DELMA LUPEPE
and
ILASHA MINING (PVT) LTD
versus
TRYNOS NKOMO

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 22 FEBRUARY 2018 AND 15 MARCH 2018

Urgent Chamber Application

S Siziba for the respondents
Z C Ncube for the applicant

MOYO J: The applicant filed an application seeking the following interim relief:

"Pending the final determination of this matter on the return date, the applicant be and is hereby granted the following relief:

1) That the execution of the writ dated 30 August 2017, in HC 1758/17 be and is hereby stayed pending the finalization of the application for rescission of judgment filed undercover of case number HC 320/18.
2) In the event that the 2nd respondent had dismantled the stamp mills he be ordered to re-install them immediately at the 1st respondent's expense."

The background of this matter is that the parties entered into an agreement of sale of mining shares the terms of the agreement were allegedly not fully complied with by the first respondent. The applicant sought to cancel the agreement. First respondent then sued for profits/dividends on the basis of the agreement of sale. He obtained default judgment against the applicants in that respect.

Applicants are now seeking to rescind that judgment. This application has been filed to stay the execution of the default judgment pending the finalization of the application for

rescission of judgment. The first respondent raised four points *in limine*. Firstly, that Mr *Z. C Ncube* cannot represent applicants in this matter as he drew the agreement of sale between the parties and is therefore having a conflict of interest. Advocate *Siziba,* submitted that the conflict of interest arises from the mere fact that Mr *Z. C Ncube*, drew the agreement of sale and is therefore privy to its contents and thus cannot represent the applicants in this matter. He has not shown the court factually that Mr *Ncube* acted on first respondent's behalf when he drew the agreement of sale. On the other hand Mr *Ncube* submitted that he has always acted for the applicants as his established clients and that even in the agreement of sale, he owed the first respondent a general duty as a legal practitioner in drawing the agreement of sale but that he was always acting on behalf of his own client, the applicants. I fail to understand the substance of this point *in limine*. I do not hold the view that Mr *Ncube* has changed any course in the representation of his clients. He has always represented his clients even during the drawing of the agreement of sale, except that of course the agreement of sale had two parties whom he owed the general professional duty despite that he was pursuing his clients instructions as the seller in the agreement. In the absence of specific issues raised as to how Mr *Ncube* has become compromised or how his representation of the applicants specifically prejudices the first respondent, I am unable to accept the first respondent's contention. Again, an effort was made by Advocate *Siziba* to refer to an agreement between first respondent and a company that has no relationship at all with the parties before me. A suggestion was made that Mr *Ncube* drew that agreement which shows that first respondent is indebted to a company called Trackier Investments Pvt Ltd.

It was not shown as to how this relates to the current matter. That agreement was also drawn by Phulu and Ncube Legal practitioners which has no relationship at all with applicant's lawyers.

It is also important to note that in paragraph 3 of his opposing affidavit, the first respondent says that "Mr *Z Ncube* a legal practitioner before this Honourable Court being the senior partner of Ncube and partners has represented me in several matters." This is apparently not true because the first respondent does not go on to state such matters. Neither could his

counsel be drawn to tabulate such matters before the court. The conclusion of this court on this point is that first respondent was not being candid with the court. He sought to mislead the court on this point in a bid to frustrate the applicant. This point has no substance at all and is accordingly thrown out. The second point was that of dirty hands. That the applicants are approaching this court with dirty hands hence they should not be heard. The basis for this assertion is the return of service by the Sheriff dated 14 February 2018 in which the Sheriff stated that he was frustrated from executing the writ by this Honourable Court in that applicant's representative shut him out and denied him entry. However there is another conflicting return of service for the 14 February 2018 wherein the Sheriff stipulates that he did not execute the agreement as an urgent application for stay of execution had been served at their offices. There is no affidavit from the Sheriff to explain these two conflicting returns emanating from his office purportedly on the same event that occurred on the same day. In the absence of verified facts as to what transpired indeed on the day in question, this point *in limine* cannot stand as taking away a party's right to be heard is a drastic and outrageous measure that can only be exercised on concrete, clear and proven facts. I thus cannot uphold this point *in limine.*

The third point *in limine* is that the applicant deliberately failed to disclose his knowledge of the case in that in the certificate of urgency it is stated that the applicant got to know of the matter for the first time on 8 February upon execution and yet the in affidavit they say they got to know on 6 February and that therefore applicant failed to disclose material facts before the court.

I hold the view that this is a petty argument from a litigant who is trying by all means to just throw in everything in a bid to block the other party from being heard. I believe there is nothing that can be made of the assertions in the urgent application as to whether the applicants got to know of the application on 6 and 8 February there is really nothing material that flows from there. What we can glean from the facts is that about that time, around 6 to 8 February that should be the time during which the applicants got to know of the judgment. In fact we should go by the affidavit which comes from the applicants themselves and is in fact a sworn statement unlike the certificate of urgency. The view taken by this court is that first respondent is splitting hairs in a bid to try by all means to shut out, the applicants from being heard. Surely these courts

are courts of substance they cannot be swayed by every petty argument advanced by a litigant, especially where such litigant wants to have another litigant blocked from being heard.

The fourth point *in limine* raised is that of failure to file an application for condonation together with the application for rescission of judgment. First respondent's counsel submitted that the judgment having been granted in August 2017, and the application for rescission being only filed in February 2018, the applicants were duty bound to apply for condonation in terms of the Rules. He submits that despite that denial applicants' have been aware of the judgment since the return of service by the Sheriff stipulates that summons were served on the gardener on 7 July 2017, therefore applicants were aware. The gardener, Mr Phiri has sworn to an affidavit stating that he never received the summons as alleged in the return of service by a Nzvere from the Deputy of Sheriff's office but that he received a bundle of documents from Mr Bunhu on 7 July 2017 and he did surrender them to his boss the first applicant, who in turn instructed his lawyers to defend them. There is also another return of service on the same gardener on the same day by a Mr Bunhu from the Sheriff's office and this service was for an urgent chamber application and a notice of set down. These papers were allegedly served on the gardener by two different sheriffs but on the same day. The gardener acknowledges receipt of the papers served by a Mr Bunhu being the urgent application and denies that he was served with a summons by another sheriff official on the same date. Again, there is a problem here in that a question immediately arises that, the sheriff's office sent two different people from its offices to the same address on the same day? Especially in light of the denial by the gardener that the other sheriff official never came. Again, if one were to say that did happen, why would the gardener choose to keep the summons and not give them to the applicants and yet he gave them the other documents relating to the urgent chamber application? If the gardener gave the applicants all the documents including the summons, why would the applicants quickly take them to their lawyers with instructions to defend same and yet ignore the summons? This whole chain of events would defy logic and as a result it is difficult to say that applicants did receive the summons and decided to ignore them. I again find no substance on the aspect of knowledge of the judgment, as clearly applicants' papers state that they only became aware of the judgment during the

current month and therefore I am not persuaded by the submission that they should have sought condonation as clearly the rules show that the one month prescribed in Rule 63 starts from the date of knowledge as opposed to the date of judgment. The presumption that a party is expected to have known about the judgment within two days is only applicable where there are no factual averments as to when applicant became aware of the existence of the judgment.

On the merits, first respondent's counsel conceded that they have no challenge to the application on the merits and I also hold the view that this is a matter clearly where the execution of judgment should be stayed pending the hearing and determination of the application for rescission of judgment as clearly a lot of issues, admittedly by both counsel, have to be ventilated in order to resolve the dispute between these parties.

The provisional order is accordingly granted as sought in terms of the draft

Joel Pincus, Konson and Wolhuter, applicants' legal practitioners
Ncube and Partners, respondents' legal practitioners