

**DAVID JASI HWEHWE**

versus

**JOSEPH MUPASI**

**And**

**JESSICA MAZIVAZVOSE**

**And**

**JAISON MHERE**

**And**

**COLLEN MOYO**

**And**

**SIPHEPHILE MACHACHA**

**And**

**SHURUGWI COMMUNITY EMPOWERMENT TRUST**

**And**

**PROVINCIAL MINING DIRECTOR – MIDLANDS N.O.**

**And**

**OFFICER IN CHARGE – ZRP SHURUGWI CENTRAL MINERALS, FLORA AND  
FAUNA N.O.**

**HIGH COURT OF ZIMBABWE**

**MAMBARA J**

MASVINGO 14 and 16.April 2025

*I.Mupfiga*, for the applicant

*N.Hlabano*, for the respondents

*Urgent chamber application*

MAMBARA J:

**1. Introduction**

The Applicant, Mr. David Jasi Hwehwe, approached this Court by way of an urgent chamber application seeking an interdict against the 1st to the 6th Respondents, effectively barring them from continuing any mining activities on, and requiring them to vacate, certain mining claims known as Roly 11, Roly 12, Roly 13, and Roly 14 located in Shurugwi, Midlands Province. The 7th Respondent is cited in its official capacity as the Provincial Mining Director – Midlands Province, and the 8th Respondent is cited as the Officer in Charge, ZRP Shurugwi Central Minerals, Flora, and Fauna Unit (N.O.).

The thrust of the Applicant's argument is that he holds a valid Tribute Agreement over the aforementioned mining locations and that the 1st to 6th Respondents' presence and mining activities constitute an unlawful intrusion. He claims that the matter is urgent since he stands to suffer ongoing financial losses in the face of the 1st to the 6th Respondents' alleged continued mining.

The 1st to the 6th Respondents oppose the application and vehemently contest its urgency. They raise, among other points, that the Applicant was aware of their occupation for many months prior to instituting this application, such that any urgency he now relies upon is self-created. They further allege that the purported Tribute Agreement is not valid given that it was never approved in accordance with the Mines and Minerals Act [Chapter 21:05].

This judgment focuses primarily on the issue of urgency because if the Court finds that the matter is not urgent, it need not inquire into the further merits. The cause for urgent relief is always to be weighed against the legal principle that a matter must not be placed on the urgent roll where an applicant has failed to treat it with the diligence demanded by the law.

In arriving at this decision, the Court has had regard to the parties' papers on record, counsel's written and oral submissions, and all pertinent legislation and authorities that clarify the question of urgency.

**2. Factual Background**

Although the parties differ on some points of detail, a large part of the material facts is common cause or not seriously disputed:

**2.1 Initial Tribute Agreement**

The Applicant avers that, in or around 2016, he entered into a Tribute Agreement with Falcon Gold Zimbabwe Ltd for mining on the claims known as Roly 11 (PM 21368), Roly 12 (PM 21369), Roly 13 (PM 21370), and Roly 14 (PM 21371). According to the Applicant, this agreement was approved on 5 April 2017 by the Mining Commissioner (Midlands), in compliance with the Mines and Minerals Act.

## **2.2 Renewed Agreement and Purported Cancellation**

On 20 January 2023, the Applicant and Falcon Gold Zimbabwe Ltd allegedly signed a new (or renewed) Tribute Agreement set to run until December 2026. Subsequently, on or about 29 December 2023, Falcon Gold wrote to the Applicant purporting to cancel that Tribute Agreement, giving him three months' notice of termination. The Applicant disputed the validity of that cancellation.

This dispute culminated in litigation under Case No. HCMSC 156/24 before this same Court. Ultimately, the judgment in that matter was delivered on 7 March 2025 (and allegedly issued or made available on 27 March 2025) by the Hon. Justice Zisengwe. The Court declared that the purported termination of the Tribute Agreement by Falcon Gold was null and void, effectively restoring the Applicant's position under the Tribute Agreement as he sees it.

## **2.3 Occupation by 1st to 6th Respondents**

While that litigation was ongoing, around August 2024, the 1st to the 6th Respondents took occupation of at least two of the Roly claims (Roly 11 and Roly 12). The 1st and 6th Respondents contend that Falcon Gold had already sold those mining locations to the 6th Respondent (Shurugwi Community Empowerment Trust), and that the lawful transfer was in progress.

## **2.4 Attempts to Engage Authorities**

The Applicant lodged various reports with the 8th Respondent (ZRP) alleging unlawful occupation, vandalism, and threats of violence. In January 2025, the 7th Respondent's office (Provincial Mining Director) suggested that if the Applicant sought eviction or cessation of mining activities, he might have to approach the Court on an urgent basis. The Applicant counters that he was constrained to wait until the finalization of his dispute with Falcon Gold Zimbabwe Ltd, which had a bearing on whether there was a valid and extant Tribute Agreement.

## **2.5 Subsequent Events**

The Applicant's application for declaratory relief (HCMSC 156/24) was eventually decided in his favour, with the Court ruling that Falcon Gold's cancellation was unlawful. The Applicant then proceeded to lodge this present urgent chamber application for an interdict, contending that it was only after the 27 March 2025 issuance of the order that his right to remove or evict the 1st to 6th Respondents became crystallized.

For their part, the 1st to the 6th Respondents maintain that the Applicant has been aware of their activities and presence in the mine since August 2024 and that any alleged urgency now is self-induced. They also raise additional points in limine, among them the alleged non-joinder of Falcon Gold Zimbabwe Ltd, material disputes of fact, and the assertion that the Applicant has not satisfied the standard requirements for an interim interdict.

## **3. Points in Limine**

The 1st to the 6th Respondents raise several preliminary points. Most germane to the present judgment—given the structure of urgent applications in our courts—is the issue of urgency. As the well-known principle goes, if the matter does not meet the

threshold of urgency, the Court will not consider the further merits, and the application would ordinarily be struck off or removed from the roll of urgent matters.

They also raised other issues, including:

The Respondents argue that Falcon Gold Zimbabwe Ltd was a necessary party to the present proceedings because it purportedly sold the mining locations to the 6th Respondent.

They further contend that there are material disputes of fact regarding the validity of the Applicant's Tribute Agreement and ownership rights that cannot be resolved on the papers.

The Respondents maintain that the Applicant lacks a clear or even a prima facie right, because the relevant agreement was not validly registered or approved in terms of the Mines and Minerals Act.

While these points in limine are potentially dispositive, this judgment will focus on the question of urgency, for that alone may determine the fate of this application.

#### 4. Legal Framework on Urgency

It is trite in our jurisdiction that urgent relief is a special and exceptional procedure in terms of which a litigant is permitted to jump the queue of ordinary set-downs. Our courts have repeatedly cautioned that litigants must not abuse the urgent roll by waiting long periods before taking action, only to then claim that the matter is urgent.

Among the leading local authorities is **Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H)**, where it was held that a matter is urgent if, at the time when the need to act arises, the Applicant acts promptly and does not allow the grass to grow under his feet. Further clarifications appear in decisions such as:

**Madzivire & Ors v Zvarivadza & Ors 2006 (1) ZLR 514 (S)**, where the Supreme Court underscored that one does not wait until "the day of reckoning" before acting.

**Nyekete & Ors v Lion Finance Ltd HH-603-21**, which highlights that even if irreparable harm is threatened, if the Applicant knew of the relevant facts for a long period and took no steps, urgency is usually negated.

South African jurisprudence, which is often cited with approval in Zimbabwe on procedural matters, similarly insists that an applicant must show that it acted without undue delay. In **Luna Meubel Vervaardigers (Edms) Bpk v Makin & Another (t/a Makins Furniture Manufacturers) 1977 (4) SA 135 (W)**, the court spoke of one who seeks to jump the queue as needing to show real urgency.

Thus, the critical question in the present matter is whether the Applicant, upon realizing that the 1st to 6th Respondents had occupied portions of the mine in August 2024, should have instituted urgent proceedings then, or within a reasonable

time thereafter, or whether the pendency of the other litigation (HCMSC 156/24) genuinely justified his delay.

## 5. Summary of Parties' Submissions on Urgency

### 5.1 Applicant's Submissions

The Applicant insists that he could not have brought this matter on an urgent basis before finalizing the dispute with Falcon Gold Zimbabwe Ltd, as the central issue of the ownership or the viability of the Tribute Agreement hinged on the validity of that Agreement. He claims that it was only once the High Court, per Zisengwe J, ruled (on 25 March 2025, order issued on 27 March 2025) that the cancellation was invalid, that his rights became fully vindicated and unassailable as against any other parties on site.

After receiving the formal order on 27 March 2025, he promptly lodged a police report and wrote to the 7th Respondent's office, only to be advised on or about 1 April 2025 that the police would not intervene. He contends that, from that date, he moved swiftly to bring this urgent application.

### 5.2 1st to 6th Respondents' Submissions

The Respondents argue that the Applicant has known of their presence since August 2024, which is approximately nine months prior to the filing of this urgent chamber application (filed in early April 2025). They highlight that the Applicant's own founding papers confirm that he attempted engagement, filed police reports, and was aware of continuous mining by the Respondents all along.

They cite **Nyekete & Ors v Lion Finance Ltd HH-603-21** and other cases for the principle that failing to act expeditiously once the cause of complaint arises defeats any claim of urgency. In their view, the alleged "day of reckoning" here was August 2024, or at the very latest September/October 2024, when the Applicant could have moved for an interdict to stop the 1st to 6th Respondents from occupying and mining on the disputed claims.

They further note that the Applicant has not demonstrated any special or extraordinary circumstance that warranted waiting for the finalization of separate litigation. The existence of a dispute with Falcon Gold, in their submission, did not prevent him from applying for an urgent interdict to preserve the status quo pending the outcome of that matter.

## 6. Analysis of Urgency

### 6.1 Delay and Explanation Thereof

The hallmark question in an urgent application is whether the Applicant acted promptly after the cause of complaint arose. The Applicant's stance is that the real trigger for urgent relief only arose once the High Court made a definitive pronouncement on the invalidity of Falcon Gold's purported cancellation.

However, in evaluating whether that explanation is satisfactory, the Court must consider that the Respondents' continued occupation and mining on at least two of the relevant claims is alleged to have started in August 2024. The Applicant certainly knew at that time that the Respondents were on site, extracting minerals, and allegedly threatening or blocking the Applicant's own operations. If the Applicant had a fear of irreparable harm from that moment onward, it is unclear why the existence of the separate lawsuit (HCMSC 156/24) precluded him from seeking an interim interdict on an urgent basis. The relief of an interdict is typically employed precisely to prevent ongoing or imminent harm while a principal dispute wends its way through the courts.

It is settled law that irreparable harm or commercial prejudice alone does not create urgency if the Applicant does not act when the need to act arises. In **Kuvarega v Registrar-General & Anor (supra)**, the Court stated that one must act when the cause arises; waiting for many months unravels the argument that the matter must be heard forthwith.

Here, the "need to act" seemingly arose in August 2024, once the 1st to 6th Respondents established physical presence and commenced operations. The fact that the Applicant might have desired a declaratory order from the Court in HCMSC 156/24 does not bar an urgent application. Indeed, a typical approach in these scenarios is to seek an interdict *pendente lite* or seek a prohibition on adverse actions while the main question (validity of a contract, ownership, or cancellation) is being litigated.

#### 6.2 Self-Created Urgency

Our courts are particularly wary of applications that appear to manufacture urgency by referencing the final pronouncement on an issue. In **Air Zimbabwe (Pvt) Ltd v Chikupe 1999 (1) ZLR 61 (H)**, it was highlighted that a litigant cannot watch a situation develop over time and then, upon receiving some final impetus, scramble to the Court's urgent roll.

The Respondents have thus correctly pointed out that the Applicant's present sense of urgency springs from his own choice not to have acted sooner. This is the essence of self-created urgency, which the courts consistently frown upon.

#### 6.3 Balance of Prejudice and Timing

While it is true that the Applicant might have wished for clarity on whether his Tribute Agreement survived Falcon Gold's purported cancellation, the need to protect his alleged rights against third parties was equally pressing. Indeed, by the time of the hearing of the main cancellation matter in September 2024 (HCMSC 156/24), he was already aware of the 1st to 6th Respondents' mining. Yet, no urgent action was launched against them.

From August 2024 until this application was finally filed in or about April 2025, a protracted period elapsed. In circumstances where a party has knowledge of the offending conduct for such an extended duration, the Court's well-trodden approach is to refuse to accord the matter preferential treatment under the urgent roll.

#### 6.4 Whether the Applicant's Delay Was Reasonable

The Court is mindful that the Applicant's counsel contends the decisive event was the issuance of the final order under HCMSC 156/24 on 25 March 2025 (and availed on 27 March 2025). Yet, an important question is: Did the Applicant truly lack a cause of action or the possibility of relief prior to that date? If indeed the 1st to 6th Respondents' actions were causing immediate and irreparable harm, an application for an interim protection could have been made many months before.

It is fundamental in our practice that one may simultaneously pursue an action (or application) for a declaratur or related relief and an urgent application for an interdict. The Court has, in multiple matters, recognized that the final determination of a contract dispute or property dispute does not preclude an interdict against third parties if they are infringing the litigant's rights in the meantime.

Consequently, the explanation that the Applicant "waited" on the outcome of HCMSC 156/24 does not, without more, satisfy this Court that the matter now qualifies as urgent.

### 7. Disposition on Urgency

Having considered:

The Applicant's knowledge of the 1st to 6th Respondents' presence from as early as August 2024;

The 1st to 6th Respondents' uncontroverted averments that the Applicant lodged reports and engaged in discussions regarding the occupation many months prior, indicating that the situation was both known and ongoing;

The standard set in **Kuvarega v Registrar-General & Anor** and in **Nyekete v Lion Finance** (supra) to the effect that self-created urgency should not be rewarded;

I find that the Applicant failed to act when the need to act first arose. The subsequent finalization of the dispute with Falcon Gold Zimbabwe Ltd is not a sufficient reason to justify the delay of approximately nine months from the initial occupation. Indeed, while it might have been convenient for the Applicant to wait, convenience does not equate to legal urgency.

Therefore, the Court concludes that the matter has not been established as one of urgency, as contemplated by the High Court Rules and by a long line of judicial authorities on this point.

In light of this finding, it becomes unnecessary for me to delve into the other points raised in limine (for instance, the alleged non-joinder of Falcon Gold or the question of whether the final relief and interim relief sought are substantially the same). Furthermore, the issue of whether the Tribute Agreement is valid in terms of the Mines and Minerals Act is likewise not a matter for this Court to adjudicate under an urgent roll if no urgency is established.

## 8. Conclusion

Given the above analysis, the Court finds that the Applicant has not established any grounds upon which this matter should leapfrog other matters on the ordinary roll. The bulk of the alleged harm has been ongoing for at least nine months. The impetus for lodging this application appears to be the final order in a parallel matter, but that impetus does not transform this dispute into one requiring extraordinary relief by way of urgent proceedings.

Consequently, the matter is not urgent and must be removed from the roll of urgent matters. In so doing, the Court expressly refrains from making any pronouncements on the substantive merits, including the validity of the Applicant's Tribute Agreement, or whether the 1st to 6th Respondents have lawful entitlement to be on the premises. Those issues may well be ventilated in the normal course—whether by action or application procedures—on the ordinary roll.

While costs are ordinarily in the discretion of the Court, the 1st to 6th Respondents prayed for costs on an attorney-and-client scale, arguing that the Applicant's approach was vexatious and inappropriate. Generally, an applicant who attempts to place a non-urgent matter on the urgent roll risks an adverse costs order. However, whether there was a genuinely vexatious approach here or whether the Applicant simply erred in believing that the finalization of the Falcon Gold dispute triggered new urgency can be debated. A moderate approach is to order that costs follow the cause but on the ordinary scale. Nothing in the present record suggests that the Applicant acted out of malice or pure abuse.

In the result, it is ordered as follows;

0. The matter is hereby removed from the roll of urgent matters for want of urgency.
1. The Applicant shall bear the costs of this application on the ordinary scale.

MAMBARA J.  .....

*Gundu Dube & Pamacheche*, applicant's legal practitioners

*Hlabano Law Chambers*, 1<sup>st</sup> -6<sup>th</sup> respondents' legal practitioners.