

DISTRIBUTABLE (26)

(1) MINE MILLS TRADING PRIVATE LIMITED (2)
CHARLES CHISANGO (3) KEVIN MAKONI
v
NJZ RESOURCES (HK) LIMITED

**SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & GUVAVA JA
HARARE, JANUARY 31, 2014**

T Magwaliba, for the appellant

S Chihambakwe, for the respondent

GUVAVA JA: This is an appeal against the whole judgment of the High Court dated 9 October 2013. At the hearing of the matter it was the view of the court that the appeal lacked merit and it was dismissed with costs. We advised that the full reasons for our decision would follow. These are they.

The appeal was pursuant to an order granted by the High Court following the filing of an urgent chamber application in which the NJZ Resources (HK) Limited (applicant in the court *a quo* and hereafter referred to as NJZ) sought an order that certain items of machinery or equipment and motor vehicles which were in the possession of Mine Mills Trading Private Limited (respondents in the court *a quo* and hereafter referred to as Mine Mills Trading) be delivered to the Deputy Sheriff for safekeeping pending the determination of a dispute between the parties.

The background to this matter may be summarised as follows. Mine Mills Trading is a limited liability company incorporated in Zimbabwe. Its address for service is No 206 Teresa Close, Groombridge, Harare. The second and third respondents are both directors of the company. The NJZ is a foreign limited liability company incorporated in accordance with the laws of Hong Kong. Its address for service is 7 Lawson Avenue, Milton Park, Harare Zimbabwe. In January 2010 and in Hong Kong the parties entered into an agreement whereby NJZ sold and delivered machinery and equipment to Mine Mills Trading as well as providing short term bridging finance loan. The total indebtedness of Mine Mills Trading to NJZ was in the sum of US\$ 1 558 068.53. It was an agreed term of their contract that this amount was to be repaid in twelve equal monthly instalments. Mine Mills Trading was further given a grace period of eight months before the payments became due. It was alleged before the court *a quo* that Mine Mills Trading had failed or neglected to make the payments in accordance with their agreement. NJZ thereafter instituted proceedings in the High Court in case HC 2111/13 for the recovery of the machinery or equipment and the motor vehicles from Mine Mills Trading. The matter is pending before the High Court.

NJZ also instituted an urgent chamber application before the High Court for an order to secure the machinery or equipment and the motor vehicles from wear and tear and the possibility of an accident. At the hearing of the urgent application the court *a quo* gave two judgments. The first judgment was issued by the court *a quo* on 29 May 2013 and related to a number of preliminary points which had been raised by Mine Mills Trading. Following the judgment of the court *a quo* dismissing the preliminary points the matter was set down for argument on the merits. Judgement on the merits was handed down on 9 October 2013. It provided as follows:

1. That pending the final determination of this matter the respondents shall deliver all the machinery or equipment set out in annexure “A” to applicant’s founding affidavit, and the motor vehicles (i.e. black Isuzu, white Isuzu and a Lupo) to the Deputy Sheriff of Zimbabwe, Harare within forty eight (48) hours of service of this Order, failing which the Sheriff of Zimbabwe or his lawful Deputy, with the assistance of the Commissioner General of Police, and each and every member of the Zimbabwe Republic Police shall be authorised and empowered and ordered to give effect to this order.
2. That the machinery or equipment and the motor vehicles specified in para (1) above shall be parked or stored at the premises of Ruby Auctions (Harare) or the Vehicle Inspection Depot, Harare under the control or supervision of the Sheriff of Zimbabwe or his lawful Deputy, until the final determination of this case.

Mine Mills Trading filed a Notice of Appeal on 11 October 2013 against the whole judgment that was granted by the High Court on 9 October 2013. Mine Mills Trading set out eight (8) grounds of appeal. The first five grounds related to the preliminary points that were determined by the court *a quo* on 29 May 2013. It was submitted by Mr *Magwaliba* that there was no requirement for him to seek leave from the court *a quo* to appeal against the interlocutory order. He submitted, firstly, that the judgment of 29 May 2013 was a mere ruling which was not appealable even with leave. He relied on the case of *Mwatsaka v ICL Zimbabwe* 1998 (1) ZLR 1. He opined that on the basis of that judgment he could appeal against both the interlocutory ruling and the judgment on the merits without seeking leave of the court *a quo*. It was however the unanimous view of the Court that the judgment of 29 May 2013 was not a ruling but a judgment and therefore could only be

appealed against provided Mine Mills Trading complied with s 43 of the High Court Act [Cap 7:06]. Section 43(2) which provides that:

“(2) No appeal shall lie –

(d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases-

(i) where the liberty of the subject or custody of minors is concerned;

(ii) where an interdict is granted or refused

(iii) in the case of an order on a special case stated under any law relating to arbitration.”

As no application for leave had been made to the court *a quo* and the case did not fall within the exceptions set out above it was the view of the court that the submission was without merit.

It was submitted by Mr *Magwaliba* that it was not necessary to apply for leave from the court *a quo* because he was appealing against both judgments which were made by the court *a quo*. However it was quite evident from the notice of appeal that there was only a specific reference to an appeal against the judgment of 9 October 2013.

We were of the firm view that his argument could not be sustained as the Notice of Appeal did not comply with r 29(1) (a) of the Supreme Court Rules, 1964. Rule 29 which provides that:

(1) Every civil appeal shall be instituted in the form of a notice of appeal signed by the appellant or his legal representative, which shall state-

(a) The date on which , and the court by which, the judgment appealed against was given;

- (b) If leave to appeal was granted, the date of such grant;
- (c) Whether the whole or part only of the judgment is appealed against;
- (d) The grounds of appeal in accordance with the provisions of rule 32;
- (e) The exact nature of the relief which is sought
- (f) The address for service of the appellant or his attorney.

In the case of *Jensen v Acavalos* 1993 (1) ZLR 216 (s) at 220 A-B this Court held that a notice of appeal which does not comply with the above rule is fatally defective and invalid. Mine Mills Trading stated in their notice of appeal that it was appealing against the judgment of 9 October 2013. The judgment of 29 May 2013 was not mentioned at all. If Mine Mills Trading had wished to appeal against both judgments then it should have stated this in the notice of appeal.

It was for the above reasons that the court ruled that the grounds of appeal relating to the judgment of 29 May 2013 were not properly before it and declined to hear argument in relation to grounds 1 to 5. The court proceeded to hear argument on grounds 6, 7 and 8 which were set out in the Notice of Appeal as follows:

- “6. The court *a quo* erred in finding that the Respondent had established that it was the owner of the property in dispute.
- 7. The court *a quo* misdirected itself in finding that the interdict sought by the Respondent fell within the class of interdicts known as anti-dissipation.
- 8. Further, the court *a quo* misdirected itself in holding that the Respondent had established the essential requirements for anti-dissipation interdict. The court failed to exercise its discretion judiciously in that regard.”

Having failed on the arguments in the preliminary issues Mr *Magwaliba* did not pursue with any vigour the grounds set out above. Indeed he would have been hard pressed to do so as the stance adopted by the court *a quo* was unassailable.

With regard to the ground that the court *a quo* had misdirected itself in finding that NJZ was the owner of the property in dispute, an examination of the judgment by the court *a quo* shows that it did not make a finding that NJZ was the owner of the property. The court was alive to the fact that the matter was to be determined in another case which was not before it. At p 2 of the cyclostyled judgment it was stated as follows:

“It is clear that the applicant is the source of the property in dispute. It has not been paid anything for the use of the property. In the absence of a clear demonstration of the capacity to pay compensation the respondents’ continued use of the property without any payment of either the purchase price or rentals is likely to lead to irretrievable prejudice to the applicant in the event that they lose in the main case. “

With regard to the seventh and eighth grounds that the court *a quo* erred by finding that the interdict sought fell into the class of interdicts known as anti-dissipation and that the court had failed to exercise its discretion judiciously it was our view that the reasoning of the court *a quo* dealt effectively with the point. These grounds, in our view, could only be dealt with together. The court *a quo* stated as follows:

“The applicant’s claim falls within the class of interdicts known as anti-dissipation interdicts which translates into a prohibitory interdict. All what the applicants has to prove in order to succeed is that it has a prima facie case as observed by CHATIKOBO J in *Bozimo Trade & Development Co P/L v Merchant Bank of Zimbabwe & Ors* 2000 (1) ZLR 1 (H) On the papers before me I am satisfied that the applicant has on the face of it discharged the onus on a balance of probabilities ...”

The above cited case highlighted that the requirements for an anti- dissipation interdict are the same as those for a prohibitory interdict. The applicant must establish that it has a prima facie right, even if open to doubt, that an infringement of such a right is

imminent, that it will suffer irreparable harm if the interim relief is not granted, that there is no other satisfactory remedy and that the balance of convenience favours the grant of such an interdict. It was our view that the acceptance that NJZ had provided the funds for the purchase of the machinery or equipment and the motor vehicles was sufficient to establish proof on a balance of probabilities that it had a prima facie right to the property. Although there was submission by Mine Mills Trading that all it owed was money for the purchase of the property which now belonged to it, this issue is obviously a point that is the subject of litigation currently before the court *a quo*. It was also clear that the court *a quo* was mindful of the fact that the grant of the order would lead to loss of business and employment but was of the view that this could not justify the irreparable prejudice that the applicants would suffer in the event that the respondents were to lose in the main case. Clearly the court *a quo* was concerned with preserving the property so that the judgment of the main case would not be a *brutum fulmen*. Such an approach cannot be faulted as the property is mining property and is subject to ordinary wear and tear. With regards to the motor vehicles it is not beyond human experience that they could be involved in accidents. It was our view that the court *a quo* had exercised its discretion properly as NJZ had established on the facts that there would be irreparable harm if the interdict was not granted. Mine mills Trading had already failed to make any payments in terms of the agreement. There was thus no other satisfactory remedy available to NJZ.

It was for these reasons that this court came to the inescapable conclusion that the appeal was devoid of merit and the balance of convenience favoured the grant of the interdict.

The court made the following order:

The appeal is hereby dismissed with costs.

MALABA DCJ:

I agree

GOWORA JA:

I agree

Wintertons, 1st, 2nd & 3rd appellants' legal practitioners

Chihambakwe Mutizwa & Partners, respondent's legal practitioners