

MINERALS IDENTITY (PRIVATE) LIMITED
versus
THE COMMISSIONER –GENERAL OF POLICE N.O
and
OFFICER IN CHARGE SUPPORT UNIT MAKOSA
INSP WELLINGTON NYAMUSHAMBA N.O
and
DEAN MUNYORO
and
DYNA MANDISEKA
and
MATHIAS MANDIWANZIRA
and
MR NDEMERA
and
MINISTER OF MINES AND MINING DEVELOPMENT
and
THE REGISTRAR OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 1 September 2020 and 7 October, 2020

Urgent chamber application to amend spoliation application

G. Madzoka, for the applicant
K. Gama, for 3rd-6th respondents
No appearance for 1st, 2nd, 7th and 8th respondents

CHITAPI J: This application is predicated on case No. HC 4276/20 which is an urgent application for an order of spoliation pending before PHIRI J involving the same parties. In the application before PHIRI J, the applicant herein prays against the respondents therein for an order of spoliation wherein the applicant prays to the court to order the respondents to restore to the applicant undisturbed possession of a mining claim Koo Doo 10 situate in Mudzi District. The

application was set down for hearing on 25 August, 2020. On that date the application was not determined. PHIRI J issued an order as follows:

“IT IS ORDERED THAT:

Direction is hereby given in this Urgent Chamber Application that:

1. The applicant lodge a chamber application to amend dates in terms of paragraph 3 page 2 of their answering affidavit on /or before the 26th August, 2020.
2. The respondents are given leave to file opposing papers thereof within forty-eight (48) hours of receipt of the chamber application.
3. Costs shall be costs in the cause.”

The present urgent application is purportedly made in compliance with PHIRI J’s order as quoted above. The applicant has filed this application and headed it “Urgent Chamber application for Amendment of Documents in urgent chamber application for a spoliation order in case no. HC 4276/20”.

The applicant has brought the application in the form of a prayer for a provisional order which is couched as follows:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made on the following terms:

1. The 8th respondent be and is hereby ordered to substitute Urgent chamber Application for a spoliation order documents under Case No. HC 4276/20 with those filed as attachment to the Urgent Chamber Application for Attachment of Documents.

INTERIM RELIEF GRANTED

Pending the return date of the provisional order, the application is granted the following relief.

1. The hearing of case No. HC 4276/20 proceed as if amendments to documents filed therein have been amended.”

It came as a surprise that I ended up presiding over a protracted hearing in an application that I had considered to be simple and straight forward. Due to the fact that the greater parts of arguments made by counsel were not assistive in the determination of the application I will determine the application by addressing the following issues:

- (i) The interpretation of PHIRI J order.
- (ii) Whether the order was complied with.
- (iii) Appropriate order to grant.

In relation to PHIRI J's order, the learned judge noted that there was inconsistency on dates which were deposed to by the applicant in the answering affidavit. It is not necessary for me to resolve the inconsistency since PHIRI J still has dispose of the main application case No. HC 4276/20 in which the inconsistencies arose. The learned judge decided to give directives on way forward. The learned judge directed the applicant to **“lodge a chamber application to amend dates in terms of paragraph 3 page 2 of their answering affidavit on or before the 26th August, 2020”**. In effect, the learned judge faced with disagreements of the parties on how to deal with the inconsistencies aforesaid directed the filing of a chamber application to amend. What was to be amended was simply the dates and nothing else in the answering affidavit. A time limit for filing the application was ordered being 26 August, 2020. The applicant filed the current application as directed in the order of directions by PHIRI J.

To expound more on the interpretation of the order, the learned judge did not order a substitution of the application before him by way of an amendment. The order is simple. It simply should be interpreted as the learned judge saying to the parties- “applicant, the dates in paragraph 3 page 2 of your answering affidavit are inconsistent. I grant you leave to revisit your answering affidavit and amend the dates.” You should if advised to abide the directive, apply to amend the dates by way of chamber application.” The leaned judge also gave leave to the respondents if they wished, to file opposing affidavits to the application if advised. In the event the respondents were minded to oppose, they had to do so within 48hours. The 3rd to 6th respondents filed their opposing affidavits on 31 August, 2020 after they were served with the application on 27 August, 2020.

The next issue is to consider is whether or not the applicant complied with the directive of PHIRI J. In other words, is the application before me in the nature of the application ordered by PHIRI J. The 3rd to 6th respondents counsel raised points *in limine* arguing firstly that the relief sought in the provisional order was incompetent, secondly that an affidavit cannot be amended and thirdly that the certificate of urgency is invalid.

The third to sixth respondents averred that it was incompetent to file an urgent chamber application because PHIRI J had directed that the applicant file a chamber application *simpliciter*. There is no merit in this objection. A chamber application and an urgent chamber application are both applications which are placed before the judge in chambers for determination. It was not

necessary for the learned judge to specify whether or not the application be by way of urgent chamber application or ordinary application. The chamber application ordered by PHIRI J to be filed was *sui generis*. The learned judge directed the filing of the application in the course of presiding over an urgent application. The order in terms of times lines for filing the application and its opposition was very short and intended to have the main application expeditiously or urgently dealt with. The applicant was on 25 August, 2020 ordered to file its application by the following day and the respondents to file opposing papers by no later than 48hours thereafter. The application was clearly an interlocutory one intended to deal with a matter which arose in the course of a hearing. Such applications would ordinarily be dealt with by the same judge dealing with the main urgent application. *In casu* however, the 3rd and 4th respondents took issue with PHIRI J determining this application. They wrote a letter dated 27 August, 2020 wherein they *inter alia* objected to the applicant's legal practitioner's request to the Registrar to place the application before PHIRI J. There was no basis to take issue with the applicants' request. PHIRI J is the one who had been seized with the matter that gave rise to the interlocutory application. As a matter of procedure an interlocutory matter arising in the course of proceedings is resolved by the same judge unless that judge for good reason decides not to deal with the interlocutory application.

The other objection taken to PHIRI J dealing with the applications was that the learned judge had before ordering the filing of the chamber application for amendment intimated to the parties during the stayed hearing that the corrections which the applicant intended to make were "well conceived" and "in order". The objections to both the request by the applicant that the application be set down before PHIRI J and that the learned judge should recuse himself were contained in letters dated 27 and 25 August, 2020 respectively, addressed to the Registrar and the second letter similarly addressed albeit for the attention of the learned judge. I do not propose to dwell on these letters nor with arguments presented to me in regard to the letters at the hearing *in casu*. I have already indicated that the interlocutory application whether or not the applicant's legal practitioners had requested for its placement before PHIRI J or not, remained an interlocutory in a matter being an application to be dealt with by PHIRI J. If placed before another judge, that other judge would have referred it to PHIRI J. However in this matter, PHIRI J after receiving the letter requesting him to recuse himself directed the registrar to place the application

before another judge in view of the protest letter. I note that the practice where recusal of the judge arises as an issue is normally informally dealt with by legal practitioners seeking the audience of judge in chambers and expressing their clients positions on recusal. In this regard I would for posterity quote the remarks of TURNER J in *Mely v Friends Life Limited* [2017] EWHC 2415 (QB) wherein the learned judge stated-

“Despite resolution, lawyers will also be aware that numerous judges today are fond of making informal remarks or asking questions in preliminary or interlocutory hearings about the possible merits or elements of a party’s case. This is often done in the hope that parties see sense and seriously (re) consider resolving their dispute out of court. It is unlikely that such remarks would provide sufficient grounds for a recusal application”

I have quoted the above case for posterity because PHIRI J recused himself and there is therefore no issue arising on recusal. In commenting that the applicants were not wrong to request for placement of the application before PHIRI J, it must be appreciated that the learned judge could have resolved the issue of the inconsistencies by calling the deponent in terms of order 33 r 246 (1) (a) to explain the anomaly. Rule 246 (1) (a) gives power to a judge dealing with both an ordinary chamber application or an urgent chamber application to “require the applicant or deponent of any affidavit or any person who may, in his (judges) opinion be able to assist in the resolution of the matter...” to appear before the judge and give such information on oath or otherwise as may be considered necessary to resolve the matter. There was scope for the learned judge to have invoked the rule. That said, needless to state that the direction by the judge that the inconsistencies in the answering affidavit be dealt with by chamber application was within the learned judge’s direction to order. The point I make at the end of the day is that, the application would have been properly dealt with by PHIRI J as it was an interlocutory application dealing with an issue which arose in the course of proceedings being heard by him.

The side comments aside, I must determine whether the application which has been placed before me complies with PHIRI J’s order. In other words does the applicant apply to amend the answering affidavit, more specifically para 3 thereof as directed by the judge or the application falls outside the limited parameters and scope given in the learned judge’s order. The third to fourth respondents objected to the nature of the application and argued that it did not flow from PHIRI J’s order. Mr *Gama* strenuously argued that the application was now in the form

of an application for a *mandamus* as opposed to it being for an amendment of the answering affidavit. The third to sixth respondents in this regard have raised a valid point.

The applicants have joined the Registrar as eighth respondent in this application. They seek as a final relief that the Registrar should substitute the application pending before PHIRI J HC 4276/20 with those filed in this application. Clearly such an order is incompetent. The obvious question that arises is, what happens to the original papers in regard to which PHIRI J made an order that the answering affidavit be reconciled on dates by way of an application for an amendment of that particular affidavit. The interim relief sought is for an order that the hearing of the application before PHIRI J should proceed on the documents which pertain to this application. Both the final and interim orders sought do not find a basis in the interlocutory order by PHIRI J which was an order to the applicant to apply by chamber application to amend a specified paragraph of the answering affidavit in the main application.

If one carefully interrogates PHIRI J's order, the learned judge did not authorize a substitution of the papers filed of record in the application HC 4276/20 pending before him. The learned judge authorized an amendment to the answering affidavit. It is not even clear as to why the applicant prays for a provisional order. Related to this, I must take note that the bringing of the application by way of urgent application did not violate PHIRI J's order. After all the main application before the learned judge was an urgent application. Any interlocutory application arising would have to be dealt with as a urgent matter. The third to sixth respondents' objections in this regard are without merit. That said, the applicant would have been within the terms of PHIRI J's order had it simply asked the deponent to the answering affidavit to depose to an affidavit explaining the inconsistencies of dates cited in para 3 of the answering affidavit. The draft order would simply have been to pray to the judge to grant the amendments to para 3 of the answering affidavit and the main matter proceeds to be finalized.

I am in no doubt that the applicant was not properly advised on the purport, meaning or sense of the interlocutory order of PHIRI J. The learned judge was faced with an answering affidavit with contradictory dates. The learned directed that a chamber application be filed by the applicants to explain and amend the anomalies. The learned judge would then determine the chamber application before disposing of the main application. There was no scope for the filing of an application which asks for a provisional order. An urgent application can be made for a

final order. The circumstances of each case will determine whether the applicant is entitled to a final or a provisional order.

Another objection made by Mr *Gama* was that an affidavit cannot be amended. I do not agree. Mr *Gama* relied on the judgment of MULLINS J in *Nedbank Ltd v Hoare* [1988] 3 All SA 193 CE) in which the learned judge quoted r 28 (1) of the South African rules of court which provides that-

“Any party deserving to amend any pleading or document other than an affidavit, filed in connection with any proceeding may give notice to all other parties to the proceedings of his intention to amend.”

There is no similar provision in the Zimbabwe High Court Civil Rules, 1971. Even then the quoted South African Court rule does not state that an affidavit cannot be amended. The rule speaks to pleadings being capable of amendment on notice to other litigants by the litigant seeking to amend. It is trite that in application proceedings, the affidavits take the place of both pleadings and evidence. Affidavits constitute evidence on oath. It follows that inasmuch as a witness testifying in court on oath can revisit his or her evidence to correct him or herself, errors made in affidavits can also be corrected. Such correction would have to be by way of affidavit. Rule 235 of the High Court Rules provides for filing of further affidavits after the answering affidavit, with leave of the court or judge. This procedure provides a window for the filing of further affidavits which may *inter-alia* correct errors in the founding, opposing and answering affidavits. Mr *Gama* accordingly did not properly capture the law on revisiting or correcting affidavits. It is noted as well that PHIRI J by his order allowed for such a course. The objection thereof could only be taken up on appeal.

I do not find it necessary to deal with the third to sixth respondents’ objection to the validity of the certificate of urgency which accompanied this application. The objection does not take the matter any further in view of my determination that this application as presented did not flow from the interlocutory order of PHIRI J which remains extant and not complied with. There is equally no reason to get into the merits of this application since it is not in the nature of what PHIR J ordered it be done.

The last issue concerns costs. The third to sixth respondents pray for costs on the higher scale. A party who claims costs on the higher scale must justify the justiciability for such level of

award. The third to sixth respondents have not justified such a scale of costs except to simply pray for the dismissal of the application with costs on the higher scale. The party who prays for such level of costs must set out facts which are out of the ordinary to justify that a higher level as opposed to the ordinary scale level of costs is justified. In the absence of such facts being alleged and proved, the court does not just grant a scale of costs which is punitive. Whilst costs are in the discretion of the court, any discretion can only be judiciously exercised in the light of established and proven facts which would then inform and support the decision reached. In the absence of the third to sixth respondents justifying the punitive level prayed for, costs must be granted on the ordinary scale and will follow the result.

It is consequently ordered as follows:

1. The application be and is hereby struck off the roll with costs.

Chinawa Law Chambers, applicant's legal Practitioners
Gama and Partners, 3rd – 6th respondents' legal practitioners