TAIYUAN SANXING COMPANY LIMITED
versus
PHILCOOL INVESTMENTS (PRIVATE) LIMITED
and
SHEPHARD TUNDIYA
and
CEPHAS MANDLENKOSI MSIPA
and
FRED MOYO
and
GILBERT CHAWANDA
and
HWANGE COAL GASIFICATION COMPANY (PRIVATE) LIMITED
and
HWANGE COLLIERY COMPANY LIMITED
and
ZIMBABWE REPUBLIC POLICE PROVINCIAL POLICE COMMANDER FOR THE MATEBELELAND SOUTH PROVINCE
and
TEL-A-FARE ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 9, 12 and 13 December 2022 & 19 January 2023

Urgent Chamber Application

Mr SS Banda, for the applicant
Mr RT Mutero, for the 1st respondent
Mr T Zishiri, for the 2nd respondent
Mr TST Dzvetero, for the 3rd to the 5th respondents
Mr E Mubaiwa, for the 6th respondent
Mr BM Maunze, for the 7th respondent
Mr P Chibanda, for the 8th respondent
No appearance for the 9th respondent

DEME J: The applicant approached this court on an urgent basis seeking the relief couched in the following way:

> "TERMS OF FINAL ORDER
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
> 1. Application to have the Chamber Application for Contempt of Court case no. HC8050/22 set down on the urgent roll be and is hereby granted.

2. The Registrar be and is hereby directed to set down case No. HC8050/22 for hearing on the next available date on the urgent roll.
3. The Respondents are hereby ordered to file and serve their opposing papers in case No. HC8050/22 within 24 hours of this Order.
4. The Applicant is hereby ordered to file and serve its answering affidavit(s) within 24 hours of receipt of Respondents' opposing papers.
5. All parties are hereby ordered to file their Heads of Argument within 24 hours of the filing and service of Applicant's answering affidavit(s).
6. There shall be no order as to costs.

INTERIM RELIEF GRANTED

Pending the determination of this matter and the final determination of case no. HC 8050/22, the applicant is granted the following relief:

1. 6th Respondent's technicians and their ancillary workforce be granted immediate unfettered and undisturbed access to the coke oven battery plant, and 1st to 5th Respondents be interdicted from interfering with the access of 6th Respondent's technicians and ancillary workforce and their operations at the coke oven battery plant."

Before the commencement of the hearing of this matter, the applicant amended its relief. More particularly, the amended relief is as follows:

"TERMS OF FINAL ORDER
That you show cause to this Honourable Court why a final order should not be made in the following terms:
1. The application to have the Chamber Application for Contempt of court case no. HC 8050/22 set down on the urgent roll be and is hereby granted.
2. There shall be no order as to costs.

INTERIM RELIEF GRANTED

Pending the determination of this matter and the final determination of case no. HC 8050/22, the applicant is granted the following relief:
1. The application to have the Chamber Application for Contempt of Court in case no. HC 8050/22 set down on the urgent roll be and is hereby granted.
2. The Registrar be and is hereby directed to set down case No. HC8050/22 for hearing on the next available date on the urgent roll.
3. The respondents are hereby ordered to file and serve their opposing papers in case no. HC 8050/22 within 24 hours of this order.
4. The Applicant is hereby ordered to file and serve its answering affidavit(s) within 24 hours of respondents' opposing papers.
5. All parties are hereby ordered to file their Heads of Argument within 24 hours of the filing and service of Applicant's answering affidavit(s)."

The application for amendment was granted and the applicant was directed to bear wasted costs for the first to the fifth respondents occasioned by the amendment pursuant to the provisions of Rule 41(9) of the High Court Rules, 2021.

In brief, the applicant obtained an order interdicting the first to fifth respondents from interfering with the technical team of the sixth respondent at the coke oven battery plant (hereinafter called "the plant") under case number HC 7708/22. According to the further terms of the interim Order, Engineer Ruhwaya would be the sole representative of the first to the fifth respondents who would be allowed to be at the plant. In particular, the order under case number HC 7708/22 is as follows:

> "1. Pending determination of the various matters for the rescission of the order granted in HC B2014/22, the 1st, 2nd, 3rd, 4th and 5th Respondents and any person acting through them be and are hereby ordered to:
> (a) Allow 6th respondent's technical team to access without hindrance (sic) the plant and coke oven battery for the purpose of monitoring of the maintenance of feeding coking coal to maintain the temperature at safe levels.
> (b) Engineer Augustine Ruhwaya shall be the only representative of 1st to 5th respondents who shall remain on the plant.
> (c) Removal of coke from the plant shall be on condition that the removal of the coke shall require coking coal in the ratio of 3:83 tonnes of coking coal for every one tonne of coke until a ratio is determined by an independent engineer to be appointed by the Zimbabwe Institute of Engineers within twenty-four (24) hours of this order.
> (d) The parties to carry out a reconciliation of the current coke, coking coal and fuel stocks against the stock levels as at 13th October 2022.
> 3. No order as to costs."

The applicant alleged that the first to the fifth respondents failed to observe the terms of interim interdict under case number HC 7708/22. It is the applicant's case that the first to the fifth respondents interfered with sixth respondent's technical team's access to the plant. The applicant further averred that the violation of the interim interdict forced it to apply for an order for contempt of court against the first to the fifth respondents under case number HC 8050/22 which is still pending. The applicant also affirmed that the first to the fifth respondents were served with the application of contempt of court on 28 November 2022. Despite being served with this application, the applicant further claimed that the first to the fifth respondents continued with the violation of the interim order under case number HC 7708/22. According to the applicant, the continued violation of the interim order put the plant under the danger of explosion and may potentially collapse.

The application was opposed by the first to the fifth respondents on various grounds. The sixth to the eighth respondents did not oppose the present application. In opposing the present application, the first to the fifth respondents raised numerous points *in limine*. Firstly, the first to the fifth respondents argued that the matter is not urgent. Secondly, they also opposed the present application on the basis that the applicant, being a *peregrinus* ought to

have deposited security of costs. Thirdly, they contended that the present application has no cause of action as the Sheriff had successfully enforced the order under case number HC 7708/22 as may be confirmed by the Sheriff's return of service. Fourthly, the application was also opposed on the basis that the certificate of urgency supporting the present application is defective. Fifthly, the first respondent argued that the present application does have material disputes of fact which cannot be resolved by way of affidavits. Lastly, the first respondent argued that the present application fails to disclose irreparable harm which is a prerequisite for urgent chamber applications.

With respect to merits, the first to the fifth respondents submitted that the present application is an abuse of court process as there is no violation of the court order alleged by the applicant. They further alleged that the Sheriff successfully enforced the order under case number HC 7708/22. They referred the court to the return of service generated by the Sheriff after enforcing the order. The first to the fifth respondents also maintained that they did not at any time interfere with sixth respondent's technical team's access to the plant. Further, they affirmed that the plant is safe and sound and is not under danger of explosion contrary to the applicant's allegations.

I will now shift my attention to the points *in limine* not necessarily in their order. I will firstly deal with the point *in limine* raised by the first to the fifth respondents to the effect that the applicant is a *peregrinus* which is required to deposit security of costs before instituting the present application. This is critical to be determined at first as it is of paramount importance to ascertain whether the applicant is properly before the court. If the point *in limine* concerned is upheld, the rest of the points *in limine* may not be addressed. This point *in limine* was initially raised by the first respondent's counsel. Subsequently the second to the fifth respondents associated themselves with this point *in limine.*

The first to the fifth respondents submitted that the applicant is a *peregrinus* which may make it difficult for the respondents to successfully recover their costs if the applicant loses the present application. On that basis, the first to the fifth respondents claimed that the applicant ought to have deposited the security of costs before lodging this application. In response, the applicant submitted that the applicant owns the plant which may be attached if the respondents wish to recover their costs. This was strongly opposed by Mr *Mutero* who, on behalf of the first respondent, argued that the plant in question cannot act as security of costs as the applicant is alleging that the plant is on the verge of exploding. Mr *Banda,* on behalf of the applicant, further submitted that the court may exempt foreign juristic and natural persons

from the requirement of depositing security of costs. He referred the court to the cases of *Bowes and Ors* v *Manolakakis*[1] and *Redstone Mining Corporation (Pvt) Ltd & 3 Ors* v *Diaoil Group Zimbabwe (Pvt) Ltd & 4 Ors*[2].

The security of costs of a *peregrine* party has been resolved in our jurisdiction and beyond. A *peregrinus,* in the majority of cases, is ordinarily required to deposit security of costs. Where it is apparent that the *peregrinus* does have property within the jurisdiction of the court, the *peregrinus* may be exempted from this requirement. Reference is made to the provisions of s 15 of the High Court Act [*Chapter 7:06*] which provides as follows:

> "In any case in which High Court may exercise jurisdiction founded on or confirmed by the arrest of any person or the attachment of any property, the High Court may permit or direct the issue of process, within such period as the court may specify, for service either in or outside Zimbabwe without ordering such arrest or attachment, if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached, and the jurisdiction of the High Court in the matter shall be founded or confirmed, as the case may be, by the issue of such process."

In casu, the property in question likely to be attached for security of costs may not be capable of being attached. According to the applicant's version, the plant, which it offered as security of costs, is on the verge of collapsing. This likelihood of collapsing prompted the applicant to approach this court on an urgent basis seeking the present relief. Thus, going by the applicant's account of events, this plant cannot act as security of costs.

In the case of *Bowes and Ors* v *Manolakakis* (*supra)*, MATHONSI J, as he then was, beautifully and succinctly propounded the following remarks:

> "The basis of the rule requiring a *peregrinus* to provide security for the costs of an *incola* defendant was set out by SANDURA JP (as he then was) in *Zendera* v *McDade & Anor* 1985 (2) ZLR 18 (H) at 20A-D as follows:
>
> > 'The issue relating to the furnishing of security for costs by a plaintiff who is a *peregrinus* is discussed by the learned authors of The Civil Practice of the Superior Courts of South Africa 3rd ed at p 25. There the learned authors have this to say:
> >
> > > 'A *peregrinus* who initiates proceedings in our courts must, as a general rule, give security to the defendant for his costs, unless he has within the area of jurisdiction of the court immovable property with a sufficient margin unburdened to satisfy any costs which may arise.
> > >
> > > The presence of immovable property is a defence to a claim for security, but the doctrine has not been extended to include movable property.
> > >
> > > The court has, however, a discretion to dispense with security in exceptional cases but should exercise its discretion sparingly.'
> >
> > The rule requiring a *peregrinus* to give security for the defendant's costs was laid down as far back as 1828 in *Witham* v *Venables* (1828) 1 Menz 291 and subsequently explained in *Lumden* v *The Kaffrarian Bank* (1884-5) 3 SC 366. The object of the rule is to make sure that an *incola* will not suffer any loss if he is awarded the costs of

[1] HB103/11
[2] HH 438/15

> the proceedings. The rule exists primarily to protect the interests of an *incola* who is sued by a *peregrinus.*"

In casu, the applicant attempted to mount a defence in the sense of existence of immovable property namely the plant. However, as discussed before this plant cannot act as security of costs. No other immovable property has been pledged as security of costs by the applicant.

Our case law has established that it is difficult for the incola to recover costs of the proceedings against the *peregrinus* if the *peregrinus* is not ordered to pledge or deposit security of costs. MATHONSI J (as he then was) in *Redstone Mining Corporation (Pvt) Ltd & 3 Ors* v *Diaoil Group Zimbabwe (Pvt) Ltd & 4 Ors* (supra) stated the following remarks:

> "What appears to be lost to litigants is that the requirement of security for costs to be given by a *peregrinus* is not only there for the asking, neither is it there as a weapon of defence by an *incola* bent on preventing an approach to the court by a *peregrinus*. The object of the rule relating to provision of security is to ensure that an *incola* will not suffer loss if he is awarded costs of the proceedings. It protects the interests of the *incola*. See Herbstein and van Winsen, *The Civil Practice of the Superior Courts of South Africa,* ed 3 at p 251, *Zendera* v *McDade & Anor*, (*supra*)."

Where the court is of the view that the security of costs are demanded in bad faith, the court may not entertain such application for the depositing of security of costs. In *Grandwell Holdings (Pvt) Ltd* v *Minister of Mines & Mining Development & 4 Ors*[3], the court had this to say:

> "I summarily dismissed the point *in limine*. Plainly, it was raised in bad faith. The idea was manifestly to thwart the application before it could even begin. There had been no prior demand for such costs… But substantively, an order for security for costs is one entirely in the discretion of the court. It is a rule of practice, not one of substantive law: see *Saker & Co Ltd* v *Grainger*[4]. Admittedly, the discretion has to be exercised judiciously, not capriciously. Many considerations are taken into account, not least the particular circumstances of the case, the equities and fairness of the request, and even the character of the *peregrinus* itself: see *Magida* v *Minister of Police*[5] and *SA Iron & Steel Corporation Ltd* v *Abdulnabi*[6].
>
> Only when there is reason to believe that a company, whether local **or foreign**, may be unable to pay the costs of the defendant or respondent **may** the court order security for costs."

It has been established that the concept of security of costs is the matter of practice and is not the issue of substantive law. Reference is made to the case of *The Sheriff of*

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[3] HH 193/16
[4] 1937 AD 223, at pp 226 – 227
[5] 1987 [1] SA 1 [A] at p 12B – D
[6] 1989 [2] SA 224 [T], at p 233C – I

Zimbabwe & Anor v *Anderson Manja & 98 Others*[7], where the court cited with approval the following passage in Herbstein & van Winsen's *Civil Practice of the High Court of South Africa* (5 ed) at page 391:

> "The question of security for costs is one of practice and not of substantive law. The courts have a discretion to grant or refuse an order for security and in coming to a decision will consider the relevant facts of each case. Hardship to the *peregrinus* and financial ability to provide security are taken into account but are not necessarily decisive. The court should have due regard to the particular circumstances of the case and consideration of equity and fairness to both the *incola* and the non-domiciled foreigner."

In casu, I have no reason to believe that the first to the fifth respondents demanded security of costs in bad faith. I do not foresee any hardship likely to be suffered by the applicant if it is ordered to deposit security of costs. The applicant does have financial ability to comply with such directive. The character of the *peregrine* applicant raises some suspicion that it may not be willing to pay costs if it is ordered to do so. The applicant pledged as security the plant which it verily believes is on the verge of collapsing. It is that character which has attracted the attention of the court. Despite being challenged that the plant may not be attachable, the applicant did not offer any alternative immovable property for purposes of security of costs.

The rule requiring a *peregrine* party to furnish security of costs must never by any stretch of imagination be construed to be an act of discrimination against any party concerned. The rule is meant to ensure that there is sanity in the justice system by guaranteeing that the judgments of courts remain effective and efficient remedies to the litigants. The courts are reluctant to make hollow judgments not capable of enforcement. Security of costs under such circumstances, in turn, protects the dignity, integrity and reputation of the courts. The concept also inspires public confidence in the justice delivery system.

In the circumstances, it is fair and just that the applicant must furnish security of costs as may be determined by the Registrar in accordance with Rule 75(2) of the High Court Rules, 2021 if it wishes to pursue this matter. Pending the furnishing of such security, this matter has to be stayed to allow such process to be finalised. The other issues raised by the first to the fifth respondents will be addressed upon resumption of this matter. It may not be

[7] HH 325/19

ideal to deal with them at this point as it is desirable that the issue of security of costs be firstly addressed.

Accordingly, it is ordered that:

(a) The matter be and is hereby stayed pending the furnishing of security of costs by the applicant as may be determined by the Registrar in consultation with first to the fifth respondents.

(b) Each party shall bear its own costs.

Mutumbwa Mugabe and Partners, applicant's legal practitioners
Dube Legal Practitioners, first respondent's legal practitioners
Kwenda Legal Practitioners, second respondent's legal practitioners
Antonio and Dzvetero, third to the fifth respondents' legal practitioners
Manase and Manase Legal Practitioners, sixth respondent's legal practitioners
Mawere Sibanda Commercial Lawyers, seventh respondent's legal practitioners
Civil Division, eight respondent's legal practitioners