WENTSO MILLING (PVT) LTD
and
GILIAN THERESA JACKSON
and
WILLIAM LORENZO PARSON
and
VINYU TSOKA
versus
WENDALL ROBERT PARSON
and
PROVINCIAL MINING DIRECTOR
and
MASHONALAND CENTRAL, MINISTRY OF
MINES & MINING DEVELOPMENT
and
FIDELITY PRINTERS & REFINERS (PVT) LTD
and
SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 21 May 2018

Opposed Matter

G Nyandoro, for the applicants
J Samukange, for the 1st respondent
No appearance for the 2nd respondent
No appearance for the 3rd respondent

MUZENDA J: This is an application for the confirmation of the provisional order which was granted by MUREMBA J on 15 December 2017 after the applicants had made an *exparte* application in terms of r 242 (1) (c) of Order 32 of the High Court Rules, 1971 which rule provides as follows:

> "1. A chamber application shall be served on all interested parties unless the defendant or respondent as the case may be, has previously had due notice of the order sought and is in default or unless the applicant reasonably believes one or more of the following–
> (a) ….
> (b) ….
> (c) that there is a risk of perverse conduct in that any person who would otherwise be entitled to notice of the application is likely to act so as to defeat wholly or partly, the purpose of the application prior to an order being granted or served."

When the applicant's legal practitioners appeared in chambers for the urgent chamber application before MUREMBA J in December 2017 he applied orally for an additional relief to the Draft Order to the effect that the filing of a notice of appeal by the affected respondent will not affect the operation of the provisional order to be granted by the court, it was granted.

On 20 December 2017 the first respondent filed his notice of opposition moving the court to discharge the provisional order and served a copy on the applicants. From 21 December 2017 the applicants were at the mine and virtually caused the first respondent to stay away from the mine. The applicants had taken over the operations of the mine, mining and taking the ore out for milling. They had also been selling gold to the third respondent without accounting to the first respondent. The workers are owed salaries and the first respondent as employer of those workers is exposed to litigation.

The application for confirmation or discharge of the provisional order was set down by the first respondent after the application has been lying idle from December 2017. The applicants did not file an answering affidavit, did not consolidate the record for hearing and only filed their heads after the first respondent had taken the initiative of doing so. It is apparent from the record of proceedings that after the applicants had obtained the provisional order from MUREMBA J they boarded an attitude of a comfort zone and enjoyed the operations of the mine without the first respondent's interference.

The first applicant is a company which can be legally represented by an appointee, invariably adirector but since the company is a separate persona, any appointee of the company is obliged to be authorised by the company's directors or managers to act on its behalf through a special resolution.

In the matter of *Madzivire and others* v *Zvarivadza and others* 2006 (1) ZLR 574 it was held:

> "There is no evidence that there was any service of a notice of a meeting to pass the required resolution authorising the first appellant to represent the fourth appellant. Even if the first, second and third appellants had agreed on the action there is no indication that the first respondent who is one of the directors, was served with a notice of a meeting of directors to

> pass the resolution of authority. Both the fourth appellant and the first respondent are entitled to be served with a notice of meeting so that a resolution be passed authorising the first appellant to represent the fourth appellant. This was not done and failure to do so renders the decision to represent the fourth appellant invalid."

At page 576 B – D CHEDA JA added;

> "This is a well-established legal principle, which courts cannot ignore. It does not depend on the pleadings by either party. The fact that the appellant is the managing director of the fourth appellant does not clothe him with authority to sue on behalf of the company in the absence of any resolution authorising him to do so. In *Burstein* v *Yale* 1958 (1) SA 768 (W) it was held that the general rule is that directors of a company can only act validly when assembled at a board meeting."

It is this court's view that the second applicant, Ms Gilian Theresa Jackson is not authorised to state facts on behalf of the first applicant. The CR 14 form annexed to the urgent chamber application does not assist the applicants at all. Second applicant is but a director and l agree with Mr *Samukange* for the first respondent that the second to third applicants could only have competently approached this court through a derivative action.

See the matter of *Lameck Kafandada* v *Dairiboard Zimbabwe Ltd and others* HH 504/15. *L. Piras & Sow (Pvt) Ltd and another Intervening* v *Piras* 1993 (2) ZLR 245 (SC).

As a result the second applicant lacks authority to represent the alleged first applicant and could not have sought to protect the alleged interests of the company. The second to fourth applicant were not candid with the court when they lodged the urgent chamber application and in the matter of *Trackman NO* v *Luvshitz* 1995 (1) SA 282 (A) SMALLBEGER JA stated at p 288 E-H;

> "It is trite law that in *ex parte* applications the utmost good faith must be observed by an applicant. A failure to disclose fully and fairly all material facts known to him may lead in the exercise of the court's discretion to the dismissal of the application on that ground alone. See for example *Estate Logie* v *Priest* 1926 AD 3(2), *Schlesinger* v *Schlesinger* 1979 (4) SA 342 (W) at 348 E – 350B."

On the aspect of paragraph 3 of the interim order granted by MUREMBA J to the effect that the order will not be suspended by the noting of an appeal. It is clear that the applicant's legal practitioner deliberately misled the court by seeking to have that part of the order added to the draft order. Applicants had not made a separate application for an order granting leave to execute pending appeal. Not only was the order grated *ex parte* but it was granted on an incomplete record. Hence in this court's view paragraph 3 of the provisional order is a nullity and should be discharged.

See the matter of *Matanhire* v *BP Shell Marketing Service (Pvt) Ltd*, 2005 (4) ZLR 140 (S) at 147 F-G.

In *Whata* v *Whata* 1994 (2) ZLR 277 (S) citing the case of *Arches (Pvt) Ltd* v *Cuthrice Hldgs (Pvt) Ltd* 1989 (1) ZLR 152 (H) at 154 G-H stated:

> "The need to take account of such factors serves to underscore that it is contrary to the basic tenets of natural justice for a court to order that its judgment be operative and not suspended, before giving the unsuccessful party the right to be heard as to why execution should be stayed."

See also *ABC Bank Ltd* v *Mackie Diamonds BUBA* SC 22/13.

On the date of hearing of the application Mr *Nyandoro* moved the court to postpone the application to allow the respondents to file an answering affidavit. Mr *Samukange* opposed the application. It is clear from the papers filed of record that there is no application for condonation for such an application the applicants had since filed their heads, effectively closing the pleadings for the purposes of the application. The applicants as already mentioned herein adopted a lackadaisical approach to the matter especially after getting the provisional order and were not in a hurry to expedite the *exparte* application. The application for postponement was dismissed.

After the matter was heard on 21 May 2018 Messrs Hamamukwadi & Nyandoro Law Chambers wrote a letter to the Registrar to the following effect:

> "We write this letter requesting reasons of the court in discharging the provisional order in the above referenced matter which final judgment has been delivered, *ex tempore* today 21 May 2018 by his Lordship Justice Mwenda without giving reasons for discharge …"

In the first place there is no judge by the name Mwenda and it is not correct that reasons were not given. Legal practitioners have developed an attitude of ignoring to take down oral reasons given in an open court with a view of embarrassing a judge later on by stating incorrectly that no reasons were given, yet they were indeed crisply outlined. The ideas of legal practitioners writing to the registrar demanding reasons for *ex tempore* judgments should be in extreme circumstances not to be done as a norm of practice.

The applicants did not treat the matter as urgent once the provisional order was granted on 15 December 2017 and did not take any action from there till they were served with the first respondent's heads of argument in February 2018. When the application was made in 2017 even the grounds for urgency were not adequately presented and indirectly the whole impetus of their application was to remove the first respondent from the mine to allow them to extract the mineral and benefit from the output. The balance of convenience in this application is to discharge the provisional order to allow the first respondent to freely access the mine and produce. The applicants lacked *locus standi in judicio* when the urgent chamber application was initially made on behalf of the first applicant and misled the

court to grant an irregular relief relating to barring the first respondent from resorting to lodging an appeal as an unsuccessful party. It was because of these reasons that the provisional order granted by MUREMBA J on 15 December 2017 was discharged with costs and it is so ordered.

Hamunakwadi & Nyandoro, applicants' legal practitioners
Venturas & Saumkange, 1st respondent's legal practitioners