

LIZANNE CHANTAL MULLER N.O  
and  
MARI HAYWOOD N.O  
versus  
CECIL MADONDO NO (In his capacity as the  
CORPORATE RESCUE PRACTITIONER  
for MCA VENTURE CAPITAL (PVT) LTD  
(UNDER CORPORATE RESCUE)  
and  
MASTER OF THE HIGH COURT N.O  
and  
STANBIC BANK LIMITED  
and  
CENTRAL AFRICAN BUILDING SOCIETY

HIGH COURT OF ZIMBABWE  
MUCHAWA J  
HARARE, 18 December 2023 & 25 January 2024

### **Urgent Chamber Application**

Mr *H Mutasa*, for the applicants  
Mr *RG Zhuwarara*, for the 1<sup>st</sup> respondent  
No appearance for the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> respondents

**MUCHAWA J:** This is an urgent chamber application in which the following order is sought:

#### **“TERMS OF 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 first respondent be and is hereby barred from exercising the functions of Corporate Rescue Practitioner for MCA Venture Capital (Pvt) Ltd (under corporate rescue).
2. The first respondent shall pay the costs of this application on the scale of legal practitioner and client in his personal capacity.

#### **INTERIM RELIEF SOUGHT**

1. The first respondent shall not make any transactions involving the use of any funds that are due to be remitted to the applicants in terms of the approved Corporate Rescue Plan of MCA Venture Capital (Pvt) LTD ( under corporate rescue).

2. The third and fourth respondents shall ring fence an amount of US \$ 610 319. 47 in the bank account which the first respondent is operating for MCA Venture Capital (Pvt) Ltd (under corporate rescue transactions.”

The applicants are joint liquidators of a company incorporated under the laws of the Republic of South Africa named Micro Carbon Alloys (Pty) Ltd (MCA SA) (in liquidation).

The first respondent is the Corporate Rescue Practitioner of MCA Venture Capital (Pvt) Ltd (MCA Venture) (under corporate rescue), a company duly incorporated under the law of Zimbabwe and which is debtor to MCA S.A.

The documents before the court show that at the time of being placed under corporate rescue, MCA Venture owed MCA SA an amount of US\$2 139 220. 59 which was accepted at the first meeting of creditors. In the approved rescue plan for MCA Venture the first respondent had an obligation to pay US\$610 319, 47 to MCA SA which was 28;53% of its total approved claim.

The first respondent advised that it was awaiting exchange control approval for the transmission of the US 610 319, 47 to South Africa and an application had already been lodged. As at 7 November 2023 the first respondent communicated that it was holding such funds in a bank account maintained with the fourth respondent. It was further intimated that such funds could be transferred to the applicants’ Legal Practitioners Trust Account pending the exchange control approval.

What spurred the applicants to lodge this application is the first respondent’s turn of heart when he said he had written to the second respondent to advise that he had since applied some of the funds in issue towards “corporate rescue costs” and was preparing a reconciliation to be submitted to the second respondent by 30 November 2023. He has also recommended that the second respondent should now reject MCA SA ‘s claim based on alleged violation of the Zimbabwean Exchange control laws by the shareholders of MCA S.A.

The applicants, fearing that the first respondent is acting contrary to s 45 of the Exchange Control Regulations Statutory Instrument 109 of 1996, and that he is now utilizing the funds for his own purposes filed a court application seeking the removal of the first respondent as Corporate Rescue Practitioner on 29 November 2023. This matter is still pending. In an effort to preserve those funds pending the determination of the court application, the applicants have filed this urgent chamber application in which the order set out above, is sought.

The application is opposed. The first respondent raised points *in limine*. I heard the parties and reserved my ruling I now deal with each of those points in turn below .

WHETHER THE APPLICANTS ARE NOT PROPERLY BEFORE THE COURT FOR FAILURE TO PAY SECURITY FOR COSTS

Mr *Zhuwarara* submitted that the applicants are *peregrini* suing an *incola* and they should have paid security for costs to safeguard the respondent's interests. Because there is no such payment it was prayed that the matter be dismissed or be stayed pending the payment of costs as determined by the Registrar. The court was referred to cases such as *Toyn Traillers (Pty) Ltd v Gelko Logistics Pvt Ltd* HH 777/22 and *Taiyuan Sanxing Company Limited v Philcool Investments Pvt Ltd* HH 32/23.

Mr Mutasa countered this by pointing out that the letter in which security for costs was demanded was only served on them at 8:18 am on the date of hearing and they had sent a response in which they denied the obligation to pay security of costs for these proceedings. It was argued that the first respondent was in fact holding USD610 319.47 of the applicant's funds and it would be absurd to grant that security for costs be paid in such circumstances as such costs would only be a few thousand dollars relative to what the first respondent is holding.

The court was pointed to r75 of the High Court Rules, 2021 as governing issue of security of costs. What is sought is said to be a provisional order and then the main matter will follow. The first respondent was said not to be a party who would be left with no recourse to recover costs if he succeeds it was stated that there is no determination by the Registrar on whether costs are payable and it would be in the interest of justice for the matter to proceed and have this point *in limine* dismissed.

I am indebted to DEME J for his seminal judgment on this subject in the case of *Taiyuan Sanxing Company Limited v Philcool Investments (Private Limited)* +8 Ors HH 32-23. At p 5 DEME J held as follows:

“The security of costs of a *peregrine* party has been resolved in our jurisdiction and beyond. A *peregrinus*, in the majority of cases, is ordinarily required to deposit security of costs.....

In the case of *Bowes & Ors v Monolakakis* HB 103/11, MATHONSI J, (as he then was) beautifully and succinctly propounded the following remarks:

“The basis of the rule requiring a *peregrine* to provide security for costs of an *incola* defendant was set out by SANDURA JP (as he then was) in *Zendera v Mcdade & Anor* 1985 (2) ZLR 18 (H) at 20 A-D as follows:

“The issue relating to the furnishing of security of costs by a plaintiff who is a *peregrini* is discussed by the learned authors of *The Civil Practice of the Superior Courts of South Africa* 3<sup>rd</sup> ed at p 25. There the learned authors had this to say:

“A *peregrinus* who initiates proceedings in our courts must as a general rule give security to the defendant for his costs unless he has within the area of the jurisdiction of the court,

immovable property with a sufficient margin unburdened to satisfy costs which may arise,.....

The court, has however a discretion in exceptional cases but should exercise its discretion sparingly.”

The rule is clearly meant to protect the interests of an incola who is sued by a *peregrinus*. In the case of *Redstone Mining Coporation (Pvt) Ltd & 3 Ors v Digoil Group Zimbabwe (Pvt) Ltd & 4 Ors* HH 438/15 it was held that the requirement for a *peregrini* to pay security of costs should not be used as a weapon of defence by an incola bent on preventing an approach to the court by a *peregrini*.

This is a fitting case, in the exercise of my discretion where I am convinced, I should dispense with security of costs being deposited. This is because a perusal of the papers shows that the first respondent is holding USD 610 319.47 which is an amount owed by MCA Venture to MCA S.A. The first respondent has acknowledged this in various correspondences. In this case what interests of the first respondent would be prejudiced if the applicants are not made to pay security for costs. I think none. The first respondent appears bent on ensuring that the applicants are shut out of this court. That would not be in the interest of justice.

I therefore dismiss this point *in limine*.

## 2. WHETHER THIS MATTER IS URGENT

Mr *Zhuwarara* submitted that this matter is not urgent as the applicants say they came to know on 16 November 2023 of the position communicated to the second respondent in a letter dated 10 November 2023. It is averred that what is in that letter was communicated to the applicant’s Legal Practitioner on 7 November 2023. As there is no explanation for the delay from 16 November to 1 December 2023, when the matter was finally filed, it is contended that the applicants failed to treat the matter with urgency and the matter should fail on the urgency hurdle. Reference was made to the case of *Document Support Centre v Mapuvire* 2006(2) ZLR 240 @ 244.

Furthermore, it was contended that the applicants simply seek to safeguard payment of money and have other recourse available to them. It was prayed that the matter be removed from the roll of urgent matters.

Mr *Mutasa* relied on the case of *Prosecutor General v Busangabanye* HH 427/15 wherein a delay of twenty-two days was not considered inordinate.

In this case the need to act is said to have arisen on 16 November 2023 when the applicants got to know that the second respondent was making attempts to avoid paying their dividend. They then filed this application fifteen days later. Upon such realization they filed an ordinary court application for removal of the first respondent as Corporate Rescue Practitioner. Thereafter they filed this urgent application and explain that the delay is because they are based in South Africa.

I am inclined to take the position taken by MATHONSI J in the *Prosecutor General v Busangabanye & Anor supra*. He held as follows:

“In my view this issue of self-created urgency has now been blown out of proportion. Surely a delay of 22 days cannot be said to be inordinate so as to constitute self-created urgency. Quite often in recent history we are subjected to endless points *in limine* centred on urgency which should not be made at all.....

I am satisfied that this application was brought within a reasonable time and that it is one which deserves to be heard on an urgent basis. I accordingly dismiss the point *in limine*.”

It is for the same reasons that I do not consider a delay of fifteen days as inordinate so as to constitute self-created urgency given that the applicants are based in South Africa. I accordingly dismiss this point *in limine*.

### 3. WHETHER THE INTERIM RELIEF SOUGHT CANNOT BE GRANTED

Mr *Zhuwarara* submitted that the third and fourth respondents are not currently holding the amount of money which the applicants seek to be ringfenced and if the interim order was to be granted it would be *a brutum fulmen*.

The second reason is that the applicants who are foreigners cannot lawfully be paid money, whether in Zimbabwe or offshore without the exchange control approval of the Reserve Bank of Zimbabwe and this approval has been refused.

The third reason given, is that the claim on which the application is based, was only provisionally accepted pending examination and exchange control authority such authority

has not been granted and first respondent has recommended to the second respondent that the claim be rejected.

The basis for the Reserve Bank of Zimbabwe's non- approval is that the Shareholders and Directors failed to supply documents that were requested.

It is also contended that this application has been brought prematurely as the second respondent is yet to accept or reject the first respondent's recommendation. Upon the decision of the second respondent, the applicants are alleged to have a right to challenge same. Additionally, the matter is said to be premature as no exchange control approval has been given yet.

Another argument is that MCA Venture is still trading and there will be no prejudice on applicant's part because once they successfully satisfy the exchange control requirements, they will be paid an equalizing dividend.

In support of the contention that the court cannot grant an interdict for past invasions of a right and that a party has to prove existence of a *prima facie* right, the court was referred to the cases of *Mayor Logistics v Zimbabwe Revenue Authority 2014 (2) ZLR, 84 (CC)* and *Airfield Investments (Pvt) Ltd v Minister of Lands and Ors 2004(1) ZLR 511(S)*.

Mr *Mutasa* submitted that the applicants are not seeking payment of US\$610 319.47. They simply seek to ringfence the amount. The order, it was argued, cannot be said to be *brutum fulmen*.

The bank statements attached by the first respondent are alleged to be unhelpful as they do not prove that they relate to accounts operated by the first respondent as they do not show who the account holder is. They are also criticized for relating to dates of more than six months from today hence they are said not to reflect the current status.

Annexure B1 dated 3 April 2023 which is a letter addressed to the Exchange Control Officer at CABS is said to confirm that the account was in funds then and the first respondent was in a position to pay the USD610 319.47. The question posed is where was the money if bank statements show as little as USD474.70 on 4 April 2023 and USD24.50 as at 22 May 2023. It was argued that the first respondent is not being candid with the court and the opposition mounted should be dismissed.

A perusal of the notice of opposition and its annexures does confirm that the statements do not have adequate information so as to attribute them to the first respondent and his role as Corporate Rescue Practitioner for MCA Venture. The inconsistencies pointed out relating to amounts in the account cannot be ignored. I find that the statements are unhelpful.

I further find that what the applicants are seeking is not payment of the amount in issue but mere ringfencing. This means that the argument that they cannot be paid as foreigners without approval does not hold water. Its interim order sought does not assume for a moment that payment has been approved.

The first respondent does accept that the decision of the second respondent to his recommendation, is still pending as is that of the Exchange Control Authority.

There is no justifiable reason why it can be held that if this interim order is granted, it will be a *brutum fulmen*.

Given the unhelpful nature of the bank statements, the case authorities of *Mayor Logistics v ZIMRA supra* and *Airfield Investments supra* are irrelevant. One cannot successfully contend that there is no *prima facie* right on account of there being no funds in the account.

#### WHETHER PARAGRAPH 2 OF THE INTERIM RELIEF SOUGHT IS ENFORCEABLE.

In the course of writing my ruling, I observed a problem with para 2 of the interim relief sought which does not specify the account numbers of the accounts allegedly held with third and fourth respondent which are required to ringfence the amount of US\$610 319.47. I called counsel for the applicants and first respondent and put the question to them.

Both counsel conceded that the paragraph would indeed be difficult to enforce for third and fourth respondents.

Mr Mutasa related the difficulties which they have faced in getting the relevant details from the first respondent.

They had hoped to get relevant account details in the course of the proceedings. Unfortunately, the bank statements attached by the first respondent are the same ones applicants have impugned as not reflecting that they have an account in the name of first respondent which is operated for the corporate rescue transactions of MCA Venture.

Mr *Mutasa* applied to have the interim order amended by substituting the current para 2 with an order directing the first respondent to disclose the account details in issue which he is operating for MCA Venture. It was argued that as a public officer, such a compelling order should not be problematic. Paragraph 2 would then become paragraph 3.

Mr *Zhuwarara* opposed the attempt to amend the order on the premise that such an order would not have any averment in the founding affidavit supporting such a compelling order. He argued that an application stands or falls on its founding affidavit. A further averment was that it has not been stated whether the obligation to disclose arises from common law or statute. He prayed for dismissal of the amendment sought.

Mr *Mutasa* countered that the court has inherent power to amend a draft order. He also pointed out that even if it was found that paragraph 2 is unenforceable paragraph 1 would still stand on its own. The court was urged to protect the applicants from a seemingly dishonest public offer who was not operating transparently.

The court cannot grant an order which does not naturally flow from the founding affidavit. It is indeed trite that an application stands or falls on its founding affidavit. The founding affidavit before me is mum on the absence of the relevant account numbers. It does not venture to suggest that the first respondent be compelled to supply these. Neither is a legal basis provided for such proposed amendment. My hands are therefore tied. I cannot grant the amendment sought.

I find that para 2 of the interim relief sought is unenforceable and I proceed to strike it out. Paragraph 1 of the interim relief can be sustained by the founding affidavit and it survives the chop.

**Disposition.**

1. There being no merit in the first, second and third points *in limine*, they be and are hereby dismissed.
2. Paragraph 2 of the interim relief sought be and is hereby struck out.
3. The Registrar is directed to set the matter down for hearing on the merits at the next available date.

*Gill Godlonton & Gerrans*, applicant's legal practitioners  
*Danziger & Partners*, first respondent's legal practitioners