ASA SERVICES (ZIMBABWE) LIMITED
and
FREDA REBECCA GOLD MINE
versus
VANSBURG DRUMGOLD ENTERPRISES (PRIVATE) LIMITED
and
TURTLE 16 MINE a.k.a PEACE MINE

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 7 June & 30 June 2022

Civil Appeal

Mr T Sibanda, for the appellants
Ms R Mabwe, for the first respondent
No appearance for the second respondent.

MUCHAWA J: This is an appeal against a judgment rendered by the Magistrates' Court which dismissed an application for rescission of judgment filed by the appellants.

The first and second appellants are companies which are duly registered in terms of the laws of Zimbabwe. They claim to be sister/associate companies with the first appellant being an investment vehicle which holds numerous mining claims around the country whereas the second appellant is the management company which operates all the mining claims for both companies. The second appellant is said to hold title in some such claims.

The first respondent is also a company whilst the appellants state that there is no legal persona answering to the name of the second respondent which entity they claim they are holders of rights, title and interest over commonly known as Turtle 16 consisting of eight gold reefs situate in the Silobela Communal Lands with certificate of registration number 22232 which was issued on 23 October 1997. It is pointed out that the certificate of registration was granted under first appellant's name, Reunion Mining (Zimbabwe) Limited which name was then changed to Cluff Mining (Zimbabwe) Limited, then to Mwana Mining (Zimbabwe) Limited, and further changed

to Mwana Africa Services Zimbabwe Limited and finally to Asa Services (Zimbabwe) Limited. The certificates of change of name are on pages 35 to 38 of record.

The application before the court *a quo* was done in terms of Order 30 Rule 4 of the Magistrates Court (Civil) Rules, 2019, it being alleged that a judgment given in favour of the first respondent in case KK CIV 21/20 in an action against the second respondent had been granted without their knowledge as they were not a party to such proceedings but they were an affected party. The order in favour of the first respondent ordered the second respondent to pay US$13 700.00 or the RTGS equivalent to the first respondent plus holding over damages of ten per cent per month rate of the capital amount with effect from 19th November 2019 to date of full payment and costs of suit on an attorney and client scale.

The following grounds of appeal have been set out in impugning the magistrates' court decision;

1. The court *a quo* erred and misdirected itself by failing to find that there is no legal persona which answers to the appellation "Turtle 16 Mine aka Peace Mine"
2. The court *a quo* erred and grossly misdirected itself in finding that the summons commencing action was served on an employee of the appellants contrary to evidence before her.
3. The court *a quo* erred and grossly misdirected itself in finding that the appellants ought to have proceeded in terms of order 16 r 3 of the Magistrates Court (Civil) Rules, 2019 when they were neither party to the action nor served with the summons commencing action.
4. The court a quo erred and grossly misdirected itself by declining to rescind judgment on the basis that the appellants did not "propose a way forward" and that rescission of judgment would leave the first respondent without recourse.
5. The court *a quo* erred and grossly misdirected itself by declining to rescind judgment on the basis that the appellants ought to have dissuaded the first respondent from investing in the second respondent.
6. The court *a quo* erred and grossly misdirected itself by failing to find that the court order under HC 1926/18 which had granted Apollo Mhlope rights, title and interest in second respondent was set aside by the High Court under HC 311/21

7. The court *a quo* erred and grossly misdirected itself by failing or neglecting to deal with preliminary points which were raised before it.

The seventh ground of appeal was abandoned by the appellants in their heads of argument. Only the first respondent opposed this appeal. Several points in *limine* were raised to argue that the notice of appeal is fatally defective, as follows;

i. That the notice of appeal is not directed against the court but rather against the official
ii. That it fails to comply with order 31 r 4 (b) in that the grounds of appeal are not stated concisely and clearly
iii. That the prayer fails to state which exact matter and judgment is to be set aside
iv. That the notice failed to comply with order 31 (2) (b) as there is no proof of deposit of the costs of the appeal

We heard the parities on both the points in *limine* and the merits and reserved our judgment. This is it and I start off with the points in *limine,* in turn below.

That the notice of appeal is not directed against the court but rather against the official

Ms Mabwe submitted that the notice of appeal is fatally defective as it is directed against an official, Magistrate S Gumbo instead of against a court thus falling afoul of Order 31 r (4) (d). The case of *Sambaza* v *Al Shams Global BVI Limited* SC 3/18 was relied on for this argument.

Mr *Sibanda* submitted that the first respondent is clutching at straws in raising this point.

In *Sambaza* v *AlShams Global supra* the court was seized with an interpretation of r 29(1) (a) of the Supreme Court Rules, 1964 which provided as follows;

29. Entry of appeal

(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;(my emphasis)

What was impugned was the following;

> "TAKE NOTICE THAT the appellant hereby appeals against the whole judgment by the Honourable Mr Justice TAGU of the High Court of Harare in Case Number HC 4556/12 which was handed down on 22 June 2016." (emphasis added)

The court held as follows;

> "There is a distinction between a "court" and a "judge". Section 43 (1) of the High Court Act [*Chapter 7.06*] provides as follows:

"(1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction."

It is therefore clear that an appeal from the High Court should be against a judgment of the High Court. Order 1 r 3 of the High Court Rules 1971 defines the words "court" and "judge" as follows:

"court" means the general division of the High Court;"

"judge" means a judge of the court, sitting otherwise than in open court;"

The word "judge" only applies when a judge is not sitting in open court. It only applies to a judge sitting in chambers. The notice of appeal was found to be defective therefore in this respect. The current matter is distinguishable. It is not concerned with the Supreme Court Rules and the High Court Act. The Magistrates' Court Rules, 2019 also similarly provide as follows in Order 31 r (4) (d);

"4) A notice of appeal or of cross-appeal shall state—
(*a*) whether the whole or part only of the judgment or order is appealed against and, if part only, then what part; and
(*b*) in the grounds of appeal, concisely and clearly the findings of fact or rulings of law appealed against; and
(*c*) the nature of the relief sought; and
(***d*)** the date of judgment and name of the court against whose judgment the appeal is noted" (my emphasis)

However the Magistrates Court Act *[Chapter 7:10*] defines a court and a magistrate differently from the High Court Act's definition of a judge and a court. In s 2 the following definitions are given;

"court" means a court of a magistrate;

"magistrate" means any person who has been appointed to hold magisterial office in terms of this Act

The description *in casu* which says;"--- the appellants hereby appeal against the whole decision handed down by the Honourable S. Gumbo sitting as a Magistrates' Court at Kwekwe------" cannot be said to be non-compliant with these definitions. Appellants have specified the court of a magistrate as the one which rendered the decision appealed against. There can be no fatal defect therefore.

The further reference to Practice Direction 1 of 2017 is also irrelevant as that practice direction was published to give direction on how notices of appeal in compliance with the Supreme

Court Rules, 1964 were to be done by prescribing forms. This matter is an appeal before the High Court.

It is my finding that there is nothing defective in how the notice of appeal is directed at the court of a magistrate who is then identified by name. There is no merit in this point in *limine.*

That it fails to comply with order 31 r 4 (b) in that the grounds of appeal are not stated concisely and clearly

Ms Mabwe submitted that the grounds of appeal are not clear and concise. Grounds 1,2,3,4 and 6 are alleged to be attacking the factual findings and not the decision whilst grounds 4 and 5 are said not to challenge any substantive decision. In support of this argument was raised the case of *Kingstons Limited* v *L.D Ineson (Pvt) Ltd* SC 8/06 in which it was stated that it is trite that an appeal can only be noted against the substantive order made by a court and not against the reasons for making, or the process by which it arrives at, the order in question. Further, the case of Chikura *N.O & Anor* v *Al Sham's Global BVI Ltd* SC 17/17 was cited in support of the assertion that great care should be taken in drafting a notice of appeal to ensure that the grounds of appeal concisely and clearly set out the issues to be determined by the appeal court and the respondent is properly informed of the case he has to meet on appeal. It was prayed that the matter be struck off on account of defective grounds of appeal.

In defence of the grounds of appeal, Mr Sibanda submitted that ground 1 attacks the ruling in that the court failed to find that there was no legal persona in the defendant cited in case KK CIV 21/20. Ground 2 was said to question whether there was proper service on the appellants which is an issue relevant in rescission. Ground 3 is alleged to attack the only authority in the entire ruling wherein the court found that the appellants should have proceeded in terms of order 16 r 3 and that the court went on a frolic of its own. Grounds 4 and 5 are said to be saying that the ruling of the court does not qualify as an order a court can make in a rescission matter and that ground 6 shows that there was no legal basis for the court order.

I am in agreement with Mr *Sibanda* particularly as supported by the case of *Econet Wireless (Pvt) Ltd* v *Trustco Mobile (Pty) Ltd & Anor* SC 43/13 which qualifies the position advance by Ms Mabw*e;*

> "It seems to me that the principle that comes out in the case of *Chidyausiku* v *Nyakabambo* is not always fully appreciated, even amongst lawyers. That case is not authority for the proposition that in an appeal one should not attack the reasons for the order. What that case says is that an appeal

> should be directed at the order and not simply the reasons. Quite clearly if the intention is not to have the order interfered with in any way, then no purpose would be achieved by attacking the reasons thereof. It goes without saying that in order to attack the order made one must attack the reasoning process leading to the order. In other words in order to attack the order made, one must attack the findings made that justify the order made."

This is particularly so in *casu* where the order of the court simply said "The application for rescission is hereby dismissed with costs". In order to attack the order made, one must therefore attack the findings made that justify the order. There is no merit in this point and I dismiss it.

That the prayer fails to state which exact matter and judgment is to be set aside

Ms Mabwe cannot have seriously made the submission that the prayer does not state which matter and judgment is to be set aside. Mr Sibanda pointed the Court to the notice of appeal which states that the appeal is lodged against the judgment of the Magistrates' Court sitting at Kwekwe presided over by Honourable Magistrate Gumbo on 26 January 2022. It is therefore clear that when the prayer asks for the judgment of the court *a quo* to be set aside, it is that judgment sought to be set aside and substituted. There is therefore no merit in this point in *limine* and I dismiss it.

That the notice failed to comply with order 31 (2) (b) as there is no proof of deposit of the costs of the appeal

Ms Mabwe further submitted that the notice of appeal fails to comply with Order 31 (2) (b) in that the appellants have not deposited proof of payment of costs of the appeal. If one has regard to para(s) 2 and 3 of the notice of appeal, it is clear that the appellants complied with this requirement in the usual manner. In *Telecel Zimbabwe (Pvt) Ltd* v *POTRAZ & Ors* HH 446/15 MATHONSI J, as he then was aptly expressed my sentiments when he said:

> "Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence *viz-a-viz* the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propiis*."

The rest of the points in *limine* raised by the first respondent in its heads of argument were not persisted with and I will not detain myself with those. I move to the merits of this case.

Ground 1: Whether the court *a quo* erred by failing to find that there was no legal persona which answers to the appellation "Turtle 16 Mine aka Peace Mine"

The appellants' case is that the court *a quo* entered judgment against a non existent entity as there is no legal persona answering to the name, "Turtle 16 Mine aka Peace Mine." They provided proof that the first appellant is the registered holder of rights, title and interests in Turtle 16 which consists of eight gold reefs situated in the Silobela Communal lands with certificate of registration number 22232. The rest of the particulars have already been explained above.

The first respondent does not deny this assertion but submitted that though there is no entity known by that name, there is a natural person who answers to that appellation, Apollo Mhlope who never raised issues with the appellation as it is his alias and he accepts it.

It is not true that the appellants are raising a defence on behalf of the second respondent. The notice of attachment in execution on p 65 of record shows that messenger of Court was instructed to attach and proceeded to attach second defendant's interests and title over Turtle 16 Mine which rights were not held by second defendant as it is in fact not a legal persona. The second defendant has in fact distanced himself from being the holder of rights, title or interest in Turtle 16 Mine before the High Court, in case HC 311/20 and HC 1926/18.

Once it is accepted that there is no legal entity answering to the name in which the second respondent was cited, the law is settled. In *Gariya Safaris (Pvt) Ltd* v *van Wyk* 1996 (2) ZLR 246 (H) it was held as follows;

> "In this case, the person against whom the plaintiff thought it was proceeding as a defendant was non-existent at the time summons was issued. The proceedings and judgment that followed the summons were null and void. To try an action in which there is only one party is an exercise in futility. There were no two parties to give rise to the existence of a cause of action between them."

The same position applies herein. The action in case KK CIV 21/20 in which there was a nonexistent defendant at the time of issuing of summons, the proceedings and judgment gotten by way of summary judgment were all null and void *ab initio.* The court *a quo* could not put something on nothing and expect it to stand. It did not matter how long the matter had been on

the roll. There was no matter before it as there was only one party and proceeding with the matter was an exercise in futility.

I therefore uphold this ground of appeal.

Ground 2 of appeal: Whether the court *a quo* erred by finding that the summons had been served on an employee of the appellants

It was submitted that the summons did not cite the appellants. This is evident from record page 12. The appellants claim to have only known of the summons in KK CIV 21/20 upon conducting a search at the High Court, Harare and Bulawayo in respect of litigation instituted by Apollo Mhlope. It was argued that it is evident that the people who purported to litigate on behalf of the second respondent are the ones who were served.

My perusal of the record of proceedings does not have a return of service. It is only alleged that a security guard was served and he must have belonged to the appellants.

The first respondent submitted that the summons were served at second respondent's premises and the court correctly concluded that such summons were served on the appellants' employee as the appellants were now in control of the premises as there was no longer a tribute agreement with the second respondent.

After making a finding that there was no defendant in the summons, even the service of summons was a nullity. I note however that the summons on page 12 of record were to be served at an address given as Turtle 54, Chief Sigodo Area, Silobela and not at Turtle 16 Mine. The subsequent entry of an appearance to defend by the second respondent proves that service was effected on whoever purported to be the defendant.

In any event the court should not have relied on whether or not the appellants' employee had been served as this is not a requirement when one is proceeding in terms of Order 30 r 4.

There is no merit in this ground.

Ground 3: Whether the court *a quo* erred in holding that the appellants ought to have proceeded in terms of Order 16 r 3

After my finding above that service was not effected on the appellants' employee due to the evidence on record, it is clear that Order 16 r 3 could not have been applicable as it provides for a different scenario;

> ***"3. Summons served on wrong defendant***
> (1) This Order shall apply to a person upon whom a summons has been served who alleges that he or she is not the defendant cited in the summons and enters appearance to defend on that ground as though he or she were a defendant, and the court may, on the hearing of any such defence, order costs to be paid to or by such person as if he or she were a party to the action."

The appellants properly proceeded in terms of Order 30 r 4 which provides;

> ***"Application for rescission by person affected by judgment***
> (1) Any judgment of the court may, on the application of any person affected thereby who was not a party to the action or matter, made within seven days after he or she has knowledge thereof, be so rescind-ed, varied or corrected by the court."

The facts supported by the record are that the appellants were not a party to the action and were affected by the court's judgment hence they were seeking rescission of judgment. There is no factual evidence pointing to them being aware of the action and ignoring it.
This ground of appeal succeeds too.

Ground 4: Whether the appellants had a duty at law to propose a way forward after rescission of judgment

The appellants impugn the court *a quo's* reasoning that if it were to grant rescission of judgment, the first respondent would be left with no recourse. There was no legal basis for such reasoning as the appellants are not enjoined by Order 30 r 4 to suggest a way forward. The appellants were not privy to the arrangements between Apollo Mhlope and the first respondent.
Having already made a finding that the judgment sought to be rescinded was null and void *ab initio*, it means that nothing could save it**.** There was no room for any suggestion from the appellants which could resuscitate an already dead action.

Ground 5: Whether the court *a quo* erred by declining to rescind the judgment on the basis that the appellants should have dissuaded the first respondent from investing in the second respondent

There is no legal and factual basis for the court's reasoning. The record shows that the appellants were not privy to the arrangements between Apollo Mhlope and first respondent. How could they have stepped in and dissuaded the first respondent? Secondly they had no legal duty to do so.

Ground 6: Whether the court *a quo* erred by failing to find that the order under case number HC 1926/ 18 which granted Apollo Mhlope rights, title and interest in Turtle 16 Mine Was set aside by the High Court in case HC 311/20

Before the court *a quo* on page 137 of record was a High Court Order rescinding an earlier order in HC 1926/18 which had granted to Apollo Mhlope rights title and interests in Turtle 16 Mine. This was a strong enough basis on which to grant the rescission of judgment sought by the appellants before the court *a quo.* The reasoning that the first respondent had already invested US$13 700 could not have overridden a court order. The first respondent did not make any meaningful submissions on this point.

I accordingly find that grounds 1, 2 3, 4, 5, and 6 all succeed and I make the following order:

1. The instant appeal succeeds with costs
2. The judgment of the court *a quo* of 26 January 2022 is set aside and substituted with the following;

> " The applicants' application for rescission of judgment in terms of Order 30 r 4 of the Magistrates Court (Civil) Rules, 2019, be and is hereby granted with costs."

WAMAMBO J agrees----------

Chimuka-Mafunga Commercial Attorneys, appellants' legal practitioners
Farai & Associates Law Chambers, first respondent's legal practitioners