JAMESON RUSHWAYA
and
ANNIE RUSHWAYA
versus
PATTERSON TIMBA
and
SWIMMING POOL & UNDER WATER REPAIRS (PVT) LTD
and
TOLROSE INVESTMENTS (PRIVATE) LIMITED
and
MESSENGER OF COURT, KADOMA

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 14 and 20 January 2011

Urgent Chamber Application

A. Debwe, for the applicants
I Chagonda, for the first, second and third respondents

MAVANGIRA J: This is an urgent chamber application in which the applicants seek a Provisional Order in the following terms:

"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. That first, second and fourth respondents and/or their agents shall not interfere in any manner whatsoever with applicants' possession of Glencairn Mine or the assets thereat

INTERIM RELIEF GRANTED

Pending the determination of this matter, the applicants are granted the following relief:-

2. That first, second and fourth respondents be and are hereby ordered to remove all the locks on the 3 gold concentrators, carbon room, 4 fuel pumps, workshop and gates leading to the mining areas at Glencairn Mine.

3. That the first, second and fourth respondents restore possession of the Nissan NP 300 (registration NO. ABP 0456) and Nissan Hardbody 2.5 (registration no. ABG 4956) to the applicants".

At the onset of proceedings Mr *Chagonda* raised four preliminary points for determination by the court before the matter could be heard on the merits. The first point raised is that as Mr *Debwe*, the legal practitioner who had prepared the application and was also appearing for the applicant in this matter, was the same legal practitioner who had prepared and signed the certificate of urgency, the said certificate of urgency was therefore clearly defective. There is thus no certificate of urgency before the court and the urgent chamber application must therefore fail on that basis. He cited in support of his submission *Chafanza v Edgars Stores Ltd & Anor* 2005(1) ZLR 299 at 300G.

The second point raised is that the matter is *res judicata* as there have been no less than four urgent chamber applications involving more or less similar parties as the fourth respondent herein has not been a party to all matters. Mr *Chagonda* submitted that in one of the four urgent chamber applications the order that was sought is very similar to the order sought herein. The application in that particular matter was however dismissed by the court.

The third point raised is that the applicants herein have no *locus standi in judicio* to institute these proceedings. Mr *Chagonda* submitted that the mine and assets are owned by the third respondent. The applicants are shareholders, the first applicant being also a director of the third respondent. The company has not mandated them to bring these proceedings which they have brought in their personal capacities.

The fourth point raised *in limine* is that the matter is *lis pendens* as the applicants have filed both an appeal and an application for review in relation to an order granted by the magistrates' court in which the parties have been ordered to co-exist. The proceedings in both the appeal and the review are pending before this court yet the present application seeks to reverse the magistrates' court's order of co-existence. It was submitted that the hearing of this application would be tantamount to hearing and determining the appeal which is now pending before the court.

It appears to me that the preliminary point that must first be determined is whether or not the applicants have the *locus standi in judicio* to bring this application before the court.

The essence of the applicants' claim is that they were despoiled of their possession and control of Glencairn Mine, and the assets thereat. In his founding affidavit the first applicant has stated that the second applicant and he, in their capacities "as the legal directors and shareholders of the third respondent have been in peaceful and undisturbed possession of the mine … and all the assets thereat". Clearly the applicants' said possession was not exercised or

enjoyed in their personal capacities. It is common cause that the third respondent owns and runs the mine. Any disturbance of peaceful and undisturbed possession therefore could only be complained of by the third respondent. Had the third respondent passed a resolution authorising the institution of these proceedings, they would have been instituted in the name of the third respondent and the applicants as authorised agents would have been on solid ground.

The applicants have rather opted to cite the third respondent as a respondent to their claim. The third respondent cannot be a respondent in the applicant's claim. If any spoliation has occurred the third respondent herein, would be the applicant. Its board of directors would then pass a resolution authorising the institution of the necessary proceedings and indicating the person or persons who would do the necessary acts on its behalf. It is not the applicants' stance that they were acting independently of the third respondent. Rather in para 6 of the first applicant's founding affidavit he states that he only cited the third respondent as a respondent because in proceedings instituted by the first respondent against the applicants, which application resulted in the granting of the order that has prompted these proceedings, the third respondent herein was joined as third applicant.

It appears to me that the applicants' stance and explanation is self contradictory. The institution of proceedings against them by the third respondent under whose auspices they were engaged in all the pertinent activities, negates their very *locus standi* in this matter having regard to the nature of their claim.

For the above reasons the said point *in limine* is upheld.

It appears to me that it is not necessary in view of my finding on the discussed point *in limine*, to deal with the rest of them. The nature of the point *in limine* that has been upheld is such as to make it unnecessary to do so. No purpose would be served thereby.

In the result, it is found that the applicants have no *locus standi in judicio* to institute this urgent chamber application.

Debwe and Partners, applicants' legal practitioners
Atherstone and Cook, first, second and third respondents' legal practitioners