

LUGANIA INVESTMENTS (PVT) LTD
versus
ROSE NATALIE HEUER
and
MING CHANG SINO AFRICA (PVT) LTD

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 19 August and 8 September 2021

Urgent chamber application

In chambers

MUCHAWA J:

BACKGROUND

The background to this matter is that the applicant, a duly registered company, in terms of the law, entered into a tribute agreement with 1st respondent over several mining claims collectively known as Empress Mine in Mashava. Upon expiry of same, they entered into an agreement of sale. The first agreement was entered into on 27 March 2017 and thereafter another was signed on 7 September 2017 which allegedly met the requirements from Ministry of Mines. The parties have been in and out of court since 2018 around the issue of Empress Mine. In case HC5673/18, the applicant alleged breach of contract by 1st respondent and demanded specific performance. The 1st responded lodged a counterclaim. Both claims were subsequently withdrawn. In case 6440/18, the applicant herein, filed an urgent chamber application wherein it sought an order that the Minister of Mines and Mining Development issue it with a resumption certificate for mining operations at Empress Mine. 1st respondent herein was cited as 1st respondent .That application was dismissed.

In 2018, under case number HC6533/18 an entity called Songxiang Industry Investments Pvt Ltd sought ownership of Empress Mine on the basis that it had bought the whole shareholding in the applicant company. It dragged both applicant and 1st respondent to court.

Under case HC172/18, the deponent to the founding affidavit *in casu* sought cancellation of the agreement of sale of such shares. The court dismissed the claim by Songxiang and applicant on the basis that they were not holders of the mining claim nor beneficiaries of a tribute agreement. As Songxiang continued on the mine, 1st respondent instituted proceedings of eviction and a bar from removing mining equipment under case HC2520/18, in the High Court Bulawayo. The applicant was cited as 1st respondent. This order was to be given pending determination of case HC5673/18 filed by the applicant in Harare High Court. The order was granted and Songxiang appealed to the Supreme Court. The appeal was dismissed. 1st respondent's rights to mine at Empress Mine were confirmed in order SCB 209/20. The applicant herein was interdicted from removing mining equipment from Empress Mine whilst Songxiang was allowed to remove its personal equipment. All other parties were ejected from Empress Mine and ordered not to interfere with 1st respondent's mining activities.

In case HC4793/20 the applicant resuscitated its earlier claim as that in the matter withdrawn under HC5673/18. It seeks the declaration of the validity of the agreement of sale of 7 September 2017 between it and 1st respondent and that the cancellation be declared null and void. In the new action an entity called Two Flags Pvt Ltd has been joined as a party and they are counter claiming ownership of the mining claims. This matter is still pending.

THE APPLICATION IN CASU

This matter came before me as an urgent chamber application for an interdict. The relief sought was as set out below;

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honorable Court why a final order should not be made in the following terms;

- 1.1 That pending the mining dispute between the Applicant and 1st Respondent under case number HC4793/20, the Applicant be and is hereby ordered not to dispose of, remove or replace mining equipment it sold to the Applicant.
- 1.2 That pending the mining dispute under case number HC4793/20, the Applicant be and is hereby stopped from ceding mining rights or enter into any mining concession with any other third party. The costs of this Application be paid by the Respondents.

INTERIM RELIEF GRANTED

2. Pending determination of this matter, the Applicant is hereby granted the following relief;
 - a. That 1st Respondent or any assignee of her agents be and is hereby barred from removing, selling or replacing mining equipment from Empress Mine, Mashava. If such has already taken place, 1st Respondent be ordered to restore the status quo.

- b. The 1st Respondent be and is hereby ordered not to cede mining rights or enter into any mining partnership with 2nd Respondent or any other 3rd party.
- c. That the 1st and 2nd Respondents pay costs of this Application.

SERVICE OF PROVISIONAL ORDER

3. That a copy of this provisional Order shall be served on the Respondents by the Applicant's legal practitioners of record."

The 1st respondent filed its notice of opposition and thereafter applicant filed heads of argument. I proceeded to determine the matter on the papers.

In the notice of opposition the 1st respondent raised points in *limine* as follows;

1. Urgency
2. Lack of locus *standii*
3. Material non- disclosure and mendacity

I made a finding that the matter was urgent as the applicant acted urgently once it became aware of the conduct complained of and the need to act could not wait. I relied on the case of *Document Support Centre (Pvt) Ltd* HC6314/06.

On the question of locus *standii* I considered the submissions of the 1st respondent which were essentially addressing the question of authority of the deponent to the founding affidavit, to represent the applicant. My finding was that the said Simon Chivere had no authority to represent the applicant as there was no proper resolution by the applicant's directors authorizing him to institute this current application on its behalf. I proceeded to strike the matter off the roll with costs on account of there being no applicant before me.

The applicant has requested written reasons for my order. These are they.

REASONS FOR ORDER

The 1st respondent submitted that the applicant had relied on an outdated board resolution dated 25 November 2014 yet in proceedings under HC6440/18, the same Simon Chivere had indicated he had no board resolution and none was filed on record. In that case, Simon Chivere had relied on the fact that he was a director and shareholder. Honorable Muzofa J held that Simon Chivere did not have the authority to represent the Applicant. It was argued that had this resolution been available in 2018, it would have been produced and there had been no explanation for its nonproduction.

Reference was made to the numerous litigation between the parties and it was argued it was highly improbable that the directors had not met throughout the 7 years to discuss and come up with up to date resolutions.

The 1st respondent claimed to personally know the two directors named in the 2014 resolution and pointed out that none of these directors had signed the said resolution nor were they aware of such resolution.

Furthermore it was submitted that both Mr Ahmed and Mr Wiggill had sold their shares in the applicant company to Mr Xang who operates Songxiang Industries Investments Pvt Ltd and had since resigned from the directorship of the applicant company.

It was submitted for the applicant that the attached company resolution is legally valid for all intents and purposes as the deponent has clearly articulated that he has been authorized by applicant to depose to the founding affidavit.

The reliance on case number HC6533/18 was said to be a wrongful interpretation as a company resolution has been attached in *casu* yet none was filed in that case. Further it was stated that the applicant had not filed any supporting affidavits in support of her averments save an inadmissible piece of paper which is unauthenticated by any service provider, without any names nor dates.

Indeed in judgment HH 484/18, MUZOFA J made the following finding;

“There is no board resolution giving authority to Simon to represent Lugania in this case. So he cannot speak on behalf of Lugania.”

The situation is different from this case where a board resolution has been filed. The veracity of the board resolution is questionable given the other factual conclusions made by MUZOFA J based on evidence presented before her which I list below.

1. In a letter dated 11 August 2017, produced by Simon Chivere purportedly acting on behalf of the applicant herein, addressed to AMB Global, it advised of its shareholding and that one Xiang Pigang had been appointed director with 35% shareholding. The letter was signed by all the three shareholders who had sold shares to the entity called Songxiang Industry Investments (Pvt) Ltd.

2. Another letter dated 23 August 2017 signed by Simon Chivere as director and chairman of the applicant was also attached and it advised Xiang Pigang of his appointment as director and a holder of 35% shares in applicant's company.
3. An agreement of sale and proof of payment was produced and it showed that the three shareholders of Lugania sold all their shareholding to Songxiang. Muzofa J held that the agreement remained valid for purposes of the case before her until it was confirmed cancelled by a competent court.
4. Muzofa J made the further finding that the shareholders were embroiled in a dispute of ownership of the company, which was given by Simon Chivere as the reason for failure of the directors to meet, it was the more reason why there was need to file a board resolution authorizing Simon Chivere to act on behalf of the applicant company.

The objective of requiring a board resolution is for the Court to satisfy itself that it is the company that is the litigant and not someone on a frolic of their own. Where there is a company resolution filed, but aspersions are cast on it, the court cannot ignore this. It should still satisfy itself that it is indeed the applicant litigating. *Direct Response Marketing (Pvt) Ltd v Shepherd* 1993(2) ZLR 218 (H).

In casu, given the proven and admitted facts of the dispute of ownership of the company and the letters appointing Xiang Pigang as director in August 2017, it is disingenuous to pull out a 2014 resolution and seek to rely on it for a 2021 matter. In the circumstances, the assertions by 1st respondent that the resolution is outdated and does not serve to prove that Simon Chivere had the authority of the applicant to litigate on behalf of the applicant, found favour with me.

Though the 1st respondent appears not to have provided verifiable evidence in its notice of opposition, this court can have recourse to other records before it. That is what I did.

In *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC), it was held as follows;

“In general the court is always entitled to make reference to its own records and proceedings and to take note of their contents. ----- The position is a *fortiori* when the defence involves a reference to the previous proceedings as this one does”.

In the circumstances of this case I find that Simon Chivere has not satisfied the court that he is litigating on behalf of the applicant. There is therefore no applicant before me and I strike this matter off with costs.

Chambati Mataka & Makonese Attorneys, applicant's legal practitioners
Webb, Low + Barry, 1st respondent's LPs