

## Anesu Gold (Pvt) Ltd v Golden Reef Mining (Pvt) Ltd &amp; Ors

HH 17-21  
HC 33/21  
Ref HC 7497/20

ANESU GOLD (PRIVATE) LIMITED  
versus  
GOLDEN REEF MINING (PRIVATE) LIMITED  
and  
ONESIMO MAZAI MOYO N.O.  
and  
NELSON MUNYANDURI N.O.  
and  
THE MINISTER OF MINES & MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE  
MAFUSIRE J  
HARARE, 19 & 25 January 2021

Date of judgment: 25 January 2021

**Urgent chamber application**

*Adv L. Uriri*, with him Mr *S J Chihambakwe*, for the applicant  
*Prof W. Ncube*, with him Mr *J. Chikomwe*, for the first respondent  
Mr *T. Nyamukapa*, with him Ms *Mupandasekwa*, for the second, third and fourth respondents

MAFUSIRE J

[1] The applicant is a mining company. It seeks an anti-dissipation interdict against the first respondent, also a mining company. The second respondent is the Permanent Secretary in the Ministry of Mines and Mining Development (“*the Ministry of Mines*”). The third respondent is the Provincial Mining Director for the Midlands Province. The fourth respondent is the Minister of Mines himself.

[2] The applicant says at all relevant times prior to January 2019 it was the holder of 128 mining claims in the Mberengwa District in the Midlands Province. The respondents say 8 of them were duly cancelled and forfeited. They say by special grant they were subsequently relocated to the first respondent. The applicant challenges the cancellation and the forfeiture. It also challenges the special grant to the first respondent. It has filed a court application under HC 7497/20 which is pending (“*the main application*”). It says despite that application, and

the several other efforts by it to reverse the forfeiture and special grant, the first respondent has already moved onto the 8 sites and is busy extracting gold ore from them. So, the interdict is being sought to bar the first respondent from carrying out any mining operations until its main application has been determined.

[3] The applicant argues that the cancellation and forfeiture of its 8 claims aforesaid were done *nicodemously*. It says this was purposeful. It says the special grant to the first respondent was issued and awarded corruptly. It argues that the fourth respondent, to whom the administration of the Mines and Minerals Act (*Chapter 21:05*) is assigned, and to whom the second and third respondents are ultimately answerable, was and is heavily conflicted. He is a director of the first respondent. Through another company run and controlled by him, he is also a shareholder in the first respondent. Before he was appointed Minister, he had been roped in as consultant, or to help with due diligence, for the applicant in respect of the claims. At that time the applicant was looking for investors for the unfolding mining project. Through such involvement, the fourth respondent had gained valuable and confidential information about, among other things, the rich veins of gold ore spread across the 8 claims in question. So, instead of the notices of the purported cancellation and forfeiture being served on the applicant at its *domicilium citandi et executandi* in Harare, they had just been posted onto the notice board, outside the third respondent's offices in Gweru, to ensure that the applicant would not see them. As it happened, the applicant did not see them.

[4] The applicant submits further that the second to fourth respondents purported to invite the applicant to pay renewal and inspection fees for all its 128 claims, by issuing invoices therefor, and actually accepting and receipting the applicant's payments that were made through a loan facility from a Government-owned entity, Fidelity Printers & Refiners (Private) Limited. Even after the purported forfeiture, they actually went on to renew the claims in favour of the applicant. It says the second respondent purported to be unaware of the forfeiture and the special grant to the first respondent as he presided over meetings and engagements between the applicant and the first respondent. Yet it was him that had signed the special grants. The applicant further submits that this was all designed to camouflage the corrupt dealings of the fourth respondent. It says that this is the major reason for seeking to upset the forfeiture and cancellation in the main application. But if the interdict is not granted, the applicant stands to

suffer irreparable harm given that gold, like all other minerals, is exploitative and a fast depleting resource. There will be nothing left for the applicant on those 8 claims if it should eventually succeed in the main application.

[5] Both the main application and the interdict are being contested vigorously by all the respondents. In the present application, the first respondent in particular has raised a number of points *in limine*. Chief among them is that the matter is not urgent. Others are that the certificate of urgency is incurably defective for want of compliance with the Rules of this court and the several cases on the point, more particularly in that the legal practitioner who issued it did not apply his mind to the matter. Otherwise in no way would he have certified it as one of urgency. The first respondent also argues that the form of the application, being one to be served, was not in compliance with the proviso to r 241(1) in that it was neither accompanied by Form 29 nor modified appropriately. Finally, on the points *in limine*, the first respondent submits that the applicant has not established the requisite *locus standi* for its suit, more particularly in that the invoices for the inspection fees for the disputed claims were in the name of a completely different company; that notices of forfeiture were in that other company's name and that therefore, it has not been established how the applicant can itself purport to "vindicate" claims belonging to someone else.

[6] On the merits, all respondents stand by the cancellation, forfeiture and subsequent special grant to the first respondent. They deny any improper handling of the matter and claim that everything was done above board. In particular, they argue that the obligation to renew the certificates of registrations and to motivate the payment of the requisite inspection fees rest on the claim holder. The applicant did not live up to its obligations. It had to be prompted by the third respondent. The respondents also argue that the posting of the notices of cancellation and forfeiture on the notice board outside the third respondent's office in Gweru is the procedure provided for in the Act. The notices could not have been posted to the applicant's personal address. The respondents also raise some factual disputes such as that the fourth respondent was never at any time a consultant for the applicant, or that he has any direct interest in the first respondent.

[7] Initially, upon the application being allocated to me and being placed on my desk, my preliminary view was that it was not urgent and that as such it was not one to be heard on an urgent basis. Therefore, I declined to set it down and caused the Registrar of this court to advise the applicant accordingly. However, as is the norm, the applicant's legal practitioners made representations by letter that they felt the matter was urgent. They sought audience with me. I obliged. I set the matter down. The respondents soon filed their opposing papers. Among other things, the first respondent strenuously argues that the matter is not urgent.

[8] The first respondent's argument on urgency is this. If, as it claims, the applicant got to know of the cancellation, forfeiture and the subsequent special grant to the first respondent in September 2020 (when it had tried to move onto site but, to its surprise, had found the first respondent already *in situ* and busy mining) then the time to apply for the interdict was September 2020, or a few days or weeks thereafter. The applicant did not. It is also argued on behalf of the first respondent that the applicant, through its erstwhile lawyers, did in fact file the same application in the High Court at Masvingo in September 2020 but withdrew same on 25 September 2020. However, this was only after the first respondent had already filed its notice of opposition and after the matter had already been heard on 18 September 2020. The first respondent says the applicant did nothing afterwards.

[9] The first respondent further argues that the applicant went on to file the main application on 16 December 2020. It argues that if the applicant considered the issue of the interdict urgent, it would have filed it simultaneously with that application. However, not only did the applicant not do so, but also that it waited for several weeks, almost a month, until 12 January 2021 when it finally filed the interdict. The first respondent says there has been an inordinate delay which has not been adequately explained. Inevitably, the case of *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (H) has been cited for the proposition that a matter is urgent if the need to act arises and it cannot wait. It is not only the imminent arrival of the day of reckoning that denotes urgency. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules.

[10] The applicant denies vehemently that it can be said to have slept on its rights. As soon as it learnt of the nefarious cancellation and forfeiture of its claims, and the subsequent special grant to the first respondent, it immediately filed an urgent chamber application for an interdict at the High Court at Masvingo. However, it had to cause it to be withdrawn following advice from its current legal practitioners who had pointed out certain procedural flaws in the application and which were incurable. The applicant admits it did not immediately seek to file a corrected application. However, that does not mean it had gone to sleep. It sought to have the dispute resolved amicably and administratively through the offices of the second, third and fourth respondents. There were engagements and a meeting held amongst the parties, all at the instance of the applicant. There are documents and WhatsApp messages to prove that. It says the second respondent indeed seemed sympathetic to its cause. At a meeting of the parties on 30 September 2020, the second respondent suggested that the applicant should write a letter to the third respondent, setting out the issue. The letter would have to be copied to him. That had been done on 7 October 2020. The applicant also says it tried to have a one on one meeting with the fourth respondent. At one such appointment it had brought along its legal practitioner and a representative of its potential international investment partner. However, the fourth respondent had inexplicably, and at the last minute, declined to meet with them, instead, referring them to the third respondent.

[11] I heard oral argument on urgency only. Soon thereafter, as the parties and I sought to plot the most expedient way forward in having the matter determined finally, given the restrictions on people's movement and the limited access to the courts in this period of the covid-19 pandemic, it was agreed that the parties could file heads of argument on the rest of the points *in limine* and the merits and leave it to me to pass judgment. An earlier suggestion had been that after my decision on urgency, I would then have to proceed to hear argument on the merits, if I ruled that the matter was urgent. As a matter of fact, the first respondent had already filed its comprehensive heads of argument on both the points *in limine* and the merits. All the heads of argument have since been filed. So here now is my judgment, starting with the issue of urgency.

[12] Can the applicant be accused of such inaction as to be said to be fatal to its cause of action on the question of urgency? Verbatim, the seminal statement in the case of *Kuvarega* above is as follows:

“What constitutes urgency is not only 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. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules.”

[13] *Prof Ncube*, for the first respondent, has also drawn attention to the judgment of DUBE-BANDA J in *Seventh Day Adventist Association of Southern Africa v Tshuma & Ors* HB 213-20 in which the learned judge is said to have remarked:

“In the ordinary run of things, court cases must be heard strictly on a first come first served basis. It is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis. ... An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue, and have its matter given preference over other pending matters. .... In assessing whether an application is urgent, this court has in the past considered various factors, including, among other others; ... whether the urgency was self-created; the consequence of relief not being granted and whether the relief would become irrelevant if it is not immediately granted.”

[14] The applicant says litigation, particularly this urgent chamber application, was a last resort after it had finally become apparent that the second to fourth respondents would not solve the dispute administratively, presumably on account of the conflicted nature of the fourth respondent. The applicant says its efforts in engaging the respondents administratively had been designed to save the court’s precious time. However, this sounds hollow. The applicant *did* approach the court at Masvingo immediately after it says it had become aware of the presence of the first respondent on its 8 claims. So, no precious time of the court was being saved there, especially given that the first respondent had actually filed opposing papers, and, as I am told, the matter had actually been heard (although the applicant disputes that the matter had been heard).

[15] Even if the reason for the withdrawal of the application at Masvingo was the alleged procedural improprieties allegedly as had been pointed out by the applicant’s new legal practitioners, I do not find as reasonable the explanation for the failure to correct those flaws and re-launch the same application immediately afterwards. The law protects the vigilant, not

the sluggard. Then there is the point made by *Prof Ncube*. Why was this interdict not filed simultaneously with the main application in December 2020? Or immediately soon thereafter? In previous judgments, I have in previous judgments commented on the kind of action that is expected of a litigant as it seeks to protect its rights. In *Main Road Motors v Commissioner-General, ZIMRA* HMA 17-17 and *Icon Alloys (Pvt) v Gwaradzimba N.O. & Ors* HMA 30-17 I said that the kind of action that a litigant must take when the need to act has arisen is not just any type of action. It must be action that is effectual in the protection of one's rights in averting the impending peril.

[16] The applicant says the letter that it was encouraged by the second respondent to write to the third respondent and to copy it to him in the meeting of 30 September 2020 was in fact written. It was duly copied to the second respondent. However, it was never replied to. Up to this date, it has never been replied to. In my view, that should have prompted the applicant to act. It was at all times aware that the first respondent was busy helping itself to the ore at the 8 claims. But it took no action. It filed the main application in December 2020. But it refrained from filing the interdict. It refrained from filing the interdict even for almost a month afterwards. Late in the day it now approaches the court alleging that gold is a fast depleting resource and that by the time the main application will be heard, all the ore will have been exhausted. Incidentally, this is just a nude statement. The applicant provides no statistics or facts on the projected life spans of these mines. I am just expected to treat as fact that all the ore will be finished by the time the main application is heard, most probably in the next few months. This also is despite the provision in the rules, r 223A, that facilitates the urgent set down of ordinary court application, something which I raised with Mr *Uriri*, for the applicant, during argument.

[17] As a court of justice, allegations that someone has abused his office to gain advantage for himself to the prejudice of another, as is being alleged of the fourth respondent herein, should so outrage the court as to prompt it to set aside all its other business and attend to the injustice. But regrettably for the applicant, it has missed the bus. The time to move the court on an urgent basis is long gone. It has made its bed of roses. It must lie on it. It has itself not treated its cause with the urgency that it says it deserves. Therefore, I find the matter not urgent.

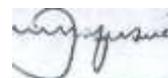
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That dispenses with the need to deal with the rest of the points raised *in limine*, let alone the merits.

[18] In the premises, the matter is hereby removed from the roll of urgent matters. The applicant shall bear the costs of suit.

25 January 2021

A handwritten signature in black ink, appearing to read 'M. Mutizwa', is written over a light blue horizontal line.

*Chihambakwe, Mutizwa & Partners*, legal practitioners for the applicant  
*Thompson Stevenson & Associates*, legal practitioners for the first respondent  
*Attorney-General's Office*, legal practitioners for the second, third and fourth respondents