

CORE MINING AND MINERALS RESOURCES (PVT) LTD

versus

THE ZIMBABWE MINING DEVELOPMENT CORPORATION

and

MARANGE RESOURCES (PVT) LTD

and

THE MINERALS MARKETING CORPORATION OF ZIMBABWE

and

CANADILE MINERS (PVT) LTD

and

THE MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE

MAVANGIRA J

HARARE, 3 and 5 January 2011

### **Urgent Chamber Application**

Mr *Chikumbirike* with Messrs *Mutumbwa*, *Mufara* and *Kanengoni* for the applicant

Mr *Mutamangira* with Mr *Moyo*, for the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents.

Mr *Hogwe* with Miss *Mberi*, for the 3<sup>rd</sup> respondent.

MAVANGIRA J. This is an urgent chamber application in which the applicant's legal practitioner raised a preliminary point which needs to be determined before the Court can proceed to hear the preliminary points that the respondents raise.

Mr *Chikumbirike* for the applicant submitted that Mr *Mutamangira* should not appear in these proceedings as a legal practitioner for the first and second respondents and that he can only appear as their agent. The basis for this is that Mr *Mutamangira* is intimately and emotionally interested in matters involving the applicant and the respondents and generally in the affairs that have developed and culminated in the institution of these proceedings. Amongst

other things he was involved in the investigations that were conducted and which led to the prosecution of the deponent to the applicant's founding affidavit. He also submitted that the legal firm Mutamangira and Associates ought not to be allowed to represent the first and second respondents in these proceedings as the affidavits that they filed on behalf of these respondents were prepared and commissioned by the same firm. This is unethical conduct which this court should not countenance beyond this stage.

It is contended that Mr *Mutamangira* and or the firm ought to have realised the impropriety of their participation in these proceedings as legal practitioners for the first and second respondents. They should have advised their clients accordingly and consequently of the need for a different firm to represent them as their legal practitioners. Mutamangira and Associates would then only act or appear as agents for the said respondents.

It was further submitted that Mr *Mutamangira* and or his firm cannot properly represent the fifth respondent as he is being sued in his official capacity and should thus be represented only by the Attorney-General as the principal legal advisor to the Government.

The documents which Mr *Chikumbirike* referred the court to in support of his submissions are mostly attachments to the first respondent's opposing affidavit which was deposed to by one Godwills Masimirembwa, the Chairman of the first respondent's board of directors. One such document is a letter dated 20 September 2010 authored by the fifth respondent and addressed to Mr Masimirembwa. Therein the fifth respondent directs that the board investigates and establishes, amongst other issues, the applicant's shareholding as well as the "standing" of its current shareholders. Specific reference was made to paragraph 4 of this letter. The paragraph states, *inter alia*, that the fifth respondent expected a professionally compiled report and that a suitable person must be identified to undertake the investigation or enquiry on the directions given by the fifth respondent in the letter. It was contended that from the events that ensued Mr *Mutamangira* turned out to be the suitable person that was needed.

Reference was made to Annexure GM3 to Masimirembwa's affidavit. This is a copy of the minutes of the meeting of the Mining Development Board members with the applicant's members held at the first respondent's head office boardroom on 19 October 2010. Amongst those recorded as being in attendance at the meeting is Advocate *F Mutamangira*. Mr *Chikumbirike* specifically referred to para (e) of the minutes at p 100 where the following decision, amongst others, was made or recorded: "That the Core Mining shares in Canadile be transferred to Marange Resources". He submitted that this shows that this was a meeting where

the “dismemberment of a duly registered company was being done or discussed and that this was in the presence of Mr. Mutamangira. He submitted that in these circumstances Mr Mutamangira cannot deny the level of involvement that is being alleged against him as the minutes are an indication of his intricate involvement in the affairs referred to.

It was Mr *Chikumbirike*'s submission that in the scenario postulated by Mr *Mutamangira*, in which a legal practitioner gives legal advice to a board of directors, the clear answer is that such legal practitioner cannot thereafter represent the same client as a legal practitioner. (In his submission this is what elementary knowledge of the law and elementary corporate governance dictates.) (omit?)

It was also submitted that it would not have been proper for the applicant to refrain from raising this preliminary issue on the basis of expediency. To do so would be to allow an extremely bad precedent to be set.

Mr *Mutamangira* in response, submitted that no evidence was placed before the court to enable it to determine the depth of his alleged involvement in the matters referred to. He submitted that the allegations made were based on speculation. As regards the investigation into the affairs of the fourth respondent which investigation was conducted at the behest of the fifth respondent, he submitted that the investigation was conducted by the first respondent and not by him or his firm. They only provided legal advice and he cannot thus be said to be or to have been intimately involved in the affairs that have developed for some time eventually culminating in the filing of the instant urgent chamber application.

Regarding the affidavits said to have been prepared and commissioned or attested by his firm, he submitted that the affidavits were prepared by the deponents and not by his firm. He also submitted that when the legal practitioner from his firm commissioned the affidavits it was not in contemplation of any legal proceedings and on the basis of that distinction the case authorities cited by Mr *Chikumbirike* were thus inapplicable. Furthermore the affidavits were attested about a month before the institution of this urgent chamber application.

Mr *Mutamangira* also submitted that had Mr *Chikumbirike* sought clarification before raising the point *in limine*, he would have been advised and shown proof that Mr *Mutamangira* had properly been briefed by the Attorney-General. He would have realised that he had the requisite authority to represent the fifth respondent in these proceedings. He submitted that

this is not the first matter in which he has been briefed by the Attorney General to represent various other clients or parties.

Mr *Mutamangira* posed what he appeared to intend to sound as a rhetoric question. He asked whether Mr *Chikumbirike* meant by his submission that he would be disqualified from acting as a legal practitioner in circumstances where he had given legal advice to a board of directors.

On a perusal of the documents which are attached to the first respondent's opposing affidavits and which were referred to by Mr *Chikumbirike*, it appears clear to me that Mr *Mutamangira's* and his firm's involvement cannot for the purposes of these proceedings be said to be merely that of a legal practitioner. He has participated in the pertinent affairs at a level that precludes him from appearing for the respondents as a legal practitioner in these proceedings. One clear instance is the attendance at the meeting of 19 October 2010 already referred to above. Whilst in *Central African Building Construction Company (Pvt) Ltd v Construction Resources Africa (Pvt) Ltd* HH 112/2010 Gowora J was faced with a different scenario, it appears to me that the observation that she made at page 4 of the judgment can be made with the same aptness *in casu*. She said:

"... He (a legal practitioner) has aligned himself so closely with his client's case that this court can be forgiven for stating that he has displayed an interest in the case going beyond that of a legal practitioner."

Similarly, the reference by Mr *Chikumbirike* to *Bozimo Trade and Development Co (Pvt) Ltd v First Merchant Bank of Zimbabwe and Ors* 2000 (1) ZLR 1 (H) is also apposite. The headnote reads in part:

"*Held*, that the legal practitioner should be allowed to represent the company as agent of the company instead of its legal practitioner. He was entitled to represent the company as its agent as he was its *alter ego*, although he was not the sole or majority shareholder in the company. However, he had such a deep-seated perception of unfair play on the part of the respondents that he might end up prejudicing the applicant's case by representing the company. It would be better for him to hand over the case to legal counsel."

CHATIKOBO J at p4 of the judgment stated:

"....Although Mr Kara is neither the sole nor the majority shareholder in applicant, his association with and the extent of his interest in the applicant is such that he should be permitted to represent the applicant. Although he appeared before me robed as counsel, I ruled that he could only represent the applicant as its agent and he did so on that basis"

In the *Central African Building Construction Company (Pvt) Ltd* case (*supra*), GOWORA J stated at p 3 of the judgement:

“In *Bozimo Trade and Development Co P/L v First Merchant Bank of Zimbabwe and Ors*, 2000 (1) ZLR 1 CHATIKOBO J in considering an objection to the appearance as counsel in the matter before him by a chairman of the applicant opined that due to the relationship of the legal practitioner of applicant with the myriad affairs of the companies that he was chairman of and with whose legal brief the legal practitioner was seized he would not permit him to appear for the same counsel but would allow him to appear as an agent of the applicants.”

She proceeded at the same page:-

“...A legal practitioner’s duty is to protect the interests of his client and to give legal advice. It is not the function of the legal practitioner to then step into the shoes of the client and to perform acts that are materially related to the dispute before the court in an endeavour to buttress the case of his client...”

With regards to the affidavits attached to Masimirembwa’s opposing affidavit, in **The Civil Practice of the Superior Courts in South Africa** 3<sup>rd</sup> Edition (Hebstein and Van Winsen) at p 443 the following is stated:

“An affidavit should be sworn to before a commissioner of oaths who is independent of the office in which it is drawn. The court will not admit affidavits sworn to before an attorney or employee or partner of an attorney acting for the deponent, or a person having an interest in such affidavit”. (emphasis added)

The authors refer to a number of case authorities in support of the highlighted portion of the above quotation including *Hersman v Angilley* 1936 CPD 386 wherein DAVIS J stated at p 387:

“I said nothing about this affidavit yesterday because I wished to say nothing in a hurry and desired to have an opportunity to think it over and to consult my brother Judges.

This affidavit is objectionable from every point of view. In the first place it was taken before one of the partners of the firm of attorneys acting for the plaintiff. It has been stated in this Court time and again that that is an improper practice. I notice that as recently as the 11<sup>th</sup> November last in the matter of *Whyte’s Stores v Bridle N.O. and Others* (1936, T.P.D. 72), PITTMAN, J., had occasion to go into the matter somewhat fully, and came to the conclusion that an affidavit taken under these circumstances is not receivable as evidence. However that may be, clearly an affidavit should not be taken before a member of the firm who is acting in the case.”

The fact that the affidavits may have been commissioned at a time when no litigation was contemplated does not in my view detract from the undesirability of the firm in representing the respondents in these proceedings. If this had not been realised or appreciated when the defence of the respondents was assumed for purposes of this urgent chamber

application, one would have expected that as soon as the issue was raised by Mr *Chikumbirike*, a concession would have been readily made.

In the *Central African Building Construction Company (Pvt) Ltd* case the following is stated at p 5:

“It is important that a legal practitioner should at all time retain his independence in relation to his client and the litigation which is being conducted...”

It was also stated in *Chafada v Edgars Stores Ltd and Anor* 2005 (1) ZLR 299 at 300G, the following was stated:

“To my mind, it is highly undesirable to either attest to an affidavit or sign an urgent certificate for and on behalf of a client who is being represented by his firm as such lawyer clearly has an interest in the matter at hand”.

In my view, to the above statements may be added the age old saying that justice must not only be done; it must be seen to be done.

With regard to the representation of the fifth respondent Mr *Mutamangira* said that he has the Attorney General’s authority to so represent him. Mr *Chikumbirike* objected to the production of the said authority by Mr *Mutamangira* on the basis that the authenticity of the document would now be suspect as it was sought to be produced at a very late stage of the proceedings. In my view this particular aspect was not fully ventilated and insufficient information was placed before the court such as to enable it to make any pronouncement on it.

In conclusion, in relation to the other aspects discussed above it seems clear to me that Mr *Mutamangira* and the legal firm Messrs *Mutamangira & Associates* cannot properly be allowed to continue appearing as legal practitioners for and on behalf of the first and second respondents.

I therefore uphold the preliminary point raised by the applicant’s legal practitioner to the extent stated above.

*Chikumbirike & Associates*, applicant’s legal practitioners

*Mutamangira & Associates*, first, second and fifth respondents’ legal practitioners

*Hogwe, Dzimirai & Partners*.