

CAPRCEND PRIVATE LIMITED  
versus  
MAZOWE MINING COMPANY PRIVATE LIMITED

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE 8, 12 & 29 July 2021

**Urgent chamber application**

*M. Mtlongwa*, for the applicant  
*G.R.J. Sithole* with *T. Sena*, for the respondent

TAGU J: This is an urgent chamber application in which the applicant is seeking an order declaring that the dispossession of the applicant by the respondent of a mining claim named Canbrae 4 M5341, claim number 10779, measuring 2 hectares and situated in Mazowe (“the property”) in the absence of an order of court is wrongful and unlawful and that the respondent be ordered to return peaceful and undisturbed possession of the property within twenty-four (24) hours of service of this Order on the respondent.

The basis of the application being that the applicant was in peaceful and undisturbed possession of the property since November 2020 until 29 June 2021 when the respondent through persons unknown to the applicant and in the company of armed members of Zimbabwe Republic Police wrongfully and unlawfully took occupation of the property by destroying structures which were erected on the property by applicant such as the security officers’ cabins, security/parameter fence and preventing the applicant from exploiting its mineral mining rights. The respondent did not have an order of court sanctioning its conduct. The respondent’s conduct is not only wrongful and unlawful but has the effect of despoiling applicant from its peaceful and undisturbed occupation of the property which it enjoyed before the respondent’s unlawful occupation.

The respondent raised four points *in limine* in its notice of opposition. These were:

1. that the applicant does not exist,
2. that the application is fatally defective,
3. that the application is not urgent and
4. that there are material disputes of facts.

I have to dispose of these points *in limine* before dealing with the merits of the application.

### **THAT THE APPLICANT DOES NOT EXIST**

The respondent's contention is that the applicant herein does not exist. It conducted a company search at the Companies Office and the results showed that there is no registered company that answers to the name "Caprcend Private Limited." The respondent challenged the deponent to the applicant's founding affidavit Clark Clever Makoni to furnish this Honourable Court with proof to the contrary, in particular by way of Certificate of Incorporation for the company failing which the instant application ought to be dismissed with costs on a higher scale being granted against the deponent personally.

In answering to this point *in limine* the applicant submitted in its answering affidavit that the Applicant is a duly registered company in terms of the laws of Zimbabwe. The applicant supplied the copy of the Certificate of Incorporation together with a Tax clearance as annexures "B1-2" and prayed that the point *in limine* be dismissed.

A perusal of Annexure "B1" which is a Certificate of Incorporation No. 115482 issued on 14 January 2009 describes the applicant as "CAPRCEND INVESTMENTS [PRIVATE] LIMITED". The Tax Clearance Certificate (ITF263) for the year ending 31 December 2021 issued on the 2 April 2021 Annexure "B2" also described the applicant as Caprcend Investments (Pvt) Ltd. The counsels for the respondent in their oral submissions insisted that the Annexures referred to are for a different entity and does not rescue the non-suited of the applicant hence there is no applicant before the Court. The counsel for the applicant in his oral submissions argued that the gist of the matter is the omission of the word "Investments" otherwise there is an entity called "Caprcend". In praying for the dismissal of the point *in limine* he referred the Court to the case of *Mercy Masuku v Delta Beverages* HB-172/12.

It is trite that proceedings brought by or against a non-existent entity is void ab initio and a nullity. See *Gariya Safaris (Private) Ltd v van Wyk* 1996 (2) ZLR 246.

In the case of *Mercy Masuku v Delta Beverages supra*, the Court, faced with a similar situation had occasion to comment as follows where “DELTA BEVERAGES” was cited as such instead of “DELTA BEVERAGES (PRIVATE) LIMITED”-

“Where, the entity is non-existent indeed the issue of nullity sits to the bottom of the sea like lead and cannot be brought up to the surface. However, the issue adopts a completely different complexion where there is in existence an entity who is by some error or omission is not cited. It would seem that authorities held that there should be a distinction. In van Vuuren Braun and Summers 1910 TPD 950 WESSELS J at 955 states:

“Now in order to bring a defendant legally into court a summons is required. In order that summons may be valid, it must comply with the requirements of r 6. It must purport to be a summons, a mere request or letter to the effect that the defendant is kindly requesting to appear in court on a certain day is an invalid citation. Next the summons must specify the defendant. It is true that it will not be described as accurately as he should be. If a man is baptized “George Smith” it is no defect to call him “John Smith” because the individual is pointed out with sufficient accuracy. But if there were no mention of the defendant at all the summons would be a wholly worthless document and could not be amended by inverting the defendant’s name in court.”

The judge went further to say –

“*In casu* the entity against whom applicant has sued is said to be non-existent. The argument is grounded on the fact that the citation omitted the full description of the respondent. The crucial question that irresistibly begs an answer is, to what extent does the omission affect the identification of the respondent? Respondent is a well-known blue chip company whose fleet of cars are all over our national and domestic roads and its commercial advertisements need no introduction....To me, applicant may have technically erred in her description, but, has described respondent with sufficient clarity to an extent of eliminating any mistake either legal or factual of respondent’s identity. Applicant sufficiently described respondent”

In the present case it is not in doubt that the applicant and the respondent entered into a mining contract collaboration agreement for gold mining and processing sometime in November 2020. The Mining Cooperation Agreement is referred to by the deponent Clark Clever Makoni at page 7 para 6 of his founding affidavit and attached to the Applicant’s application on page 16 of the record.as Annexure “B”. It is headed-

**“MINING COOPERATION AGREEMENT**

*Made and entered into by and between*

**MAZOWE MINIG COMPANY MINE WORKERS  
SCHEME**

*Represented by Hon. C.T. MUGWENI authorized thereto*

*Of*

**CAPRCEND**

**53B Kennedy Drive Greendale, HARARE**

AND  
**MAZOWE MINING COMPANY (PRIVATE) LIMITED:**  
**Under Corporate Rescue**  
Represented by MR. Stanley Matunhire authorized thereto:  
P. Bag 2005  
Mazowe.”

In view of the above, it does not make sense for the respondent to argue that there is no entity by the name “CAPRCEND”. The respondent never disputed that it entered into such an agreement with the applicant. The respondent in answer to applicant’s response said there is no such entity and submitted that there was no omission because if it there was an omission counsel for the respondent questioned why the resolution is also different? The million dollar question this court would ask is why is it that the Mining Cooperation Agreement different from the Certificate of Incorporation? The agreement does not cite the applicant in full. I am of the view that the applicant is an existing entity and is fully known by the respondent. While it is admitted that the applicant was not cited in full in this application it does not mean that it does not exist. It was a mere omission. I will therefore dismiss this point *in limine*.

**THAT THE APPLICATION IS FATALLY DEFECTIVE**

The respondent is currently under supervision and corporate rescue proceedings with effect from 20 February 2020. It was submitted that in terms of s 126 of the Insolvency Act [Chapter 6:07] there is general moratorium on legal proceedings in respect of a company under corporate rescue. During corporate rescue proceedings no legal proceedings against a company which is under corporate rescue or in relation to any property belonging to the company, or lawfully in its possession may be commenced or proceeded with in any forum except-

- i) with the written consent of the corporate rescue practitioner or
- ii) with the leave of court or
- iii) as a set-off against the company in legal proceedings or
- iv) criminal proceedings against directors or officers of the company or
- v) proceedings concerning any property or right over which the company exercises the powers of a trustee or
- vi) proceedings by a regulatory authority in the execution of its duties after written notification to the corporate rescue practitioner.

In *casu* it was submitted that no consent has been given by the corporate rescue practitioner to commence legal proceedings against the respondent a company under supervision and corporate rescue proceedings. That the applicant does not have the leave of court to file this application. It was submitted that the application filed by the applicant does not fit in any of the exceptions stated in section 126 of the Insolvency Act. In the circumstances, the application is fatally defective for being contrary to the provisions of statute hence must be dismissed with cost on a higher scale.

In its answering affidavit the applicant submitted that s 126 of the Insolvency Act [*Chapter 6.07*] is a general moratorium on legal proceedings. That it is not binding in an application of this nature wherein the applicant is seeking common law remedy of spoliation. Spoliation being a common law remedy is not affected by the said provision. It was submitted that spoliation is an exception by its nature as it does not need a remedy that affect the substantiveness of the otherwise corporate rescue of the respondent. It was argued further that this is an application for restoration of a status quo ante of the parties. Hence it was not the intention of the legislature that the respondent by the mere fact that it is under corporate rescue should therefore engage in unlawful conduct and take the law into its own hands. See *Farai Mushoriwa v City of Harare* HH-195/14 at p 3 of the cyclostyled judgment. Therefore, the general requirement for leave to sue as contemplated in s 126 of the Insolvency Act is only designed for claims or litigation that affects the objectives for recovery. It does not apply to common law remedy of spoliation that is sought. Furthermore, it was argued that the rules of this Honourable court do not provide for a procedure for urgent application for leave to sue on urgent basis. This instant application being for spoliation which needs to be heard on urgency, it cannot wait for an application for leave to sue to be done first, otherwise the need for urgent protection will fall away. See *Hwange Coal Gasification Company (Private) Limited v Hwange Colliery Company Limited & Anor* HB-246/20. The Applicant then suggested that this Honorable Court when approached on urgent basis as in this present application can only be guided by the course provided for in r 4C of the High Court Rules, 1971 and exercise its discretion in the interest of justice and waive the requirement for leave and hear the matter. See *Romeo Taombera Zibani v Judicial Service Commission and Ors* HH-797/16. Finally, it was submitted that the remedy for spoliation being sui generis cannot be said to be covered under the said section 126 of the Insolvency Act and the point *in limine* should be dismissed for lack of merit.

It is common cause that the Respondent is currently under supervision and corporate rescue proceedings with effect from 20 February 2020. Court orders under case Nos. HC 2696/19 and HC 978/20 placed the respondent under corporate rescue and REGGIE SARUCHERA was duly appointed Corporate Rescue Practitioner of the respondent. Even the Mining Cooperation Agreement between the applicant and the respondent confirmed this fact. The question to be decided is whether or not any legal proceedings of any nature could be commenced or proceeded with in any forum against a company under supervision and corporate rescue.

To answer the above question one has to briefly look at the provisions of section 126 of the Insolvency Act [*Chapter 6.07*]. The provision of the statute above reads as follows-

**“126. General moratorium on legal proceedings against company.**

- (1) During corporate rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except-
  - (a) with the written consent of the practitioner; or
  - (b) with the leave of the Court and in accordance with any terms the Court considers suitable; or
  - (c) as a set –off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the corporate rescue proceedings began: or
  - (d) criminal proceedings against the company or any of its directors or officers ; or
  - (e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or
  - (f) proceedings by a regulatory authority in the execution of its duties after written notification to the corporate rescue practitioner.”

The wording of s 126 of the Insolvency Act [*Chapter 6.07*] above is clear and requires no interpretation. In its literal sense s 126 shows that no legal proceedings may be commenced or proceeded with against a company under corporate rescue proceedings. I am not persuaded that the use of the word “may” means the clear provisions of a statute can be dispensed with. If the legislature in its wisdom wanted proceedings of an urgent nature to be commenced or proceeded with against a company under corporate rescue proceedings it should have said so. The legislature listed the circumstances under which legal proceedings may be commenced or proceeded with. I agree with the counsel for the respondent that s 126 oust the common law. This application is barred by statute. It is fatally defective as it was instituted without satisfying the conditions stated under s 126 of the Insolvency Act [*Chapter 6.07*].

**THAT THE APPLICATION IS NOT URGENT**

The basis for this contention is that the purported urgency is fictional and self-created. It was submitted that the certificate of urgency which is an indispensable component of an urgent

chamber application was done by MOSES TINASHE MAVHAIRE on 1 July 2021 whereas the founding affidavit was sworn by CLARK CLEVER MAKONI on 2 July 2021. The certificate of urgency therefore predates the founding affidavit when the former is supposed to be based on the latter. A legal practitioner cannot therefore certify urgency on the basis of non-existent founding affidavit. To that extent the certificate of urgency is fake, irregular and cannot create any urgency at all. See *Condurago Investments (Pvt) Ltd t/a Mbada Diamonds v Mutual Finance (Pvt) Ltd* HH-630/15. In that case citing *Morgen Tsvangirayi v Chairperson of the Electoral Commission* EC 6 /13 BHUNU J (as he then was) when confronted with a similar situation had this to say-

“To make matters worse the applicant has filed case number EC 27/13 without a valid certificate of urgency as is required by law. A perusal of the documents shows that Mr *Batasara* issued the certificate of urgency on 5 August 2013 three days before the applicant had deposed to his founding affidavit on 8 August 2013. Mr *Batasara*’s assertion that he had read and understood the applicant’s affidavit on 5 August 2013 is therefore false in fact and misleading, he could not possibly have read and understood the applicant’s founding affidavit on 5 August when it was not in existence. Thus the applicant filed the application with a false certificate of urgency. With respect, a fake and to that extent irregular certificate of urgency cannot establish urgency.”

In the present case Mr *Moses Tinashe Mavhaire* said on 1 July 2021 that “...having read the applicant’s Founding Affidavit and its annexures, do hereby certify that these proceedings are urgent for the following reasons...” Yet the founding affidavit of Clark Clever Makoni was only commissioned on 2 July 2021. In the *Tsvangirayi v Electoral Commission* supra, the judge quoted GOWORA JA who quoted the remarks of GILLESPIE J in *General Transport & Engineering (Pvt) Ltd & Ors v Zimbank Corp (Pvt) Ltd* 1998 (2) ZLR 301 where the learned judge of Appeal had no kind words for legal practitioners who issue certificates of urgency as a matter of routine without firstly applying their minds. He characterized that kind of conduct as an abuse of the law and remarked in the process that-

“It is therefore an abuse for the lawyer to put his name to a certificate of urgency where he does not genuinely believe the matter to be urgent. More over as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness or otherwise of the purported view. Thus where a lawyer could not reasonably entertain the belief he professes in the urgency of the matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in his certificate of urgency... In certifying the matter as urgent, the legal practitioner is required to apply his or her own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not supposed to take verbatim what his or her client says regarding perceived urgency. I accept the contention by the first respondent that it is a condition precedent to the validity of a certificate of urgency that a legal practitioner applies his mind to the facts.”

The counsel for the applicant submitted that Rules of this court does not provide content or form of certificate of urgency to be followed by legal practitioners. He said it cannot only be based on the founding affidavit but on facts placed before him. He maintained that facts in this case show urgency and that the date of commissioning confirms its status. He maintained that this being an application for spoliation its urgent by its very nature.

While I accept that spoliation applications are urgent by their very nature, I think the counsel for the applicant as well as the certifying counsel fell into the error that caused GOWORA JA to remark that “he or she is not supposed to take verbatim what his or her client says regarding perceived urgency.”

It is clear the certificate of urgency predates the founding affidavit, albeit by one day when the former was supposed to be based on the later.

**THAT THERE ARE MATERIAL DISPUTES OF FACTS**

This contention is based on the fact that the answering affidavit created material disputes of facts as it is not clear as to where and when the photos attached to the answering affidavit were taken. Indeed it is difficult to say the photos relate to what happened. Their authenticity is in question. Coupled with what I have already said, this application is fatally defective and has to be dismissed.

**IT IS ORDERED THAT**

1. The application is dismissed.
2. There is no order as to costs.

*Mangezi, Nleya & partners*, applicant’s legal practitioners  
*Chimuka Mafunga*, respondent’s legal practitioners