REPORTABLE (32)

MARANGE RESOURCES (PRIVATE) LIMITED
v
(1) CORE MINING & MINERALS (PRIVATE) LIMITED (IN LIQUIDATION),
(2) MOSES CHINHENGO, (RETIRED JUDGE) N.O,
(3) PRESIDENT OF THE LAW SOCIETY OF ZIMBABWE N.O
(4) ATTORNEY GENERAL OF ZIMBABWE N.O.

SUPREME COURT OF ZIMBABWE
BEFORE: MALABA DCJ, HLATSWAYO JA AND GUVAVA JA
HARARE, 11 FEBRUARY 2014 AND JULY 22, 2016

T Mpofu, for the Appellant

L Uriri, for the first Respondent

No appearance, for the second to fourth Respondents

HLATSWAYO JA: This is an appeal against the whole judgment of the High Court of Zimbabwe. The order sought to be impugned reads as follows:

> "I am not satisfied that the matter is urgent. This application fails. It will not be necessary to decide all the other issues raised. In the result, the application is dismissed with costs on an Attorney and Client scale."

The chronicle of events are common cause and succinctly set out in the judgment *a quo*.

A joint venture and shareholders' agreement was entered into on 14 August 2009 between Marange Resources (Pty) Ltd (the appellant), the Zimbabwe Mining

development Corporation (ZMDC) and Core Mining and Mineral Resources (Pty) Ltd. A dispute then arose between the parties over the participation of the first respondent (Core Mining and Mineral Resources (Pty) Ltd) in the affairs of the joint venture company. The appellant's position was that the agreement between the parties was void *ab initio*. The first respondent, on the other hand, arguing for the upholding of the compact, filed an application under HC 8410/10 seeking an order declaring the agreement valid. On 10 February 2012 the first respondent was placed under winding up by an order of a South African Court and joint liquidators were duly appointed. At the instance of the liquidators, the first respondent's legal practitioners addressed a letter to the appellant with a request for negotiations within a 30 day period. Having heard nothing from the appellant or its legal practitioner within the 30 day period, the first respondent wrote a letter dated 27 November 2013 to the Commercial Arbitration Centre requesting three names of arbitrators so that they could choose one. Negotiations to appoint an arbitrator failed resulting in the first respondent's legal practitioners writing a letter to the third respondent (President of the Law Society of Zimbabwe) who then appointed the retired Judge, Moses Chinhengo, the second respondent, as arbitrator.

On 12 April 2013 a pre-arbitration meeting was convened which the appellant boycotted. The meeting, however, proceeded and preliminary issues were identified and an order was made directing parties to file submissions. On the 23 April 2013 appellant filed an urgent application in the court *a quo* seeking to interdict the arbitration proceedings. The court *a quo* held that the matter was not urgent and in any event the appellant had other available remedies under the Arbitration Act [*Chapter 7:15*]. Subsequently, the appellant requested to be heard on an urgent basis which request was granted.

At the hearing the appellant raised a preliminary issue of whether first respondent was properly before the court given the mis-citation of first respondent. The matter is outlined in the judgment as follows:

> "The first respondent's first preliminary point relates to the citations of the respondent. *Mrs Mtetwa* submitted as follows. The first respondent has been cited as Core Mining and Minerals (Pvt) Ltd (In Liquidation). The final winding order from the Gauteng High Court refers to a company cited as Core Mining and Mineral Resources (Pty) Ltd …. This application was served at *Messrs Mtetwa and Nyambirai* ostensibly as representatives of the first respondent. She (*Mrs Mtetwa)* submitted that Core Mining and Minerals (Pvt) Ltd (In Liquidation) is not a party to these proceedings and is not represented by the said law firm. The first respondent is a South African registered company and it has been (wrongly) cited as Core Mining and Minerals (Pvt) Ltd (In Liquidation) instead of Core Mining and Mineral Resources (Pty) Ltd. Although it is apparent from communication regarding the arbitration proceedings that the company involved is Core Mining and Mineral Resources (Pty) Ltd, the applicant cited the company as a (Pvt) company. The first respondent conceded that the citation of Core Mining as a (Pvt) company by the applicant was in error and that this was a common error as even the arbitrator made the same error in the pre-hearing meeting minutes …. The respondent has no objection in having the error corrected. The applicant has declined the offer to rectify its papers and amend the citation. The first respondent submitted that the applicant has adopted the illogical position that its own self-created error in the citation of first responded entitles it to the relief on the basis that there is no opposition before the court. The first respondent maintained that the application is a nullity on the basis that first respondent is a non-existent company and their intervention is to protect their client's interests and is permissible under the rules of court." at page 4

Upon the appellant's refusal and failure to amend its papers and on the strength of the decision in *Mudzengi & Ors v Hungwe & Anor* 2001 (2) ZLR 1275 at 182-D-E, the court held that the appellant could not benefit from its wrong doing as it failed to amend its papers despite an invitation by the first respondent to do so. The court went on to state that even if it was wrong on the preliminary point, the matter was still not urgent hence its dismissal of the matter was inevitable. Aggrieved by the decision *a quo*, the appellant approached this court on the following grounds:

1. Having found as she did, albeit wrongly, that the matter is not urgent, the leaned judge erred in dismissing the whole cause and not striking it off the roll.
2. The learned judge erred and misdirected herself in dismissing the Urgent Chamber Application on the ground that it was not urgent when she had already delved into the merits of the matter and ought to have made a decision on the merits.
3. The court *a quo* erred and fell into error at law by making a finding that the application was properly opposed in the absence of the authority required at law for a *peregrinus* company in final liquidation to institute or defend proceedings.
4. The court *a quo* erred and misdirected itself in failing to find that the matter was urgent that the need to act arose on the 23 April being the date by which the illegality which appellant complained of manifested.
5. The learned judge erred in making a finding that an arbitrator has the power to determine the validity or otherwise of an agreement in terms of which he is appointed, which determination could only be made by the court.
6. The court *a quo* grossly misdirected itself in countenancing the abuse of its process by the arbitrator in that he proceeded with the hearing notwithstanding the pendency of the matter before the High Court and so erred in failing to confirm the interim order which it had previously granted on the 10 of May 2013.
7. The court *a quo* erred in failing to make a finding that applicant had properly cited the first respondent as the party who had instituted the arbitration proceedings which were subject to the Urgent Chamber Application.
8. The learned judge seriously misdirected herself in dismissing the application with a punitive order as to costs without any justifiable basis for so doing.

The relief sought by the appellant is crafted as follows:

Appellant seeks the following relief:

1. That the instant appeal succeeds with costs.

2. That the judgment of the court *a quo* be overturned to read as follows:

> "Pending the final determination of Case No HC 8410/10 and criminal trial under Case No CRB/10, 1st, 2nd, 3rd and 4th Respondents be and are hereby interdicted from instituting and proceeding with Arbitration Proceedings in terms of the Joint Venture Agreement and Shareholders Agreement between the applicant and the 1st Respondent dated the 14th of August 2009 that the applicant is a party (to)."

It is critical to point out that the relief sought above is not in line with the order of the court *a quo* impugned in the appeal. The operative part of the judgment *a quo* dismissed the application on the basis that it was not urgent. In the relief sought in this appeal, the appellant does not pray for the substitution of the decision *a quo* with an order reflecting that in fact the matter was urgent as would have been expected. The relief sought has no *nexus* with this ground of appeal. In fact, the relief sought would, if granted, have the effect of interdicting all respondents, which decision relates to the merits of the case and which merits a court deciding on urgency alone must not make an order on. See *Air Zimbabwe (Private) Limited (2) Air Zimbabwe Holdings (Private) Limited v Stephen Nhuta & Others* SC 65/14. If the relief was based on the ground that the court *a quo* should have decided the matter on the merits, having delved into the dispute, then this should have been made clear or such relief should have been couched in the alternative.

The relief sought by the appellant also forcefully brings to the fore the issue of mis-citation once more. Mr. *Mpofu*, for the appellant, devotes the first five pages of his 11-page heads of argument to this point, twisting and turning the argument to urge the conclusion that the matter must be disposed of as undefended.

However, the undeniable fact is that the appellant seeks to have the terms of the joint venture and shareholding agreement entered into by a party whose proper and correct citation it assiduously refused to effect, affected by the order of this court. That proper party is technically not present in these proceedings except to the extent of protecting its interests which it is entitled to do in terms of rules of court. It is common cause that the appellant in the court *a quo* cited the first respondent as CORE MINING AND MINERALS (PVT) LTD instead of CORE MINING AND MINERAL RESOURCES (PTY) LTD. Called upon to amend the mis-citation, the appellant flatly refused even when assured that such an amendment would not be resisted. It is clear on the record that the party which the appellant would not name, i.e., resists to properly cite, is the only party on liquidation and its identity is stated in the liquidation order. The appellant has no qualms in using the fact of a liquidation to silence the director of the first respondent on the basis that he cannot represent a company in liquidation and yet refuses to acknowledge the true identity of the very entity in liquidation! In my view, this kind of sophistry, which the respondent, in the light of the parties' previous dealings characterises as "convenient amnesia", comes very close to what has been termed 'fraudulent diligence in ignorance'.

The subsequent action of the appellant of seeking to have the matter disposed of as unopposed on the basis of its own failure to properly cite the first respondent is the kind of abuse of court process which I had occasion to remark about in the case of *Mudzengi & Others v Hungwe & Another* 2001 (2) ZLR 179 (H) at 182 D-E, thus:

> "I found this to be a rather startling and unusual objection, coming as it did from a party that had cited the Respondents in the first place as having the necessary *locus standi* to defend the application. Surely, an applicant who cites a party lacking in legal authority cannot rely on that incapacity to have the matter resolved in his favour. Rather, if the applicant knowingly cites a party lacking in *locus standi*, then the matter will not be properly before the court and it must be dismissed with costs on a higher

> scale. Ordinarily it would be the Respondents who would raise their own lack of capacity, or indeed applicant's lack of capacity, as a defence in *limine*."

In raising the preliminary point of its own mis-citation of the first respondent and seeking to benefit from the same, the appellant, the very party who had refused to correct the mis-citation, undoubtedly seeks to benefit from its own wrong. This court has had occasion to reiterate on the common law position that no one maintains an action arising out of his own wrong. See *Standard Chartered Bank Zimabbwe Ltd v Matsika* 1997 (2) ZLR 389 (SC). Thus, the court *a quo* was quite correct in holding that the citation of the first respondent as a Private Limited (Pvt) company instead of a Proprietary Limited (Pty) company was a material mis-description resulting in an existing company being incorrectly cited or a wrong party being brought to court. (Pvt) denotes a private company as envisaged under Zimbabwean law whilst (Pty) denotes a proprietary company as described under South African Law.[1]

The need for the proper citation of parties is highlighted in, Cilliers, A.C. et al in *Herbstein & van Winsen's The Civil Practice of the High Courts of South Africa*, 5th ed, vol.1 page 143 as follows:

> "Before one cites a party in a summons or in application proceedings, it is important to consider whether the party has *locus standi* to sue or be sued (*legitima persona standi in judicio*) ***and to asceratain what the correct citation of the party is*.***"*** (emphasis added)

Expounding on the same theme, the writer, Peter van Blerk, in *Legal Drafting: Civil Proceedings*, Juta and Company Ltd, 2014, remarks:

[1] Companies Act (Act No. 71 of 2008) section 11(2)(b)(i).

> "Generally speaking, it is the practitioner representing the plaintiff who is required to take the initiative in identifying parties to the action. This function must also receive the consideration of the defendant's legal practitioner. It happens from time to time that, to use the colloquial expression, the plaintiff has sued the 'wrong party' or even, although less frequently, that the 'wrong plaintiff' has sued. A practitioner faced with one or the other of these situations must identify precisely what has occurred. In the case of the so-called 'wrong defendant', the first question to be asked is on whom the summons was served. Is it the party cited in the summons? If so, the second question is whether the cause of action relied upon by the plaintiff is one that lies against the defendant cited by the plaintiff. If the party served with the summons is correctly described (ignoring spelling errors or minor immaterial mistakes), then one should admit the allegations concerning the identity of the defendant and deny the appropriate allegations regarding the cause of action. If the description of the defendant clearly does not apply to the person on whom the summons is served, the person served has, technically speaking, no duty to oppose the proceedings." At page 13.

The present matter before the court is one where the description of the respondent does not apply to the person on whom process was served and therefore, technically speaking, on whom no duty to defend the proceedings arises, but for the obvious compromise of the first respondent's interests as already noted in the terms of the draft order sought and the consequent entitlement to intervene.

As for the legal consequences of wrong citations, understandably very few situations of 'wrong defendants/respondents' or 'wrong plaintiffs/applicants' have had to be decided in our jurisdiction, as such errors, I believe, are routinely rectified in consultation between the parties. *See* also, for comparison, Paterson TJM, *Eckard's Principles of Civil Procedure,* Juta and Company Ltd, 2005, 5th ed(2012) p.184 where it is stated: "In the event of these pleas (non-joinder and mis-joinder) being successful, the court will order a stay in the proceedings so that the pleadings can be amended so as to bring the proper parties before the court."

The case of *CT Bolts (Pvt) Ltd v Workers Committee* SC 16/12 involved a 'wrong respondent' and it was held that a "workers committee" "not being a legal *persona*, is not properly before this court. The proceedings before the Labour Court and prior to that, the arbitrator, were similarly void".

Again a wrong party, this time an applicant, sued in *Gweru Water Workers Committee v City Of Gweru* SC 25/15 and MALABA DCJ remarked as follows:

> "The appellant claimed on behalf of the employees. A worker's committee can only represent the interests of the employees who appointed or elected it at the workplace. It cannot substitute itself for the employees and claim their rights in litigation. The right to sue accrues to the employees and the employees in their individual capacities can enforce the rights. The employees would be claiming rights under contracts of employment with their employer. A *universitas personarum* would not have a right to sue for those rights when it is not privy to any of the contracts of employment. Representation in terms of s 24(1) of the (Labour) Act does not mean that a person or body would have the right to substitute itself in place of the employees as a party to proceedings."

Thus, the fate of an application where a wrong party is cited is clear. The proceedings cannot be sustained. *In casu*, the wrong citation was compounded by the appellant's stubborn refusal to rectify the error even when assured by the other side that such an application would not be opposed. This application should therefore suffer not only the general fate consequent upon such errors, but also an exemplary order of costs wrought by the appellant's unhelpful attitude. The other matters raised in the appeal necessarily fall away in the light of this conclusion.

Accordingly, the appeal not being properly before this court, it is hereby ordered as follows:

1. The appeal is struck off the Roll.
2. The appellant shall pay to Core Mining and Mineral Resources (Pty) Ltd (In Liquidation) as represented by Mtetwa and Nyambirai Legal Practitioners the costs of this appeal on the legal practitioner-client scale.

MALABA DCJ: **I agree**

GUVAVA JA: **I agree**

Chambati & Matake Attorneys, appellant's legal practitioners

Mtetwa & Nyambirai, respondent's legal practitioners