

THE RIGHT INVESTMENTS (PRIVATE) LIMITED
versus
GILBERT MUPONDA
and
NYASHA WATYOKA
and
KUNZE KWAYEDZA ENTERPRISES (PRIVATE) LIMITED
and
PHILLIPA ANN COUMBIS
and
THE REGISTRAR OF DEEDS
and
THE REGISTRAR OF COMPANIES AND OTHER BUSINESS ENTITIES

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 15, 16, 28 November & 7 December 2022

Urgent Chamber Application

T Nyamakura, with him *J Makiya* for the applicant
C Bare, for the 1st & 2nd respondents
S Muzondiwa, for 3rd respondent
B Maunze, for 4th respondent
No appearance for 5th & 6th respondents

ZHOU J: This is an urgent chamber application for an order suspending the execution of the judgment granted in Case No HC 5385 B/22 pending the determination of an application for its rescission filed under HC 7557/22. The applicant also seeks an order interdicting the first and second respondents from acting as its directors, shareholders or officers pending determination of the application for rescission of the judgment. Costs are being sought against any party that opposes the application while there is a proposal for each party to bear its own costs for those that have not opposed it.

The application is opposed by the first and second respondents.

On 15 November 2022 the matter was postponed at the instance of the first and second respondents to enable them to file their opposing papers. Applicant advised on that day that it was withdrawing the application against the fourth respondent with a tender of costs. The withdrawal and tender of costs were accepted by the fourth respondent through counsel. Third respondent advised that it was not opposing the application. The matter was postponed to 16 November 2022. On this date the parties argued the objections *in limine*. I dismissed all the objections, and advised that the reasons for the dismissal would be contained in the final judgment. After the determination on the objections *in limine* the matter was postponed to 28 November 2022 for argument on the merits. The postponement was at the request of the applicant whose counsel was not available owing to some prior commitments.

The preliminary objections raised by the first and second respondents are that (a) the individuals purporting to represent the applicant are not authorized to represent it; (b) the resolution attached to the founding affidavit is invalid, (c) the matter is not urgent; (d) there is material non-joinder; and (e) the draft order is fatally defective because it is not in the form of a provisional order. These preliminary objections will be dealt with not necessarily in the order in which they were presented.

Urgency

The respondent's contention is that as at 13 October 2022 the deponent to the founding affidavit was already aware of the fact that the first and second respondents were the directors of the applicant. The respondents base their contention on the complaint of fraud which they made against the deponent to the founding affidavit around 13 October 2022. The application *in casu* was not prompted by the report to the police. It was triggered by the knowledge of the order that was obtained by the respondents ostensibly acting on behalf of the applicant on 14 September 2022. The applicant has stated through the deponent to the founding affidavit that it only became aware of that order on 26 October 2022. The instant application was filed on 8 November 2022 about thirteen days after the deponent became aware of the judgment. The period of thirteen days does not deprive the matter of its urgency. For these reasons the objection must fail.

Whether the proceedings have been authorized by the applicants.

The respondent's case is that the deponent to the founding affidavit is not a director of the applicant. This objection goes to the very essence of the dispute between the parties. It cannot be resolved by reference to form. The substantive dispute is about the directorship and shareholding of the applicant. While it would have been preferable for the individuals who are involved in the dispute to be the parties, their non-participation does not invalidate the application. The applicant's case, as presented, is that it did not participate in the order that was granted in HC 5385B/22 because it never authorized the proceeding. The issue of how the first and second respondents regained their directorship of the applicant is the precise question to be determined on the merits of the dispute. There are allegations and counter allegations of fraud which will have to be dealt with by this court. The objection pertaining to the authority to institute the instant application cannot, therefore, be sustained.

The validity of the resolution.

The respondents' case is that Leno De Villiers who signed the resolution authorizing the deponents to the founding affidavit to represent the applicant is non-existent. The letter dated 14 November 2022 which is attached to the respondent's opposing affidavit does not prove that Leno De Villiers is non-existent. It is merely proof on the face thereof that the identity particulars ascribed to him belonged to another person. The question of whether Leno De Villiers is a director of the applicant is connected to the issue dealt with above. That is what must be ventilated in the main dispute between the parties. For the purposes of the instant application the objection to the validity of the resolution is without merit hence it was dismissed. On the face of it, the resolution is valid.

Non-joinder of Phillipa Ann Coumbis

The respondent's state that Phillipa Ann Coumbis, who was cited as the fourth respondent, is entitled to be joined in this application because the applicant has alleged that she holds 83 percent of the shareholding in the applicant. Phillipa Ann Coumbis was not a party to Case No 5385B/22 which is the case to which the relief being sought herein relates. Further, Rule 32(11) of the High Court Rules, 2021 provides that a cause or matter shall not be defeated

by reason of the misjoinder or non-joinder of any party. *In casu*, the issues in dispute so far as they affect the rights and interests of the persons who are before this court can be determined in the absence of the fourth respondent. I note, however, that after the matter had been argued my attention was drawn to notice of opposition and opposing which in its heading says it belongs to Phillippa Ann Hangoood but in the body thereof states that it was signed by Phillippa Ann Coumbis. Be that as it may, the fourth respondents was legally represented on 15 November 2022 when the application was withdrawn against her. She was also legally represented and made no submissions when the objections *in limine* were debated on 16 November 2022. In the result, the objection based on her non-joinder was dismissed.

The Merits

The principles that apply in an application for suspension or stay of execution are settled. These were expressed in the case of *Mupini v Makoni* 1993(1) ZLR 80(S) at 83B-D as follows:-

“Execution is a process of the court, and the court has an inherent power to control its own process and procedures, subject to such rules as are in force. In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution or, for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The *onus* rests on the party seeking a stay to satisfy the court that special circumstances exist.....Such special reasons against execution issuing can be more readily found where, as *in casu*, the judgment is for ejection or the transfer of property, for in such instances the carrying of it into operation could render the restitution of the original position difficult See *Cohen v Cohen* (1) 1979 ZLR 184(a) at 187 C; *Santam Insurance Co. Ltd v Paget* (2) 1981 ZLR 132 (G) at 134G – 135b; *Chibanda v King* 1983(1) ZLR 116(H) AT 119C – H; *Strime v Strime* 1983(4) SA 850(C) at 852A.”

In casu, the order whose execution is being sought to be suspended among other things, reverses a transfer effected in terms of a deed a transfer and, further, seeks to reinstate a deed of transfer that was superseded by the one that is referred to in para(s) 1 and 2 of the order. This is typically one of the situations contemplated in *Mupini v Makoni*, supra, hence real and substantial justice dictates that the execution of the order be suspended. If the execution of the order is not suspended then the order for its rescission would become meaningless if the applicants succeed in Case No. HC 7557/22. On the other hand, if the application for rescission fails the respondents would not be precluded from enforcing the order. The delay in the enforcement of the order arising from the granting of the order *in casu*, does not amount to irreparable harm.

Further, there are allegations and counter allegations of fraud which must be investigated by the court. These relate to how the first and second respondents lost control of the company in the first instance, and how they regained such control. It is just that until those allegations are investigated the situation be frozen to avoid irreparable prejudice to the applicant in the event that it is ultimately found that the first and second respondents are not authorized to represent it.

In the circumstances, I conclude that this is an appropriate case for execution to be suspended pending determination of the application for rescission of judgment.

In the result, IT IS ORDERED THAT:

1. The operation and effect of the judgment of this court dated 14 September 2022, handed down in Case No. HC 5385B/22, is suspended pending the finalization of the application for its rescission in Case No. HC 7557/22.
2. Pending the determination of the application for rescission of judgment under HC 7557/22, the first and second respondents are interdicted from performing any duties as directors, shareholders or officers of the applicant.
3. First and second respondents shall pay the costs jointly and severally the one paying the other to be absolved.

DATE.....

JUDGE.....

Makiyo and Partners, applicant's legal practitioners
Murambasvina Legal Practice, first and second respondent's legal practitioners
Samukange and Hungwe, third respondent's legal practitioners
Mawere Sibanda, fourth respondent's legal practitioners