IBI MINERAL RESOURCES (PVT) LTD
versus
TIME OF HOPE MINING SYNDICATE
and
PLAXEDES MUBAIWA
and
REGINALD NGULUBE
and
DOUGLAS NGULUBE
and
JOEL MTETWA
and
PATRICK MATEWU
and
EDMORE KAUTEKO
and
THE OFFICER COMMANDING, MASHONALAND CENTRAL
PROVINCE ZIMBABWE REPUBLIC POLICE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 9 December 2021 and 9 February 2022

Urgent Chamber Application

W T Jiti, for the applicant
P Mutukwa, for the 1st, 2nd, 3rd and 4th respondents
M Chipetiwa, for the 5th, 6th and 7th respondents
No appearance for the 8th respondent

MUTEVEDZI J: The applicant, a company incorporated in terms of the laws of Zimbabwe, approached this court with a chamber application. The application was filed under a certificate of urgency. The summarized facts of the case are that in December 2013 the Mining Commissioner issued a certificate of registration in favour of the 1st respondent which is a Mining Syndicate fronted by the 2nd respondent in respect of mining claims known as Block 41573 Kimberly F (herein 'Kimberly F') located in Bindura.

The 2nd, 3rd and 4th respondents are members of Time of Hope Mining Syndicate, the 1st respondent in this case. Their connection to this case is that they represented the 1st respondent when it entered into the Mining Partnership Agreement with the applicant as described below.

On 25 October 2021, the applicant entered into a Mining Partnership Agreement with the 1st respondent which was represented by the 2nd, 3rd and 4th respondents. On the strength of that agreement, the applicant sought to commence mining operations at Kimberly F. It erected a perimeter fence and hired a private security company to protect its interests and assets. It also brought on site mining equipment. Unfortunately, those efforts were violently resisted by what the applicant described as illegal artisanal miners. The violence was so intense and rampant that the artisanal miners destroyed the mining equipment which had been brought on sight, attacked and injured the private guards and brutally killed their patrol dogs. The applicant was left with no choice but to seek police assistance.

The marauders all evaded arrest and could not therefore be properly identified. Through police investigations, two of the artisanal miners were later arrested on 29 November 2021. After their arrest, they argued that they were lawfully on the mine on the basis of a partnership agreement which they had entered into with 1st respondent. It may be important to mention even at this stage that the so-called partnership agreement is simply an affidavit in longhand dated 29 October 2021 allegedly deposed to by the 2nd respondent. It is that affidavit which mentions 5th, 6th and 7th respondents as 2nd respondent's partners in mining operations at Kimberly F. Waving that affidavit in the face of the police, the 5th - 7th respondents disarmed the police and stopped the applicant dead in its tracks from pursuing any criminal remedies.

The applicant, faced with the reality that the police were powerless to deal with what had clearly turned out to be a civil dispute, had no choice but to approach this court on 2 December 2021 seeking an order in the following terms:

TERMS OF THE FINAL ORDER SOUGHT

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

1. The 2nd respondent be and is hereby barred permanently from granting or transferring mining rights to any third party until all the terms of the Deed of Partnership in respect of Block 45173 Kimberly F between applicant and 1st respondent have been extinguished
2. The Deed of partnership between 1st respondent and the 5th, 6th and 7th respondents dated 29th October 2021 in respect of Block 45173 Kimberly F be and is hereby declared invalid and of no legal force
3. The 2nd, 5th, 6th and 7th respondents are hereby ordered to pay costs of suit on an attorney –client scale

INTERIM RELIEF GRANTED

Pending determination of the final relief sought herein, the applicant be and is hereby granted the following interim relief:

1. The 2nd, 5th, 6th and 7th respondents are ordered to refrain from interfering with mining activities at Block 45173 Kimberly F Bindura
2. The 2nd, 5th, 6th, and 7th respondents and all those acting for and on their behalf are ordered to refrain from carrying out, commencing to carry out, or continuing to carry out any mining activities on mining location pegged as Block 45173 Kimberly F Bindura
3. The 8th Respondent be mandated to remove and/or arrest any persons purporting to be acting in terms of the Partnership Agreement of 29th October 2021 between 2nd, 5th, 6th and 7th Respondents.

The 1st, 2nd, 3rd and 4th respondents elected not to oppose the application. They filed no opposing papers but their counsel appeared at the hearing. He advised the court that the 2nd respondent completely dissociated herself from the affidavit used by the 5th -7th respondent as the basis of their partnership agreement with her. Her argument was that she was coerced by those respondents into signing the affidavit. She alerted the court to the masculinity of the handwriting on that affidavit as an illustration that it could not have been her who had drawn the affidavit. She however did not disown the signature of the deponent to the affidavit. I will revert to deal with the issue later.

The 5 - 7th respondents opposed the application on various grounds with the 6th respondent deposing to the opposing affidavit on his and the other respondents' behalf. They took three preliminary points namely that: (a) there is no proper applicant in the matter, (b) a mining syndicate is not a juristic person and (c) the matter is not urgent. The court will later deal with each of those issues in turn.

On the merits, the three respondents' opposition was among other non -material assertions and arguments pivoted on the grounds that:

i. the alleged agreement between the applicant and 1st respondent did not qualify as a partnership
ii. that agreement only came into effect on 30 October 2021. As such it was preceded by their own oral agreement with the 1st respondent authorizing them to conduct mining operations at Kimberly F and which culminated in 2nd respondent deposing to the affidavit of 29 October 2021

iii. the application does not meet the requirements for the grant of an interdict

THE PRELIMINARY OBJECTIONS

1. That there is no proper applicant

The 5th - 7th respondents argued that the application is fatally defective in that there is no proper applicant before the court because IBI Mineral Resources (Pvt) Ltd is not the owner of the mining block in dispute. They argue that as such the applicant has no real rights over the mining location.

I am not sure of the reason why this argument is being raised particularly as a preliminary objection. It is ludicrous in my view. The requirement for the grant of a provisional interdict is not that the applicant must specifically prove a real right, personal right or any other form of right. The law is settled that in an application for an interim interdict the applicant must illustrate that the right which he or she seeks to protect is either clear or, if not clear, is *prima facie* established though open to some doubt.In *Airfield Investments (Pvt) Ltd v The Minister of Lands, Agriculture & Rural Resettlement and 4 Others* 2004 (1) ZLR 511 (S) p. 517 at para C – E the Supreme Court, citing with approval the case of *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F, was emphatic that in an application for interim relief the applicant has to prove:

> "(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
>
> (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
>
> (c) that the balance of convenience favours the granting of interim relief; and
>
> (d) that the applicant has no other satisfactory remedy."

In my view, the phrase *prima facie* simply means at first impression correct unless proven otherwise. C.B. Prest in his textbook titled *The Law and Practice of Interdicts* 9th ed *Juta & Co (Pty) Ltd* 2014, actually argues that a *prima facie* right signifies the level of proof rather than the existence of the right itself. All that the applicant is therefore required to show is that it is more possible than not, that at the hearing to resolve the main dispute he/she/it is likely to succeed. It must show that there is a sufficient likelihood of success to entitle it in the circumstances, to the maintenance of the *status quo*. As is obvious, the allegation that an

Commented [u1]: Dest on his book Interdicts argues that it signifies the level of proof rather than the existence of the right itself.

applicant has failed to establish a *prima facie* right is one that must be taken on the merits and not as a preliminary objection to the court hearing the application.

A preliminary objection addresses queries, technical or procedural issues before the court can hear the facts of the dispute scheduled for determination. Establishment of a right whether clear or *prima facie* is a central requirement to the grant of a provisional interdict. It goes to the root of that remedy. The existence of a right is a matter of substantive and not adjectival law. The question of whether an applicant has clearly or only *prima facie* established that right also becomes a question of evidence. See *Eto Electricals & Rewinding (Pvt) Ltd v ZESA Holdings (Pvt) Ltd & Ors* HH 547/15 at p. 3 *and ZESA Holdings v Energy Sector Workers' Union* HH 28/18 pp 1 & 2. It is, therefore, illogical to seek to raise it as a point *in limine*. In view of that, the preliminary objection is without merit and is accordingly dismissed.

The 5th - 7th respondents by raising this point are in a way challenging the applicant's *locus standi* to approach the court. As stated in the case of *Makarudze and Anor v Bungu and Ors* 2015(1) ZLR 15 (H) at p. 23 paragraph B – C:

> "*locus standi in judico* refers to one's right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a *direct and substantial interest* in the subject matter or outcome of the litigation: See *Zimbabwe Teachers Association & Ors v Minister of Education and Culture* 1990 (2) ZLR 48 (H). In that case EBRAHIM J, as he then was, stated at pp 52-53:
>
> > 'It is well settled that, in order to justify its participation in a suit such as the present, a party…has to show that it has a direct and substantial interest in the subject-matter and outcome of the application.'"

It therefore follows that *locus standi* may also refer to a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the court. There is no magic required to illustrate that ability. All that the person sponsoring the litigation is required to do is to demonstrate that one has a direct and substantial interest in the subject matter and outcome of the litigation. In *Mawarire v Mugabe N.O & Ors* 2013 (1) ZLR 469 (CC) the Constitutional Court admonished the courts against being quick to refuse *locus standi* to a litigant who seriously alleges that a state of affairs exists within the court's jurisdiction which is prejudicial to the litigant's interests. The court held as follows:

> "The principle on *locus standi* is after all that it is better to let people have access to the fountain of justice where they fail for the reasons of their folly than have them blame the gatekeepers."

The applicant in this case has set out in detail its commercial arrangement with 1st respondent which entitles it to engage in mining operations at Kimberly F. By doing so, it has

demonstrated that it has direct and substantial interest in the mining block in question. The question of whether it has *locus standi* cannot possibly arise. On that basis, that sub-objection *in limine* must also fail.

The 5th - 7th respondents additionally contended that the applicant and the 1st respondent purportedly formed a partnership to carry out mining operations at Kimberly F. As such it was that resultant partnership and not the applicant which must have instituted these proceedings. Immediately after making that assertion, the 5th -7th respondents contradicted themselves by arguing that a partnership has no capacity to sue and be sued in its own name. If that argument is accepted the aforementioned respondents' proposition becomes preposterous in that they expected the applicant to sue as a partnership but at the same time be disbarred from doing so on the basis that a partnership cannot sue or be sued in its name. In any case, the essence of the applicant's case is that the 1st respondent with which it entered into a partnership breached the terms of that partnership. There was no other way that the applicant could have vindicated its right other than to sue the 1st respondent on the basis of breaching the terms of their agreement. The applicant Company and 1st respondent entered into a business relationship for the objective of achieving mutually beneficial goals. There is no law which bars individual parties in a partnership from suing each other where the one party is alleged to have breached the terms of that agreement. As will be demonstrated later in the judgment the agreement between the applicant and 1st respondent is a valid partnership. Again I am left with no choice but to also dismiss this particular objection by the 5th -7th respondents.

1. <u>That a Mining Syndicate is not a juristic person</u>

The 5th -7th respondents argued that a Mining Syndicate is not a juristic person. They referred the court to the case of *Shantel Mbereko and Ors v The Mining Commissioner (Harare) and Ors* HH 245/18 at p. 2. In that case, CHIKOWERO J held that mining syndicates do not exist at law and cannot therefore be regarded as a *legal persona.* His decision was on the basis that he "had not found any provision in either the Rules of this Court or the Mines and Minerals Act [*Chapter 21:05*] referring to a mining syndicate let alone clothing the same with legal personality.

I am respectfully constrained to disagree with that finding. Both the repealed High Court Rules, 1971(hereinafter 'the old rules') and the High Court Rules, 2021 (herein 'the High Court Rules') clothe syndicates with the authority to sue and to be sued in their own names. Order 2A of the old rules defines association to include (i) a trust; and (b) a partnership, <u>a</u>

syndicate, a club or any other association which is not a body corporate (my emphasis). Order 2A Rule 8 then provides that associates may sue and be sued in the name of their association.

The High Court Rules in Part 11 equally provide as follows:

> ***"11. Proceedings by or against firms and associations***
> (1) In this rule— "associate" in relation to—
> (a) a trust, means a trustee;
> (b) an association other than a trust, means a member of the association;
> "association" means any unincorporated body of persons, and includes a partnership, a syndicate, a club or any other association of persons;
> (c) …
> " "plaintiff" and "defendant" include applicant and respondent; "sue" and "sued" are used in relation to actions and applications;"

In *P & M Spares & Distributors (Pvt) Ltd t/a P & M Construction & Civil Engineering Services v G T Earthmovers & Plant Hire (Pvt) Ltd & Anor* SC 141/97 at p 7, the Supreme Court gave a general definition of a syndicate. The salient passage from the judgment reads as follows:

> "Generally speaking, a partnership between companies is usually called a consortium, although it may also be referred to as a syndicate and often as a joint venture. See Lindley and Banks *Law of Partnership* (1990) at p 61."

Under common law principles a partnership or in this case, a syndicate could not sue or be sued in its own name. It could only sue or be sued in the names of any or all its constituent members. This naturally followed from the doctrine that a partnership was not a distinct legal entity from its members but merely an aggregate of individuals unless it qualified as a universitas personarum. Various authorities confirm this position. See *Morrison v Standard Building Society* 1932 AD 229 at p. 238*; Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C) at 860H–863G.

Rule 11 of the High Court Rules, 2021 eroded the common law position that partnerships as they are, are not a legal *persona* and could not be cited in legal proceedings and that one wishing to recover against them could only cite the individual members. A reading of R 11 leaves no doubt that the 1st respondent is an association. In turn, an association has been defined to include a syndicate. It follows that in terms of the rules, a syndicate is allowed to sue and be sued in its own name as if it were a juristic person. Given this state of affairs, the position in Zimbabwe is that syndicates, whether they are mining or any other kind of syndicates can sue and be sued in their own names.

The above position is similar to that in South Africa. Rule 14 (1)-(3) of the Uniform Rules reads as follows:

> "(1) In this rule:
> 'Association' means any unincorporated body of persons, not being a partnership.
> 'Firm' means a business carried on by the sole proprietor thereof under a name other than his own.
> 'Plaintiff' and 'defendant' include applicant and respondent.
> 'Relevant date' means the date of accrual of the cause of action.
> 'Sue' and 'sued' are used in relation to actions and applications.
> (2) *A partnership, a firm or an association may sue or be sued in its name.*
> (3) A plaintiff suing a partnership need not allege the names of the partners. If he does, any error of omission or inclusion shall not afford a defence to the partnership" (The emphasis is mine)

As is the case with Rule 11, the above-cited rule has the object of ensuring procedural convenience and is not intended to bestow corporate status on associations, syndicates and like bodies. The comment by authors Van Winsen & Herbstein in *The Civil Practice of the Supreme Courts of South Africa*, 5th ed Volume 1 at pp 150 is apposite:

> "Prior to the introduction of rule 14, the citation of partnerships, firms and unincorporated associations of natural persons (also known as 'voluntary associations') in the superior courts presented certain difficulties arising from the fact that, not being separate legal personae, they could not generally be sued, nor could they sue, in their own names apart from the individual members, whose names and addresses had to be alleged in the summons. The purpose of the rule is to render it unnecessary to cite each and every individual forming part of an unincorporated body of persons and to simplify the method of citation by enabling that body of persons to be sued in the name which the body normally bears and which is descriptive of it. Rule 14 facilitates the citation of partnerships, firms and associations as defendants, as well as allowing those entities to sue in their own names. It has been held by the Supreme Court of Appeal that this rule enables members of an association to assert rights which they hold by virtue of their membership in an association in the name of the association. The rule is framed so as to bar a number of technical defences formerly open to litigants in connection with such proceedings."

From the above, I do not need to overstate that the technical argument that the agreement entered into between applicant and the 1st respondent is a nullity for want of corporate status by 1st respondent is unsustainable as it is based on a misconception of the law. The applicant does not allege that the 1st respondent is incorporated in terms of the company laws of Zimbabwe. All it alleges is that it had a partnership agreement with Time of Hope Mining Syndicate. To support my view, decisions of the High Court in which syndicates sued and were sued in their own names abound. See among others, the cases of *Oozing Mining Syndicate v Tamuzi Mining Syndicate and Anor* HH609/20*; Chamu Mining Syndicate v Sibongile Mpindiwa N.O. and Chamwandoita Syndicate* HMA 31/17*; Roselex Mining Syndicate v D. Gavi and Ors* HH 680/20.

Against that background the objection *in limine* that a mining syndicate cannot sue or be sued in its own name is unsustainable. It is accordingly dismissed.

1. That the matter is not urgent

The 5th - 7th respondents disputed the urgency of the application. They implored the court to dismiss the application on the basis of non-urgency. The law on urgency is settled in our jurisdiction. Rule 60 (6) of the High Court Rules provides as follows:

> "(6) Where a chamber application is accompanied by a certificate from a legal practitioner in subrule (4)(b) to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to the duty judge, handling urgent applications who shall consider the papers forthwith." (my underlining)

The procedure in the rules is not there for the taking. The applicant in an urgent chamber application must set out clearly the circumstances and reasons upon which he/she/it believes the matter is urgent and requires a temporary abrogation of the rules. What constitutes urgency has been settled by the courts in several authorities which include the famous *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H) at p.193 F - G. In that case, the court laid the rule that to enable it to deal with a case on an urgent basis, the court must be satisfied that a number of material requirements have been met. Those requirements include that by their nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreversible harm would be occasioned. The case of *Document Support Centre v Mapuvire* 2006 (2) ZLR 240 at 244 para D perhaps graphically captured the essence of urgent cases more than any other. In that case, the High Court expressed the view that an urgent case is one in which a litigant:

> " may dismissively tell the court that if it does not act now, it can as well not bother to act subsequently for the situation will have become irreversible and irreversibly so to the prejudice of the applicant."

What is clear from the authorities is that urgent chamber applications consist of matters which require the immediate attention of judges instead of awaiting their turn to be allocated a date of hearing in the ordinary course of events. Judges must therefore always resist the temptation to turn a blind eye to challenges of lack of urgency and simply go ahead to decide matters which are not urgent. The attractiveness wrought from finally disposing of litigation should not be allowed to prevail over the rationale behind the procedure of seeking relief by means of an urgent application.

In addition to this requirement, it must be borne in mind that a judge's determination of whether or not an application is urgent is a matter of discretion. In *Econet Wireless (Pvt) Ltd v Trustco Mobile (Pty) Ltd and Anor* 2013 (2) ZLR 309, GARWE JA had the following to say:

> "It is clear that in terms of Rules 244 and 246 of the High Court Rules the decision whether to hear an application on the basis of urgency is that of a judge. The decision is one therefore that involves the exercise of discretion**.** (my emphasis*).*

In the instant case, the applicant in its founding affidavit averred the issues already stated in the introductory paragraphs of this judgment. In essence, it said after the signing of the agreement between it and 1st respondent, it proceeded to the mining location intending to commence operations thereat. After erecting a perimeter fence, assembling mining equipment and deploying security personnel to protect its assets and interests, the 5th-7th respondents instituted an orgy of violence aimed at disrupting the commencement of the mining operations. The violence was so bad that the mining equipment was damaged, the security guards were attacked and their patrol dogs were killed. In perpetrating the violence, the marauders engaged in guerrilla tactics to the extent that it was not possible for the applicant to properly identify any of them. It was only on 30 November 2020 when the police arrested some of the artisanal miners that it became clear to the applicant that it was 5th -7th respondents who were responsible for the violence and disruption of operations. They claimed that they had a right to be on Kimberly F on the authority given to them through an affidavit allegedly deposed to by the 2nd respondent. The police could therefore not intervene. The applicant lodged this application on 2 December 2021.

Given the above, to allege that the application is not urgent is disingenuous on the part of the concerned respondents. If the vandalism to the applicant's equipment, the attacks on its personnel and the carcases of the security dogs could not move the court into accepting the urgency of this matter then nothing else would. Surely the respondents did not expect to see human corpses next to believe that the applicant had a right to approach the courts for protection. The applicant had every right to seek interim relief to ensure that the violence and disruption of its operations did not escalate into something gory.

In addition, the applicant did not only allege violence and vandalism to its equipment but also alleged that the 5th - 7th respondents continued mining at Kimberly F. It needs no emphasis that mineral resources are non-renewable. Once extracted they cannot be replenished. They get diminished. It becomes inconceivable therefore that the 5th - 7th respondents expected the case to be brought to court in the ordinary run of things, join the queue of ordinary cases and await its turn whilst they continued plundering the gold from the mining block in circumstances where the applicant alleges that they had no right to do so. The court would be abdicating its responsibilities were it to accept the respondents' spurious argument on the non-urgency of the matter.

For the above reasons I am convinced that the case is one that cannot possibly wait. The applicant clearly laid the basis for the application to be heard on an urgent basis. The objection is therefore unmerited and is dismissed.

The Merits

In their opposition on the merits, the 5th - 7th respondents attacked the application on three main grounds as already stated. I now turn to deal with each of those grounds.

i.That the alleged agreement between the applicant and 1st respondent does not qualify as a partnership.

I stated earlier when disposing this same point after it was raised as an objection *in limine* that it is a convoluted argument. The insincerity with which it is raised is illustrated by the duplicitous averment stated in paragraph 20 of the opposing affidavit. Thereat, the 5th - 7th respondents whilst arguing that the agreement between applicant and 1st respondent does not meet the requirements of a partnership go on to boldly state that the law does not stipulate any requirements for a partnership. As such their partnership agreement with 2nd respondent was made orally and consummated by the affidavit deposed to by her on 29 October 2021. Unfortunately, that latter averment is incorrect because indeed the law sets out requirements for a partnership. In the case of *Metallon Corporation Limited v Stanmarker Mining (Pvt) Ltd* 2006 (1) ZLR 306 (S) at 315 para B - C the Supreme Court citing with approval the case of *Rhodesia Railways and Ors v Commissioner of Taxes* 1925 AD 438 at 465 laid down the three essentials of a partnership as that:

a) Each of the partners must bring something into the partnership or must bind himself to bring something into it, whether it be money, or his labour or skill
b) The business must be carried on for the joint benefit of both parties
c) The object must be to make profit

In relation to the first essential, an analysis of the contract between the applicant and 1st respondent shows that the applicant had an obligation to bring into the partnership mining equipment, security, cater for the welfare of workers and carry out the actual mining operations at Kimberly F. Needless to say, the 1st respondent owned the mining block and was bringing that into the partnership. It was also responsible for what the parties termed cultural activities and responsibilities. On that basis, the first requirement for a valid partnership was fulfilled.

Clause 5 of the agreement satisfied the second essential. It stipulates that the parties would share the proceeds from the venture at a ratio of twenty (for 1st respondent) to eighty (for applicant) after deduction of all expenses.

The third essential which requires that the object of the parties must be to make profit is apparent throughout the agreement. In simple terms, profit is a financial gain calculated from the difference between money gained and money spent in buying, operating or producing something. That appears to be exactly what the parties were referring to under clause 5 of their agreement.

The reasons why I dismissed this argument as a point *in limine* apply with equal force to the same ground raised as a basis of opposition on the merits. In addition to those reasons, I find it unconvincing that the respondents want this court to determine this case on the basis of whether or not a partnership existed between the applicant and 1st respondent. That in my view, is immaterial. The applicant filed its agreement with 1st respondent as Annexure 3 to the application. In that agreement, the 1st respondent was represented by 2nd, 3rd and 4th respondents who are the constituent members of the syndicate. The agreement gives rights and obligations to the parties involved. It was properly underwritten by the concerned parties and generally meets the requirements of a partnership as shown above. In contra-distinction, there is no proof whatsoever of the alleged oral agreement between the 5th - 7th respondents and the 1st respondent.

The uselessness of the affidavit of 29 October 2021 cannot be disputed. An affidavit is simply a willing declaration by an individual accompanied by an oath and nothing more. It cannot assign rights or obligations to anyone who is not a part to it. It cannot be equated to an agreement. Put differently whilst a contract must at least be bipartite an affidavit is unipartite. That unilateral characteristic it carries disqualifies an affidavit from forming the basis of a commercial agreement such as the one in issue in this case. Out of an abundance of caution, even if it were to be assumed that nothing precludes parties to an agreement to base their cooperation on an affidavit, the next hurdle which the respondents face remains insurmountable.

Kimberly F mining block is not personally owned by the 2nd respondent but by Time of Hope Mining Syndicate (1st respondent) as shown by the certificate of registration issued by the Mining Commissioner on 13 December 2013. It did not occur to the respondents that if any rights to the mining location could be ceded that could not unilaterally be done by the 2nd respondent. She required the authority of the other members of the syndicate. As if that handicap was not enough, the 2nd respondent alleged in court that the affidavit was drawn at the instigation of the 5th - 7th respondents who threatened her with violence if she refused to

sign it. Those damning allegations were never controverted by the concerned respondents and the futility of their argument is apparent. It is dismissed.

ii. That the agreement between applicant and 1st respondent only came into effect on 30 October 2021 and was therefore preceded by the one between 5th - 7th respondent and 2nd respondent resulting in the signing of the affidavit of 29 October 2021

From the above, it becomes obvious that there is no practical purpose to be achieved from the court dealing with the question of which partnership came into operation before the other. I have already held that the affidavit relied on by 5th - 7th respondents as the basis of their partnership with the 1st respondent comes nowhere near fulfilling any of the three essentials prescribed by the Supreme Court in *Metallon Corporation v Stanmarker Mining (Pvt) Ltd supra.* In short, there was no agreement between the 5th - 7th respondents and the 1st respondent. What was there is a disputed affidavit allegedly deposed to by the 2nd respondent in circumstances where she had no authority whatsoever to represent 1st Respondent. The ground is accordingly dismissed.

iii. That the application does not meet the requirements for the grant of an interim interdict.

The argument appeared to be made half-heartedly. The 5th-7th respondents employed an omnibus approach by choosing to make a block attack on the adequacy of the requirements for the grant of interim relief. In the particular instances where an attempt was made to single out specific requirements, the averments were so terse that they left the court wondering what in reality was lacking from the impeached requirement. Paragraph 25 of the opposing affidavit curtly alleges that there is no reasonable apprehension of harm because the respondents have been on the mining location since June 2021. Paragraph 26 in equally brief terms alleges that the applicant has other remedies. Not to be outdone paragraph 27 avers that the balance of convenience favours the 5th-7th respondents because they have been on the mining block since June 2021.

From that maze, I deciphered that the respondents were taking issue with three particular requirements namely that the applicant had not shown that it had a reasonable apprehension of harm, that the balance of convenience did not favour that it be granted the interim interdict and that it had not shown that it did not have any other remedies available to it. The issue of the *prima facie* right which was raised as a preliminary objection did not feature in the opposition on merits. I took it therefore that when that bid did not succeed the argument was not persisted with. I deal with each of the disputed requirements in detail below:

(a) Reasonable or well-grounded apprehension of harm

It is a requirement for the grant of a provisional interdict that where the applicant has only established a *prima facie* right, there must be a well-grounded apprehension that irreparable harm would be occasioned if the relief sought is not granted. The kind of fear that suffices was aptly described in the case of *Pure Treatment Inv. (Pvt) Ltd v Bryggen Hotels (Pvt) Ltd* HB 167/15 at p. 3 as apprehension which is reasonable or fear which is justified under the circumstances as judged by the objective standard of a reasonable man. In the instant case, the applicant pleaded this requirement by alleging that the respondents were responsible for the destruction of its property and mining equipment. They also illegally extracted mineral resources from the mining block.

The barbaric attack on the security guards and the savage killing of their patrol dogs demonstrated the callousness with which the violence was perpetrated. As held earlier the applicant averred that the respondents threatened more disruptions at the mine and continued illegal mining from the disputed location. Under such circumstances, it was not unreasonable for the applicant to harbour the fear that irreparable harm could be occasioned to it if the court did not move to interdict the respondents from continuing with the alleged illegalities. Even before filing this application, there is proof that the applicant was labouring under the same apprehension that its non-renewable gold deposits could be plundered. That fear is illustrated by its pleas to the police to intervene and stop the respondents and artisanal miners allegedly operating under their command from perpetrating violence and other disturbances at Kimberly F. I am therefore satisfied that the applicant indeed adduced evidence that proves a well-grounded apprehension of irreparable harm if I do not grant it the relief it seeks.

b) The balance of convenience

Simply put the requirement means that a judge must weigh the prejudice which is likely to be occasioned on the applicant if interim relief is not granted and balance it against the prejudice likely to be suffered by the respondent should the relief be granted. It indeed is a delicate balance. In addition, the court must not ignore the nature and practical consequences of a particular provisional order sought. In *Jonga v Chabata and Anor* HH 177/17 at p.7, the High Court expressed the view that where there is risk of irreparable prejudice to either of the parties involved the court must consider the balance of hardship to the parties. In other words, this entails that the court's decision

must lean in favour of the party where the hardship would be greater if the relief sought was or was not granted. In this dispute, the applicant based it's a claim to Kimberly F on an agreement which is apparently legal and binding whilst the 5th-7th respondents seek to lay their own claim to the same mining block on the strength of an alleged partnership which at best is very tenuous and at worst is totally illogical, hard to comprehend and barely legal.

There is no inconvenience that can be suffered by a respondent who seeks to illegally extract mineral resources from a mining location where he or she has no entitlement. There is no hardship that the 5th-7th respondents will suffer by being directed to refrain from committing acts of violence, vandalism and disruption of mining activities at Kimberly F. Yet the hardship that the applicant, in this case, stands to suffer clearly favours that the court grants it the relief which it seeks. The continuing destruction of property and equipment as well as the unlawful mining of gold that is going on is a tribulation that motivates the court to favourably look at the applicant's claim. Against that background, the balance of convenience in this case clearly favours the award of the interim interdict which the applicant beseeches the court to grant.

(c) Availability of other remedies

One of the major legal principles borne out of the jurisprudence on provisional interdicts is that an interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for relief. See *Airfield Investments (Pvt) Ltd v The Minister of Lands, Agriculture & Rural Resettlement and 4 Others (supra).* The requirement on the existence of an alternative remedy is well captured in *Neptune (Pvt) Ltd* v *Venture Enterprises (Pvt) Ltd* HH 127/89. At page 8 ADAMS J quotes LEWIS J in *Reserve Bank of Rhodesia* v *Rhodesia Railways* 1966 RLR 451 that-

> "…..NATHAN, in his well known works on INTERDICTS, states the position as follows, at p 32-
> Lastly as Van der Linden says, there must be no other ordinary remedy by which the applicant can be protected with the same result… The most familiar example, however, which comes to a lawyer's mind is that of damages. It is clear that, if the applicant will have adequate compensation by the award of damages, he will have another ordinary remedy. …….Generally speaking, however, the fact that the applicant has a remedy open to him by way of action for damages is sufficient to bar an interdict where the interference or breach of a right is capable of measurement in money."

This court is enjoined to dismiss the application in circumstances where a suitable alternative remedy is available to the applicant. In other words, the applicant must show cause why, in circumstances in which an alternative remedy exists, this remedy will not be satisfactory. Van Winsen & Herbstein in *The Civil Practice of the Supreme Courts of South Africa*, 5th ed Volume 2 at p 1467, the learned authors stressed that an alterantive remedy postulated in this context must – (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; (d) grant similar protection. It is not sufficient for an applicant to merely allege unavailability of an adequate remedy. The applicant must set out facts that prove this to be the case. An adequate remedy is "a remedy that affords complete relief with reference to the particular matter in controversy, and is appropriate to the circumstances of the case." (see *Black`s Law Dictionary* 4th edition). An alternative remedy is thus considered available if the applicant can pursue it without impediment. It is deemed effective if it offers a prospect of success and it is found sufficient if it is capable of redressing the issue in question not only in theory but also in practice failing which it will lack the requisite effectiveness.

In this case, the applicant alleged lack of an alternative remedy in the circumstances it found itself in. The 5th-7th respondents on the other hand argued that the applicant's remedy lay in suing the 1st respondent for breach of the partnership. In the court's analysis, this did not make any sense. It could not be adequate. In fact for an applicant to sit back and watch its assets vandalsied and its non-renewable resources illegally expropriated in the hope of claiming damages at a later stage is unconscionable. In this instance, even the criminal remedies that could have been readily available to the applicant had already failed. Just like an applicant must not simply allege lack of an adequate alternative remedy a respondent must also not merely allege the availability of such remedy. There is nothing that the applicant could have done other than to approach the court for an interim interdict. No other alternative remedy would have a similar effect to the one borne out of the interim interdict sought in this case. In any event, this is a *rule nisi* and the respondents have the oppoprtunity to make representaions on the return date. In the circumstances the challenge that the applicant did not prove that requirement cannot be sustained. It is dismissed.

Disposition

In the final analysis, I am convinced that the applicant managed to establish the requirements for the grant of the provisional interdict it sought. As such I grant relief in terms of the draft provisional order.

Jiti Law Chambers, applicant's legal practitioners
Mashizha and Associates, first - fourth respondents' legal practioners
Maringe and Kwaramba Legal Practitioners, fifth-seventh respondents' legal practitioners