APATRON MINING (PVT) LTD

Versus

EMMERSON DAMBUDZO MNANGAGWA N.O
(In his capacity as the Commander-In-Chief of
The Defence Forces)
And
PHILLIP VALERIO SIBANDA N.O
(In his capacity as the Commander of the Zimbabwe
Defence Forces)
And
OPPAH MUCHINGURI N.O
(In her capacity as the Minister of Defence Forces)
And
MACDUFF MADENGA N.O
(In his capacity as the Sheriff of Zimbabwe)
And
TONDERAI TSUNGA N.O
(In his capacity as the Additional Sheriff Masvingo)
And
JOSPHAT KUDUMBA
And
ELLIOT MUSWITA
And
FINGER TAPERA
And
HEADMAN MHIZHA
And
PETER MUDHUMO
And
RAFAEL SHOKO
And
SOLOMON NDLOVU
And
HAIGWARI SAFARIS (PVT) LTD
And
DIRECTOR GENERAL, ZIMBABWE PARKS AND WILDLIFE
MANAGEMENT AUTHORITY N.O
And
MINISTER OF ENVIRONMENT AND TOURISIM
AND HOSPITALITY N.O

HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 12 MARCH 2020

Unopposed Application

Z.C Ncube, for the applicant
Miss B T Nyoni, for the 1st, 2nd, 3rd and 15th respondents
Miss S F Dhlomo, for the 6th – 13th respondents

MABHIKWA J: This matter was set down before me in Motion Court on 12 March 2020. It is a court application for a declaratur. I ruled and ordered the following that;

1) The matter is opposed

2) The matter be removed from the roll of unopposed matters.

3) There be no order as to costs.

Belatedly on 7 October 2020, I received a letter which had been erroneously filed in one of the many cases involving the parties and /or some of the parties in case No. HC 1375/20 being the case of *Josphat Kudumba & 7 Others v Apatron Mining (Pvt) Ltd & 8 Others*. The letter requested reasons for my decision in this matter on 12 March 2020. Below are my reasons;

As already stated above, the matter was set down on the unopposed roll. It was clear however from the file that the matter was vigorously opposed or at least had been opposed. I must say that the above order was clearly interlocutory in nature. It did not dispose of the matter.

On 12 March 2020, *Mr Z.C Ncube* appeared for the applicant. *Ms B.T Nyoni* of the Civil Division of the Attorney General's office appeared for the 1st, 2nd, 3rd and 15th respondents. *Miss Dhlomo* of Messrs Mutumbwa Mugabe and Partners legal practitioners appeared for the 6th to 13th respondents. Only the 4th and the 5th respondents remained unrepresented. These were the Sheriff of Zimbabwe and the Additional Sheriff of Masvingo Province.

The application was vigorously opposed as shown on the papers. Both *Miss B.T Nyoni* and *Ms Dlomo* indicated that they had instructions to oppose the application and that it has always been opposed anyway. The court then briefly asked *Mr Z Ncube* why such an opposed matter had been placed on the unopposed roll. *Mr Mcube* refered the court to a

Notice of Withdrawal at page 29 of the court application and dated 27 February 2020. In that notice, the applicant withdrew the application against 6th to the 13 respondents.

However, from the record, and in court, *Ms Dlomo* refered to a letter they had written on 11 March 2020. In that letter, 6th to 13 respondents wrote to the Clerk of the Honourable Justice KABASA that they had learnt that the matter had been set down for a declarator on the unopposed motion roll on 27 February 2020.

They complained that counsel for the applicant had misrepresented to the court that the matter was unopposed when it was opposed. They said they had also learnt that the applicant had withdrawn the application against 6th to 13th respondents but the Notice of Withdrawal had not been served on them or their clients. Even in this case on 12 March 2020, they still argued that they had not received any notice of withdrawal and that the notice was therefore of no effect. This was not an issue to be argued in Motion Court proceedings. They also argued that in any event, the 6th to 13th respondents remained vigorously opposed to the application notwithstanding the purported Notice of Withdrawal. This was so because it is the 6th to the 13th respondents who had a real and substantial interest in the matter. They therefore did not accept the purported withdrawal and had instructed their counsel to persist with the opposition to the application. This again was not an issue to be argued in Motion Court. The respondents also argued that an opposed matter is not struck of the record by the mere filing of a Notice of Withdrawal because the respondents are not opposed to the person of the applicant, but to the order sought. They argued that the matter remained opposed and had been irregularly set down on the unopposed roll. This also was not an issue in my view to be argued and decided on the motion roll.

I am not so sure what transpired on the said 27 February 2020. In fact it appears from the record that the application was removed from the roll. It was then re-set for 12 March 2020.

Apart from the above, the main matter itself had contentious disputes of fact which could also not be dealt with on the unopposed roll anyway. In *Mesevenzo v Beiji & Another* 2013 (2) ZLR 203 (H) it was held that in motion proceedings, a court should endeavour to resolve the dispute raised in affidavits without hearing evidence, or, of course arguments. The court must take a robust approach and not an over fastidious one provided it is convinced that there is no real possibility of any resolution or doing an injustice to the other party

concerned. Consequently, there is a heavy onus upon an applicant seeking relief in motion proceedings needing argument or calling of evidence, moreso where the matter has multiple parties and is opposed.

Secondly, it was held in that case that depending on the facts, the court may permit or require any person to give oral evidence in terms of Rule 229 B of the rules if it is in the interest of justice to hear such evidence. Thirdly, the court can refer the matter to trial with the application standing as the summons or the papers already filed of record standing as proceedings. *In casu*, the matter had originally been opposed anyway and so the court could refer it back to the opposed roll.

Fourthly the court can simply dismiss the application altogether if the applicant should have realised the dispute when launching the application. The South African case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) was also quoted therein in Musevenzo (supra). It was pointed out that;

> "It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts avered in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation."

And also in *Lesley Faye Marsh Pvt Ltd t/a Premier Diamonds & Others v African Banking Corporation of Zimbabwe (Pvt) Ltd* and *ABC Holdings Pvt Ltd* the matter had gone up to Pre-trial stage. The defendants failed to attend a Pre-trial Conference and the respondents (plaintiffs in the main action) successfully applied for the appellant's defence to be struck off and a judgment was entered in their favour. Somehow, the counterclaim by the the respondents was left extant. There were also applications and counter applications by both parties, just as *in casu*. Ultimately, the respondents argued that the applicant had been barred and sought an order in their favour. The matter was treated as unopposed, and an order was granted. The matter had also taken a very piecemeal approach in the resolution of the dispute which approach the court framed upon. The court on appeal per MAKARAU JA stated that Rule 238 (2) is sound and based on the fact that once a notice of opposition and opposing papers have been validly filed, the late filing of heads of argument cannot automatically have the effect of negating or nullifying such filing. The court held that the rule re-asserts the common sense position that the pleadings, having been validly filed,

remain extant until struck off the record by a competent court order. A referall of the matter to the unopposed roll is one such competent court order that will have the effect of nullifying or striking off the record, the otherwise validly filed pleadings. The court stated that a specific order striking off the notice of opposition and opposing affidavits was yet another competent order that could be made in the circumstances. It follows in my view that in the absence of that specific order striking off the notice of opposition and opposing affidavits, a party cannot, on its own, decide that the other party has no valid opposition or is barred and automatically set the application on the unopposed motion roll.

In *Lesley Faye Marsh (Pvt) Ltd* above, it was held, the court *aquo* fell into error of holding that once a party has been barred under Rule 238 (2) (b), and "remained barred" the matter is treated as unopposed. The application did not automatically become unopposed.

Also in *Movement for Democratic Change & 2 Others v Elias Mashaviva & 3 Others* SC 56-2020 the 2nd and fourth respondents (Elias Mudzuri and Douglas Mwonzora) accepted the withdrawal of an appeal against them with costs tendered by the applicants. Although cited at the Supreme Court, they had also had long been barred anyway for failure to file their own opposing papers at the lower court.

However, the appellants also purported to withdraw the matter against 3rd respondent (Ms T Khuphe) whom they argued she too had not actively participated in the proceedings of the court *aquo* inspite of filing opposing papers. They argued that she was resisting the appeal on technical grounds. *Professor L Madhuku* for the 3rd respondent opposed the purported withdrawal of the appeal, arguing that she had a clear interest in the matter. In particular, he had an interest in defending the judgement *aquo* and to persue a judgement in her favour.

The Supreme Court held that Ms. T. Khuphe had a right to continue participating in the proceedings. Leave for the withdrawal of the appeal against her was refused. It was held that whilst it was clear that she was not entitled directly, to insist on a judgement following withdrawal, it was however clear that she had a direct and substantial interest in the outcome of these proceedings. It was also pointed out that case authority was agreed that the court had a discretion whether or not to grant leave for the withdrawal. The appellants could not unilaterally withdraw the appeal against 3rd respondent who was then entitled to persue a judgement in her favour once the matter had been set down for hearing.

In casu, Mr Z C Ncube argued that the 1st to 4th and 15th respondents had opposed the matter by association. Apparently they had indicated in their notices of opposition that having read and understood the comprehensive affidavit deposed to by Abigail Mushayabasa on behalf of the 6th to the 13th Respondents, they wished to incorporate the contents therein as if specifically deposed to by them. *Mr Z.C Ncube* argued therefore that since the applicant had filed a Notice of ithdrawal against 6th to 13th respondents, it meant that those who had opposed by association, banking on Abigail's opposing affidavit, effectively remained with no notice of opposition. He further argued that 4th and 5th respondents who had not filed any opposing papers together with anyone who had filed no further papers were barred. He thus set the matter on the unopposed roll and sought judgement against the 1st to 5th respondents and then 14th and 15th respondents.

Miss B.T Nyoni from the Civil Division of the Attorney General's office argued that the 1st, 2nd, 3rd, 14 and 15th respondents remained opposed to the application notwithstanding the manner the notice of opposition is filed.

I must state that this court took note of the fact that 1st, 2nd, 3rd, 4th ,5th, 14th and 15th respondents were all sued in their representative capacities with perhaps no real interest in the matter. They were sued largely for the purposes of enforcement and to give effect to any order sought should it be granted. However, it was the 6th to the 13th respondents who would practically be affected by the order as the persons with real and substantial interests in the matter. The applicant could still therefore, obtain an order against 6th to 13th respondents by cleverly "withdrawing" and thus forcing them not to oppose a matter they were otherwise vigorously opposed to. That in my view would not only have been undesirable but improper. I believe also that it is for that reasoning that *Ms Dlomo* for 6th to 13th respondents argued that once a party is cited in a matter as a defendant or respondent, they cannot be removed willy nilly at the whims of the plaintiff or applicant. In my view the scenario is akin to a situation where A sues B over a house dispute and its transfer to him. He also cites the Registrar of Deeds and the City Council for registration and enforcement purposes in their representative capacities. B vigorously opposes the application whilst the other two (2) either oppose by association or do not oppose at all. It is improper in those circumstances to purport to withdraw against B, set the matter in Motion Court and obtain judgement against the Registrar and the City Council in default. The order clearly affects B in those circumstances and not the persons against whom it is granted.

I am convinced that the applicant's counsel, before setting the matter on the unopposed roll, was well aware of the contentious issues and the apparent disputes of fact raised above. He was also aware of the effect of the order sought.

It is for the foregoing reasons that this court ruled that this was not a matter to be argued, heard and decided in motion court proceedings. I ordered that;

(1) The matter is opposed.

(2) The matter is removed from the roll of unopposed matters.

(3) There will be no order as to costs.

Ncube and Partners, applicant's legal practitioners
Civil Division of the Attorney-General's Office, 1st, 2nd, 3rd and 15th respondents' legal practitioners
Mutumbwa Mugabe & Partners c/o Danziger & Partners, 6th – 13th respondents' legal practitioners