliminary points referred to in this judgment are upheld.

Accordingly, and in the result, the application is hereby dismissed with costs.

Tanaka Law Chambers, applicants' legal practitioners
Mathonsi Ncube Law Chambers 1st to 9th respondents' legal practitioners
Civil Division of the Attorney General's Office, 10th to 13th respondents' legal practitioners