

MING CHANG SINO-AFRICA MINING INVESTMENT (PVT) LIMITED  
versus  
LIVINGSTONE MUTATAZHA  
and  
SHERIFF OF HARARE

HIGH COURT OF ZIMBABWE  
MATHONSI J  
HARARE, 10 December 2013

**Urgent Chamber Application**

*T. Mpofu*, for the applicant  
*R. Jambo* , for the 1<sup>st</sup> respondent  
2<sup>nd</sup> respondent in default

MATHONSI J: In this urgent application, the applicant, a gold mining concern, seeks a provisional order the interim relief of which is a stay of execution of a default judgement issued by this court, per ZHOU J, on 6 November 2013, pending the determination of a rescission of judgement application which it has filed.

The first respondent obtained default judgement aforesaid, in the sum of \$893 320-00 against the applicant in HC 9292/12 for his alleged share of profits in respect of a mining operation conducted on mining claims situated in Mutawatawa, breach of contract and loss of income. This followed the none appearance of the applicant at the pre-trial conference scheduled for 15 October 2013 as a result of which the applicant's defence to the claim was struck off and the matter referred to the unopposed roll for default judgement.

Taking advantage of that judgement the first respondent issued a writ against the applicant's property and instructed the Sheriff and his deputy to attach and remove the applicant's property in execution. Despite the filing and service of this application, the respondents have moved swiftly to remove the property in execution.

In the founding affidavit of Xing Ming Chang, its director, the applicant explained that it was not aware of the set down of the matter for pre-trial conference because the notice of it was served upon its legal practitioners and the lawyer dealing with the matter did not notify it of the date. This occurred because the lawyer had left the firm without committing the applicant's file to someone else.

Mr *Jambo* for the respondent raised 3 points *in limine*, the first one being that the deponent of the founding affidavit has not shown that he has to represent the applicant. He submitted that this is because no resolution of the company authorising Xing Ming Chang to sign the affidavit on its behalf has been filed. He cited the authority of *Air Zimbabwe & Ors v Zimbabwe Revenue Authority HH96/03*; *Mall (Cape) (Pvt) Ltd v Merino Ko-Operasie Bpk 1957(2) SA 347(C)* and *Direct Response Marketing (Pvt) Ltd v Shepherd 1993 (2) ZLR 218 (H)*.

While it is true that generally a company representative has to exhibit proof of authority, I find myself having to repeat what I stated in *African Banking Corporation of Zimbabwe Limited t/a Banc Abc v PWC Motors (Pvt) Ltd & Ors HH 123/ 13* at pp3-4 that:

“ I am aware that there is authority for demanding that a company official must produce proof of authority to represent the company in the form of a company resolution; *South African Milling Company (Pvt) Ltd v Reddy 1980 (3) SA431*; *South African Allied Workers Union & Ors v De Klerk N.O. & Ors 1990(3) SA 425*. However it occurs to me that that form of proof is not necessary in every case as each case must be considered on its own merits; *Mall (Cape) (Pty) Ltd v Merino Ko – Opraisie Bpk 1957 (2) SA 345 (C)*. All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not an unauthorised person. To my mind the attachment of a resolution has been blown out of proportion and taken to ridiculous levels. Where the deponent of an affidavit states that he has authority of the company to represent it, there is no reason for the court to disbelieve him unless it is shown evidence to the contrary. Where no such contrary evidence is produced the omission of a company resolution cannot be fatal to the application.”

I stand by that pronouncement. Xing Ming Chang has stated in his founding affidavit that not only is he the director of the applicant but also that he is authorised to depose to the affidavit in that capacity.

What we have here is a company which is demonstrably named after its director, Ming Chang, who happens to be the deponent of the founding affidavit. I entertain no doubt in my mind that he has authority to represent his company. On the other hand, the first respondent has not pointed to anything suggesting lack of authority beyond the absence of a company resolution. That in my view, cannot defeat the application.

The second point taken *in limine* is that the applicant has sought to amend its plea in the main action and the application for rescission of judgement as it now argues that the mine in dispute belongs to a third party and not the first respondent when in the plea the point is made that the applicant purchased the mining claim from the first respondent. In Mr *Jambo*'s

view this is an improper amendment of the plea. I am unable to comprehend the relevance of this legal argument at this stage. The present application concerns the request for a stay of execution to enable the applicant to pursue its rescission of the judgement application. It is therefore premature to be making arguments on the propriety of an amendment to a plea. That should be the concern of the trial court.

The third point *in limine* relates to the alleged renunciation of urgency by Tavenhave & Machingauta Legal Practitioners who represent the applicant in this matter. The first respondent's disquiet arises from what the applicant says in the application for rescission of judgement, itself not before me at this stage, that the legal practitioner who handled his case, left the firm a few days before the date of set down of the pre-trial conference and, "filed a renunciation of urgency" without communicating that issue to the remaining partners. Factually it is correct that a notice of renunciation of agency was filed on 10 October 2013 and it is part of the record. But, that point is not gain said. There may be some irregularity in the manner in which the legal practitioners standing for the applicant conducted themselves in their agency. This, however does not detract from the fact that the applicant has explained that it defaulted at the pre trial conference because of the dilatoriness of its legal practitioners, who did not inform it of the set down date.

In my view, the application for rescission of judgement deserves consideration. It cannot be said that the explanation given for the default is so devoid of merit as not to warrant a chance of a hearing. It is significant that the first respondent is so intent on executing a default judgement granted in a claim which is in big part, for damages, that he has gone ahead with removal of property even after this matter was set down. The first respondent would want full benefit of a judgement taken without subjecting his claim to the test of a trial. Justice cannot be achieved that way. I take the view that the application for rescission of judgement should be determined before any execution can be allowed to take place.

There is an application for an amendments relating to the citation of the Sheriff who should have been cited as Sheriff for Zimbabwe. It is an application that is opposed when it should not have been opposed at all.

Second respondent has been improperly cited, there being no Sheriff for Harare. The applicant is granted leave to amend the citation of the second respondent to read; "The sheriff for Zimbabwe" and in papers to be filed by this parties therein after that correction should be taken into account.

Accordingly I grant the provisional order in terms of the amended draft order the interim relief of which is as follows:

Pending determination of this matter the applicant is granted the following relief;

1. The execution of judgement in Case No. 9292/12 be and is hereby stayed pending the outcome of the applicant's application for rescission of default judgement.
2. The Sheriff for Zimbabwe and any of his lawful deputies who have attached and removed any property in pursuance of a writ issued in HC9292/12 are directed to forthwith release such property to the applicant.

*Tavenhave & Machingauta* , applicant's legal practitioners  
*Kamususo & Musendo*, 1<sup>st</sup> respondent's legal practitioners