REMIGIOUS TOENDEPI MATANGIRA
versus
THE PROVINCIAL MINING DIRECTOR N.O
MASHONALAND CENTRAL
and
THE SECRETARY N.O
MINISTRY OF MINES AND MINING DEVELOPMENT
and
THE MINISTER OF MINES & MINING DEVELOPMENT N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE; 8 March & 30 June 2023

Opposed Matter

R Mabwe, for the applicant
Mr D Jaricha, for the respondents

MANGOTA J: Remigious Toendepi Matangira ("Remigious") applied to review the decision of the Minister of Mines and Mining Development ("the Minister") whom he alleges to have shown interest in the cause and being biased against him when he (the Minister) cancelled his mining certificate number 24881 BM which was/ is registered as Mashona Queen 3. In the suit which he filed under HC 1255/22, Remigious cited the Provincial Mining Director for Mashonaland Central Province, the Secretary for Mines and Mining Development and the Minister as the first, second and third respondents respectively. He moved me to set the decision of the Minister aside and to direct the latter to proceed in terms of section 400 (1) (ii) of the Mines and Minerals Act (Chapter 21:05).

I heard the application which relates to HC 1255/22 on 8 March, 2022. I entered judgment for Remigious with costs.

On 19 May, 2023 the Minister and two others wrote, through counsel, requesting reasons for my decision. These are they:

On the date that HC 1255/22 was to be heard, Mr *Jaricha* who represented the Minister and his two companions advised that he was standing in for a Ms A Magunda whom he said was appearing before the Supreme Court then. He submitted that Heads for the Minister and two others were filed a day before the date that the review application was to be heard. He was candid enough to admit that the Minister and two others were barred for their failure to file their Heads within the *dies*. He applied orally for the removal of the bar. He gave as a reason for the Minister's failure to file Heads timeously that HC 1255/22 was once dismissed for want of prosecution. It was dismissed under HC 3537/22, according to him. Remigious, he stated, filed and served his Heads upon the Minister and others before the dismissal of HC 1255/22. He tendered a copy of the order which dismissed HC 1255/22 for want of prosecution. I marked it Annexure Z. He submitted that, HC 1255/22 having been dismissed, the Minister and his companions did not see any need to file Heads. He stated that Remigious successfully rescinded HC 3537/22 on 10 November, 2022 under HC 4533/22. He did so, according to counsel, after he applied under HC 4533/22 for stay of execution which the court finalized on 15 July, 2022. Remigious, he submitted, proceeded to set HC 1255/22 down for hearing. He stated that, given the history of the case, it was not unusual for counsel who represented the Minister and two others to miss the fact that she was to file Heads. He insisted that Remigious did not invite the Minister and the other two applicants to file Heads. He submitted that he was making the application for upliftment of the bar in terms of Rule 39 of the rules of court. He moved me to treat the Heads which he filed on 7 March, 2023 as having been properly filed.

Ms Mabwe who appeared for Remigious apposed the application for removal of the bar. She submitted that HC1255/22 was filed on 25 February 2022. The same was served upon the Minister and two others, according to her. She submitted that, on 15 March, 2022 only the second applicant filed his notice of opposition. The first and the third applicants, she stated, did not. The two, she submitted, were/are out of court. They were therefore barred for their failure to file their opposing affidavits, according to her. She insisted that the second applicant was barred for his failure to file his Heads within the *dies*. She submitted that the judgment which rescinded the application for dismissal for want of prosecution was granted on 10 November, 2022. The Minister and two others were represented by Ms A Magunda, according to her. She tendered a copy of the judgment which I marked Annexure Y. She submitted that, from 10 November, 2022 to 7 March,

2023 the Minister and his companions did not make any effort to file their Heads. Remigious, she stated, wrote to the Minister and two others in January, 2023 advising them that he had applied to have HC 1255/22 set down for hearing. She tendered a copy of the letter which she made reference to. I marked it Annexure X. The Minister and his companions, she argued, wrote to Remigious on 13 February, 2023 requesting him to file a certificate of service. She submitted that the Minister and two others received a copy of the letter. She stated that Annexure W which she tendered served as evidence which confirmed the stated matter. She insisted that the three applicants should explain their failure to comply with the rules of court. Rule 59 (20), she argued, requires them to have filed their Heads within ten (10) days of service upon them of Remigious's Heads. She insisted that what Mr Jaricha submitted was hearsay evidence because Ms Magunda, and not him, was seized with HC 1255/22. She raised concern on the fact that the Minister's Heads were served upon her a few minutes before the review application was to be heard. She complained that the conduct of the Minister and his companions was not according to Remigious a fair hearing. She moved that the application for removal of the bar be dismissed with costs.

Rule 39 of the High Court Rules, 2021 allows an applicant who has been barred to apply to court to unbar him. It reads, in the relevant part, as follows:

> "(4) A party who has been barred may –
>
> a) make a chamber application to remove the bar; or
> b) make an oral application at the hearing, if any, of the action or suit concerned;
>
> and the judge or court may allow the application on such terms as to costs and otherwise as the judge or court….considers fit."

In terms of the sub-rule of the rule, the applicant has a discretion to apply in writing or orally. The choice remains his. The advantages of making an oral application to remove a bar which operates against the applicant is that the latter does not remain barred. He has a window which remains open to him to unbar himself even when he files his application at the time that the matter is to be heard. The rules of court offer him an opportunity to be heard even in circumstances where he approaches the court at the eleventh hour. They do not close the door against him on a permanent basis. They allow him to explain himself for his infraction of its rules. They do so because the court does not know why he failed to comply with its rules.

The disadvantage which is associated with an oral application for removal of a bar is that, if the applicant fails to be candid and/or honest, his lack of probity will invariably work against him. The other disadvantage is that he may miss important matters which advance his cause or that he may misrepresent facts or even tell a blatant lie which will, at the end of the day, work against his well-deserved application. He should, therefore, think fast and speak as he makes his statements without telling falsehoods or misrepresenting the correct position of his case.

The advantages of filing a written application for removal of a bar are, in my view, many and varied. One of those is that the applicant has ample time at his disposal to think through his application, particularly the reasons which caused him to violate the rules of court. He has the ability to give a coherent narrative in respect of his application. He can anticipate the attitude of his adversary and address the same in the written application. He is more likely than not to avoid failing into such pitfalls as being unnecessarily argumentative and/or repetitive to the disquiet of the court. He is able to avoid such unwholesome matters as relate to giving of hearsay evidence and/or telling lies. He, in short, has the time and ability to sift from the application matters which matter to his cause and to leave out of it anything which will, in the final analysis, throw his application into the dustbin. He has the capacity to appreciate the position of his adversary which he will glean from the latter's opposing affidavit as well as to address such in his answering affidavit and in the Heads in terms of which he will apply the relevant law to the circumstances of his application which he will allow to rest on a firm foundation.

The court has also a discretion which the rule accords to it to grant or refuse the application. Its thinking process is guided by such factors as the probity or honesty of the applicant as well as the explanation which he gives for flouting its rules. It will not take an applicant who misrepresents facts to it or one who tells an obvious lie to it lightly. It insists that the applicant should tell the truth, the whole truth and nothing but the truth. It requires him to be remorseful for his unwholesome conduct. Remorseful because he chews upon its time to attend to his case to the detriment of other cases which it will have lined up for the day. It takes its business very seriously and, by the same token, it expects the applicant and, indeed, any litigant who appears before it to do the same.

Mr *Jaricha*, who appeared for the Minister and two others chose the first of the two options which are open to an applicant who is moving the court to remove the bar which operates against

him. He applied orally for the removal of the bar. He stated, in the application, that he is not seized with the application for review which Remigious filed under HC 1255/22. He advised that a Ms. A Magunda whom he said was appearing before the Supreme Court on the date that the matter was to be heard was/is representing the applicants. He, accordingly, would have had no knowledge as regards the twists and turns of the application for review. Whatever he submitted, therefore, was hearsay evidence which, as is known, is inadmissible. His submissions were, at best, a misrepresentation of facts or, at the worst, an attempt to mislead me. They lacked the ingredient of probity which is a *sine qua non* aspect of an application of the present nature.

As counsel for Remigious correctly submitted, Ms Magunda who is seized with HC1255/22 should have filed an affidavit explaining her non-compliance with the rules of court. The case of *Friendship* v *Cargo Carriers Ltd & Anor*, 2013 (1) which Ms *Mabwe* referred me to is apposite to the matter which is under consideration. Ms Magunda did not file any affidavit explaining her failure to file her client's Heads timeously. Mr *Jaricha* did not advance any explanation for her failure to execute her duties as she should have done. He allowed himself to be thrown at the deep end of the case as well as to make an effort, on his part, to swim across to safe ground. He, in the process, found it difficult, if not impossible, to break the ground which lay ahead of him.

The annexures which Ms *Mabwe* tendered during the application show that the submissions of Mr *Jaricha* were not only misplaced but were also a complete falsehood. The first is the letter, which I chose to call Annexure V, which Ms Magunda wrote to Remigious on 4 July, 2022. In the same, Ms Magunda acknowledges that she received Remigious's Heads on 17 June 2022. She states that she should have filed her client's Heads on 1 July, 2022 and that she would not do so because the main matter, HC 1255/22, had been dismissed on 20 June, 2022 for want of prosecution.

Annexure Y which Ms Mabwe tendered shows that, on 10 November 2022, Remigious successfully rescinded the default judgment which had been entered against him under HC 3537/22. He did so under HC4533/22. Ms Magunda, it is evident from the contents of the annexure, represented the Minister and two others in the rescission application. She was, therefore, aware as far back as 10 November, 2022 that HC 3537/22 had been rescinded. She was also aware as at the mentioned date that HC 1255/22 had been brought back to life and that, as a result of the stated

fact, she had to file Heads for the Minister and two others during the period which stretched from 11-24 November, 2022. She, for reasons which are known to her, and not to Mr *Jaricha*, did not file Heads for the Minister and his two companions. She advances no explanation for her non-compliance with the rules of court. Mr *Jaricha*, it is evident, made every effort to play down this very relevant factor to his application, if not to mislead me into believing his submissions on the same. It follows, from the observed fact, that the Minister and his companions did not file their Heads in the main case for seventy one (71) working days, weekends and public holidays excluded.

Annexure X shows that, on 20 December 2023, Remigious's legal practitioners wrote to the registrar requesting that HC 1255/22 be set down for hearing. It shows further that they copied that letter to the legal practitioners of the Minister and two others. These were therefore aware that HC 1255/22 was no longer a dead case but that it had been resurrected back to life. Their knowledge of this matter notwithstanding, they did not seize the opportunity to file their Heads as they should have done. They, in fact, wrote to Remigious's legal practitioners on 13 February, 2023 requesting the latter to file certificate of service upon them.

Annexure W is another piece of evidence which works against the Minister and two others. It shows that Remigious's legal practitioners served the notice of set down of HC 1255/22 upon the legal practitioners of the Minister and his companions and the certificate of set down of the review application on the opposed roll in January, 2023 and 20 February 2023 respectively.

The above-mentioned annexures show, in a clear and unambiguous language, that the three applicants were, at each turn, advised of all the steps which Remigious was taking to prosecute his review application to finality. Mr *Jaricha* cannot therefore persuade me to believe that the Minister and his companions laboured under a genuine but mistaken belief that HC 1255/22 was dead and buried. They knew not only that HC 1255/22 had come back to life but also that they were to file their Heads. They, for reasons which were/are known to them, did not do so. They, in the process, failed to comply with the rules of court. They cannot uplift the bar which operates against them. This is a *fortiori* the case given that they received the notice of set down of the application on 28 February, 2023 and did nothing which shows their effort to remain compliant with the rules of court.

The submissions which Mr *Jaricha*, for the applicants, made is, at best, an attempt to mislead me and, at the worst, to tell a complete lie. It is trite that if a litigant, through counsel,

gives false evidence his story will be discarded and the same adverse inferences may be drawn as if he has not given any evidence: *Leather Trade Zimbabwe (Pvt) Ltd* v *Smith*, HH 131/13. People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honest in respect of the circumstances which cause them to seek relief from the court: *Deputy Sheriff Harare* v *Mahleza*,1997 (2) ZLR 425. If a litigant lies about a particular incident, the court may infer that there is something about it which he wishes to hide: L.H. Hofman and D.T. Zeffert, *South African Law of Evidence*, 3rd edition, p 472.

The position of the law as stated in the above-quoted case authorities as read with the learned authors work cannot be deviated from. They pronounce the law as it is and not as it may be. The applicants are suffering for the sins of their legal practitioners. It is these and not the applicants who should have filed the latter's Heads timeously. They slept on duty and they, in the process, cost the applicants an irreparable embarrassment. They have no explanation for their unwholesome conduct. They are not even remorseful for what they did to the case of their clients. They flouted the rules of court in a very disturbing manner. Their filing of the applicants' Heads a day from the date that the application was to be heard shows their cavalier approach to their work which is, by no means, a mean one. Their service of the same upon Remigious's legal practitioners a few minutes before the hearing of the application shows their lack of seriousness to the business of the court. It also evinces disrespect not only to the court but also to Remigious who must be accorded a fair hearing just as much as the same should be accorded to the Minister and his companions.

The law of Practice and Procedure recognizes the fact that, where two or more persons are suing or being sued in motion proceedings, one of them takes the lead. He deposes to a founding or an opposing affidavit in which he states that he has the authority of those who are in his corner to depose to the affidavit on their behalf. His companions confirm the deponent's assertion by filing supporting affidavits in terms of which they associate themselves with the main affidavit. Where they do so, the law recognizes them as persons who are singing from the same hymn-book with the deponent. If they do not file supporting affidavits as they should, the law does not recognize them as being part of the application or the opposing papers. They therefore become irrelevant to the proceedings which are before the court. The law, in fact, sees them as persons who are out of court.

In casu, only the second applicant filed a notice of opposition to HC 1255/22. The first and third applicants did not do so. The second applicant states, in the notice, that he has the authority of the other applicants to speak for them. He, however, has nothing which he shows in support of his opposition of the main matter. His statement on the mentioned matter is therefore without any foundation. It is empty and meaningless in the eyes of the court and the law. The first and third applicants are, as Ms Mabwe correctly submitted, not in court. They are out of court. They cannot file any papers at this stage of the proceedings. They cannot do so on account of the bar which operates against them.

In taking the view which I hold of this application, I take comfort in the *dictum* which the Supreme Court made in *Friendship* v *Cargo Carriers & Another*, which has already been referred to in the foregoing paragraphs of this judgment. Although the case dealt with rescission of judgment, the principles which it laid down apply with equal force to the circumstances of the present application. Its head-note, with which I agree, reads as follows:

> "Condonation of failure to apply timeously for rescission of judgment is an indulgence which may be granted at the discretion of the court. It is not a right obtainable on demand. The applicant must satisfy the court that there are compelling circumstances which would justify a finding in his favour. To that end, it is imperative that an applicant for condonation be candid and honest with the court"

The applicants were not candid and honest with me. Their legal practitioners went on a frolic of their own. They, in the process, worked havoc on their clients' case. They failed to discharge the *onus* which rests upon them. Their conduct portrays nothing but a complete mockery of the justice delivery system of the country. It cannot be condoned let alone accepted. It evinces nothing else but child's play. In acting as they did, they handed judgment to Remigious on a platter, as it were.

It is on the basis of the above-mentioned reasons that I refuse to grant the application for removal of the bar which operates against the applicants. The dismissal of the application for upliftment of the bar leaves Remigious in the equation. Counsel for him moved me to treat the matter as unopposed and to enter judgment for her client.

Judgment is, in the result, entered for the applicant in HC 1255/22 as prayed in the draft order.

B Chipadza Law Chambers, applicants' legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners