CHAD CECIL MUPANDANYAMA
and
SWIFTEAGLE INVESTMENTS BUSINESS CONSULTANCY
versus
ELIAZEL MUSHIRINGI
and
TARIRAI DAVID MUNANGANGWA
and
RUAN MEATS ENTERPRISES (PRIVATE) LIMITED
and
WHOZHERI STONE CRUSHERS (PRIVATE) LIMITED
and
REGISTRAR OF COMPANIES N.O.
and
THE PROVINCIAL MINING DIRECTOR MIDLANDS PROVINCE
and
THE MINISTER OF MINES AND MINERAL DEVELOPMENT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 17 & 24 May 2023

Urgent Chamber Application – Leave to execute pending appeal

Mrs *R Mabwe,* with her Mrs *J Sande and* Mrs *M Tarugarira*, for the applicants
M Chipetiwa, for the 2nd, 3rd and 4th respondents
Ms *A Magunde,* for the 5th, 6th and 7th respondents

ZHOU J: This is an urgent chamber application for leave to execute pending appeal. The judgment which is being sought to be executed upon was granted in Case No. HC 6457/20 on 5 April 2023 following an action instituted by the applicants against the respondents herein. The operative portion of the judgment is as follows:

> "1. The first defendant (Eliazel Mushiringi)'s conduct of registering Wozheri Stone Crushers Pvt. Ltd. Using forged documentation be and is hereby declared fraudulent and all actions flowing therefrom are declared a nullity.

2. The registration of Wozheri Stone Crushers (Private) Limited by the Registrar of Companies on 29 November 2017 under certificate of incorporation number 8640/2017 be and is hereby declared null and void and consequently set aside.

3. The memorandum of agreement entered in between the first defendant (Eliazel Mushiringi) and the second defendant (Tarirai David Munangagwa) on 28 November 2017 be and is declared null and void and of no force.

4. Transfer of the mining claims, Jilikin 25 registration number 12641 BM from the first plaintiff (Chad Cecil Mupandanyama) to the fourth defendant (Wozheri Stone Crushers Pvt. Ltd and registered with the 6th defendant (The Provincial Mining Director) be and is hereby declared null and void and of no force.

5. The joing venture agreement entered into between the 4th defendant (Wozheri Stone Crushers Pvt Ltd) and 3rd defendant (Ruan Meats Enterprises Pvt Ltd) in March 2020 be and is hereby declared null and void and of no force.

6. The 1st plaintiff (Chad Cecil Mupandanyama) be and is hereby declared the owner of the mining claims under the name Jilikin 25 registration number 12641 BM registered under the Ministry of Mines and Minerals Development.

7. The third defendant, Ruan Meats Enterprises Pvt Ltd together with their subtenants, assignees, invitees, members and all persons claiming occupation through them should within 10 days of service of this court order vacate from the mining claim known as Jilikin 25.

8. The 1st to 4th defendants shall pay costs of suit."

The above order was granted pursuant to proceedings instituted by the applicants herein in which they sought to vindicate their rights in the disputed mine. That is the order that the first, second and third respondents appealed against in terms of the notice of appeal filed under Case No. SC 253/23. The filing of the notice of appeal triggered the filing of the instant application on 10 May 2023. The application is opposed by the second, third and fourth respondents. The fifth, sixth and seventh respondents advised through counsel that they did not oppose the application but would abide by the decision of the court. A notice to this effect was filed on behalf of these respondents. The first respondent has not opposed the application and did not attend the hearing.

The matter was initially set down for argument on 16 May 2023 at 0900 hours. The second, third and fourth respondents' sought and were granted postponement of the hearing to 1430 hours on 17 May 2023 to enable them to file opposing papers. Counsel representing them advised that he had not been able to complete preparation of the opposing papers and was in the process of finalizing them.

By letter dated 16 May 2023 which was delivered to the registrar at 12 06 hours by their legal practitioners the second, third and fourth respondents gave notice of an application for my recusal from dealing with the matter on the ground that in 2020 I dealt with a dispute between the same parties pertaining to the same mine in which a provisional order was granted. At the hearing of the matter on 17 May 2023 the three respondents moved their application for recusal. I dismissed the application and informed the parties that the reasons for the dismissal of the application would be contained in the final judgment.

Recusal

The application for recusal is directed at a judicial officer in circumstances where there is a reasonable possibility of bias. Such an application necessarily places a litigant and/or the lawyer representing the litigant in an unenviable position. However, the purpose of the application is to ensure that there is fairness in judicial proceedings, to ensure that a matter is dealt with by an impartial tribunal as envisaged by the Constitution and the rules of natural justice. For these reasons, a judicial officer should not regard an application of this nature as an attack on his/her integrity, and should not be oversensitive when dealing with it. It is all about fairness, hence the objective test that the court is enjoined to employ in assessing the merits of such an application.

The test to be applied is not whether there is actual bias or whether the judicial officer concerned is or would subjectively be biased. The test is the same as in administrative law, namely, whether there is a real possibility or reasonable danger rather than a real probability of bias. *Bailey v Health Professions Council* 1993 (2) ZLR 17(S). The rationale for that objective test is that justice must not only be done but must be seen to be done.

In this case the matter that I dealt with on the basis of which I was said to be disqualified from hearing the instant matter was an application for a provisional order. It is not the case that dealt with the merits of the dispute between the parties. The merits of the dispute were dealt with by MANZUNZU J in the judgment in respect of which leave to execute is being sought. As a matter of practice, the judge who dealt with the main matter, if he or she is available, would be the one better positioned to deal with an application for leave to execute his judgment. He or she is not disqualified by the fact of having dealt with the matter in respect of which leave to execute pending appeal is being sought. Thus in this case but for the fact that the judge concerned is now in the Commercial Court Division which is housed outside the building housing the High Court, he

would have been able to deal with the matter without being disqualified by the mere fact of having given the judgment in the main matter. The reason for this is that the considerations in the application for leave to execute pending appeal are different from those in the main matter. *A fortiori,* a judge who did not deal with the main matter in respect of which leave to execute pending appeal is being sought cannot be disqualified by the mere fact of having dealt with one dimension of the dispute between the parties. For the purposes of this application, particularly the assessment of prospects, the conclusions and reasons which are relevant are those of the judgment in HC 6457/20 as given by MANZUNZU J. There is no scope for traversing any factors outside the four corners of that judgment in the determination of the instant matter.

For the above reasons, the application for recusal was dismissed.

Urgency

In addition to contesting the matter on the merits, the second, third and fourth respondents challenged the hearing of the matter on an urgent basis. The two grounds for opposing the urgent hearing of the matter are (a) that a period of twelve days passed before the urgent application was filed, and (b) that they are not carrying on any mining activities at the site.

A period of twelve days does not in the circumstances of this case constitute a delay that would deprive the matter of its urgency. The debate on why it took twelve days to file the application is therefore unnecessary, as the respondents point to no activity that would make the filing of the application or its hearing on an urgent basis an attempt at closing the stable after the horse has gone out. Twelve days is not a delay, let alone an unreasonable delay for the purposes of seeking leave to execute a judgment. After all the respondents took twenty-three days after the judgment was delivered to file the notice of appeal against it.

Likewise, the allegation that the respondents have not been carrying on mining operations after the noting of the appeal does not deprive the matter of its urgency. The dispute arose because of the respondents' activities at the mine. If the order is not brought into execution there would be nothing to stop them from proceeding with the mining activities. In any event, the allegation has been made that they are actually carrying on mining activities at the site. Notwithstanding the dispute as to the correct factual position, all that is required for the matter to pass the test of urgency is reasonable apprehension of the harm. The applicant's fears are not unfounded.

For these reasons, the objection to the urgent hearing of the matter is dismissed.

The objection to the draft order

The second, third and fourth respondents objected to the draft order on the ground that it is a final order. An application for leave to execute a judgment pending the determination of an appeal noted against it is by its very nature interlocutory. The order granted pursuant to such an application is an interlocutory order because it does not dispose of any issue or any portion of the issue in the main matter which is the appeal itself. See *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839(A) at 870; *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534(A) at 549F-550A. The order is granted pending the determination of the appeal which determination will dispose of the main dispute between the parties. Leave to execute pending appeal is merely an interim measure to arrest an irreversible harm that may reasonably occur if execution is not carried into operation, which harm could potentially render the ultimate judgment a *brutum fulmen* if the appeal fails.

Accordingly, the objection that the order is a final order is meritless. Equally, in view of the nature of the order, there is no reason why it cannot be granted in the form in which the draft was presented. A provisional order would not be appropriate in this circumstance, as there would be no competent final relief, it being the case that the appeal itself is the final disposition of the dispute.

Whether the third and fourth respondents are properly before this court

The applicants took the point that the third and fourth respondents are not properly before this court. The basis of the objection is that there are no affidavits that were filed on behalf of these two respondents and, further, that there are no resolutions to show that they have authorized the second respondent to represent them.

The trite position of the law is that a company acts through its human representatives duly authorized by a resolution of the board of directors, see *Madzivire & Ors* v *Zvarivadza & Ors* 2006 (1) ZLR 514(S).

In casu no resolution was produced. In fact, the opposing affidavit does not purport to be done on behalf of those two respondents. The second respondent who is the deponent to that affidavit makes no claim to be authorized to represent them. That situation is not cured by the

notice of opposition which purports to be for the second to fourth respondents, as such authority must be evidenced by either an affidavit or through a resolution. In any event, the notice of opposition is purportedly signed by "Appellants Legal Practitioners" (*sic*), yet there are no appellants in the present application.

Mr *Chipetiwa* for the respondents submitted that the third and fourth respondents are properly before the court because there is no requirement in urgent chamber applications for the respondents to file opposing papers. That may well be so if the respondent does not intend to rely on any defence that is not in the applicant's founding papers. As long as the respondent intends to raise and rely upon a defence that is outside the applicant's papers then he or she or it should file opposing papers. This is obviously the reason for the requirement in the proviso to r 60 (1) that a chamber application that is to be served on an interested party must be in Form No. 23. That form enjoins a party that intends to oppose the application to file a notice of opposition in the prescribed form and opposing affidavits within the period specified in the notice. The notice filed with the application *in casu* did notify the respondents of that procedural right. Their failure to file the opposing papers meant that they did not intend to oppose. They have not placed themselves before the court by filing opposing affidavits or at least resolutions to show that the legal practitioner has been authorized to appear for them without the affidavits.

Accordingly, the point that the third and fourth respondents are not properly before the court is upheld.

The law applicable to an application for leave to execute pending appeal

The legal principles which are applicable where leave to execute a judgment pending the determination of an appeal against it are settled. In the case of *Masimbe v Masimbe* 1995 (2) ZLR 31 (S) at 36F-37B, the Court articulated them as in the following passage:

> "(T)he principles to be applied where a party applies to have an order of court enforced notwithstanding the pending of an appeal were set out by CORBETT JA (as he then was) in *South Cape Corp (Pty) Ltd* v *Eng Mgnt Svcs (Pty) Ltd* 1977 (3) SA 534(A) at 545 as follows:
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> 'The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave . . . In exercising this discretion, the court should in my view, determine what is just and equitable in all the circumstances and in doing so, would normally have regard *inter alia* to the following factors:

> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal, if leave to execute were granted;
> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal, (applicant in the application) if leave to execute were to be refused;
> (3)the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has not been noted with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, eg. To gain time or harass the other party; and
> (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of convenience, as the case ,may be."

The above principles have been consistently embraced and applied. See *Zimbabwe Mining Development Corp & Anor* v *African Consolidated Resources plc & Ors* 2010 (1) ZLR 34(S) at 38E-39F; *Econet* v *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149(H) at 154F.

Applying the law to the facts

In assessing the prospects of success one has to examine the grounds of appeal in light of the reasoning in the judgment in respect of which leave to execute is being sought. The notice of appeal *in casu* does not challenge the factual findings upon which the judgment turned. The following are the facts as set out in the judgment:

(1) The first respondent fully supported the applicants' claims, and admitted to the allegations of fraud upon which the transactions with the second, third and fourth respondents herein were founded.
(2) The second respondent herein, who was the second defendant in the main case, essentially conceded that the applicants' claims were valid and incontestable. His only prayer was for him to recover the expenses that he incurred in respect of the impugned transactions which were declared invalid. Clearly such expenses are not recoverable from the applicants herein, and are not the issue in the appeal noted against the judgment.
(3) The first respondent herein admitted that the fourth respondent, Whozheri Stone Crushers (Private) Limited was fraudulently incorporated in clear breach of and outside the mandate given to the first respondent herein by the first applicant. Consequently, it is not the entity that was entitled to participate in the business of the applicants. Nothing can be founded upon a fraud.
(4) The purported transfer of the applicants' title in the Jilikin 25 mine from the first applicant to Whozheri Stone Crushers (Private) Limited was fraudulently done, and the persons who

purported to pass such transfer had no authority to pass it and therefore had no rights that he could transfer.

(5) First applicant's signature was forged on the documents which purport to be the memorandum of association and articles of association of Whozheri Stone Crushers (Private) Limited, the fourth respondent herein.

(6) The company constitutions of Whozheri Stone Crushers (Private) Limited fraudulently omitted the name of Alecs Mawere as a shareholder in clear contravention of the agreement between the first respondent and the applicants.

(7) The inclusion of the second respondent, Tarirai David Munangagwa, as a director of Whozheri Stone Crushers (Private) Limited was a fraud upon the applicants.

The foregoing factual findings underpin the conclusions reached in the main judgment which was granted in favour of the applicants. Nowhere in the notice of appeal filed is there a challenge to those facts. This means that the appeal filed does not challenge the bases or reasons upon which the judgment was given. This makes the appeal a predictable failure, an abuse of the procedures of court, meant not to seek reversal of the judgment but to harass the applicants by delaying finalization of the matter while the second, third and fourth respondents are extracting the mineral.

The court also made findings on the credibility of the witnesses. It found that the first applicant and Alecs Mawere were credible witnesses whose evidence was truthful. None of the grounds of appeal impugns the findings of credibility. Instead, a look at the notice of appeal gives the impression that the person who drafted it did not read the judgment but merely the operative part or the relief granted. This probably explains why the so-called grounds are directed only at the relief and not the reasons given to justify that relief. The notice of appeal contains no valid ground of appeal.

In light of the above reasons, the appeal enjoys no prospect of success.

In the submissions made, the second, third and fourth respondents consistently stated that they are not mining on Jilikin 25. But the dispute that came before this court was over that mining concern. This should be the end of the matter, as the respondents therefore have no reason to oppose this application. They will not be prejudiced by the granting of the order for leave to execute pending appeal. Their fear is that the Sheriff in enforcing the order might go outside Jilikin

25 mine, and evict them from a Chinese residential area that is outside the mine. That is a misplaced ground of opposition. When the Sherriff enforces an order of ejectment he has a proper description of the place. If he goes beyond the area to which the order relates the respondents have a remedy at law to stop him from encroaching on property that is not covered by the order. Further, the declaratory relief granted pertains not to any other area. The harm which the respondents are apprehensive about is therefore fanciful.

On the other hand, the applicants are irreparably prejudiced by continued extraction of the mineral from their mining site. Minerals are a finite resource. They are depleted by extraction and use. The relief that is being sought is meant to ensure that such minerals are preserved for extraction by the rightful holder of title. Thus, if the application for leave to execute pending appeal is not granted the applicants would be irremediably harmed.

In all the circumstances, it is just and equitable that the applicants be permitted to execute the judgment in HC 6457/20 pending the determination of the appeal noted against that judgment.

Costs

The costs must follow the result in accordance with the trite position of the law. It has been found that the third and fourth respondents have not opposed the application. Only the second respondent opposed it. He should therefore bear the costs.

Disposition

In the result, IT IS ORDERED THAT:

1. The application is granted.
2. The applicants be and are hereby granted leave to carry the judgment in HC 6457/20 into execution pending the determination of the appeal filed under Case Number SC 253/23.
3. The second respondent shall pay the costs.

Tarugarira Sande Attorneys, applicants' legal practitioners
Maringe & Kwaramba, second, third and fourth respondents' legal practitioners
Civil Division of the Attorney General's Office, fifth, sixth and seventh respondents' legal practitioners