JOSEPH SIMBI
versus
HOMESTAKE MINING (PVT) LTD
(Under Judicial Management)
and
FRANCIS CHINGOZHO N.O
and
ENVIRONMENTAL MANAGEMENT AGENCY

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 29 June and 20 July 2022

Opposed Application

L Madhuku, for the applicant
R Mabwe, for the 1st and 2nd respondents

BACHI-MZAWAZI J: In this contested application, applicant vies for the confirmation of a provisional order whilst the respondents pray for its discharge.

Apparently, applicant sought an interim order by way of an urgent chamber application for the suspension of the respondents' mining activities and operations on Plot G, Greydine Farm, Tiger Reef, Kwekwe. Applicant is the holder of occupation and agricultural rights on the property on one hand. On the other, the first respondent a duly incorporated company, under judicial management and the second respondent its judicial manager are holders of the mining claims rights in the same property. Both parties gave different versions as to who inhabited the piece of land first. However, the essence of the original urgent application was that the first respondent had commenced harmful mining practices with adverse effects, to the farmer, his family, livestock and the general environment. Further, it was brought to the attention of the court, in that interim action, that the respondent had not complied with the Mining and Environmental Laws with respect to the acquisition of an environmental impact assessment certificate. Understandably, the interim relief suspending the respondent's mining operations of the respondent was granted on the 8th of June 2020. It is common cause, and on record that the respondents, on 13 August 2021, subsequently regularized the position by acquiring the environmental impact assessment certificate, which is due to expire in 2023.

Applicants, as already stated are moving for the confirmation of the following final order:

TERMS OF THE FINAL ORDER

That you show cause to this Honourable Court why a final order should not be made in the following terms:

IT IS ORDERED THAT:

1. It be and is hereby ordered and directed that the 1st and 2nd respondents obtain an environmental impact assessment clearance from the 3rd respondent before proceeding with mining operations on Plot 9, Greydine Farm, Tiger Reef, Kwekwe.
2. It be and is hereby ordered and directed that the 1st and 2nd respondents enter into an agreement with the applicant regulating the respective rights of the parties for the duration of the mining activities of the 1st and 2nd respondents on Plot 9, Greydine Farm., Tiger reef, Kwekwe.
3. In the event of the parties failing to reach an agreement under paragraph 2, the matter be referred to an arbitrator appointed by the President of the Law Society. The arbitrator will make a binding agreement for the parties, with each party paying 50% of the costs of arbitration.

As can be gleaned from the terms of the final order sought and the summarized facts, the first relief sought has been superceded by events. There is an Environmental Impact Assessment Certificate which has been obtained by the respondents and is part of the record. I do not agree with the submissions by counsel for the applicant that I should grant a final order on an act which has already been complied with. The situation sought to be guarded by an environment impact certificate is the one that gave rise to the interim relief in the first place. Logically, the relevant authorities would not grant such a certificate when the mining operations are contrary to the essence behind its issuance. As it where the impact assessment certificate is both a constitutional and statutory prerequisite before the commencement of any mining operations. This is a measure and safeguard to ensure that the environment, its habitants and dwellings are not adversely affected by harmful mining methods. This is well encapsulated in s 73 of the Constitutional of Zimbabwe, Amendment No. 20 of 2013 and the enabling Act the Environmental Management Act [*Chapter 20:17*]. Therefore, there is no way that the regulatory Authority would have issued the said certificate when there was non -compliance and if the respondents acts posed any danger as previously indicated in the interim relief sought

This aspect is now moot. See *Ndewere* v *The President of Zimbabwe N.O and Ors* SC 57/20. As such I will proceed to dispose of that relief as a non-issue.

However, with regards to the second and third reliefs, the applicants argue that, as there is open hostility and confrontations between the parties, it is best that the parties be ordered and directed to seek an amicable solution to their co-existence by force marching them into an agreement to that effect. If that fails then the applicant is asking this court to direct the parties to refer the issue on respective rights of the parties to an arbitrator. The reasons advanced by the applicant are that, the respondents are not yielding to the request by the applicants for a stake in the mining wealth or claims of the respondents. As such, for as long as there is that statement then there will be endless discord warranting intervention by an independent arbitrator.

In response, the respondents, commenced with a preliminary objection. They advanced that the applicants did not comply with the provisions of the Companies Act [*Chapter 24:03*] s 213, which stipulates the need to seek leave of this court before the commencement of any litigation on a company under judicial management. This point was raised as a legal point for the first time in the respondents' heads of arguments. They relied in the case of *Allied Bank Limited* v *Dengu & Anor* 2016 (2) ZLR (S) 373, amongst others. Respondents, further argue that, the interim order granted on 8 June 2020, was a legal nullity as it was *ultra vires* the said statutory provision. As such, they submitted that nothing flows out of a legal nullity as per the judgment in *Mcfoy* v *United Africa Co. Ltd* [1961]2 ALL ER 1169 (PC).

The applicant counter argued that the preliminary point had no merit. It should have found legs to stand on, in the initial urgent chamber application. Therefore, it is too late to rely on that section of the infringement of the Companies Act, as doing so entails the revisiting of a competent order of this court and this court is *functus officio*.

JUSTICE MAKARAU JA (as she then was) had occasion to deal with the issue revolving around s 213 of the Companies Act [*Chapter 24:03*] in the case of *Rio Zim (Private) Limited* v *Trust Bank Corporation Limited Co.* (in liquidation) SC 87/21. The learned judge stated that, in respect to s 213 of Companies Act [*Chapter 24:03*]:

> "The Act simply provides that the leave of the court is required before a company in liquidation can be sued. It does not lay out the test or set of factors that a court granting such leave must take into account, leaving the matter to the discretion of the court, which discretion the court must exercise judiciously ……..Thus by operation of law, all legal processes against the company in liquidation are stayed and can only proceed with the leave of the court."

In casu the issue to be decided is whether or not the failure by the applicant to seek leave of the court when it instituted an urgent chamber application nullified the order that was subsequently granted?

Counsel for the applicant stated that the court is *functus officio* as it cannot revisit its own decision. With respect to the doctrine of *functus officio*, it is appreciated that the order granted on 8 June 2020 was an interlocutory order. The court did not deal with the merits of the matter. As the name connotes it was a provisional and not a final order.

NDOU J in *Chahwanda* v *Dube* HB 6/2007 asserted that:

> "It is a general principle of our land that once a court has duly pronounced a final judgment, it has no authority to correct, alter or supplement it. The court becomes *functus officio*. Its jurisdiction in the case having been fully and finally exercised its authority over the subject matter ceases…. There are, however, a few exceptions to this general rule e.g. the rule or corrections made pursuant to the provisions of the Rules of this court…
>
> This court has not fully addressed and finally exercised its jurisdiction in this matter. It still enjoys its inherent powers to supplement, clarify or correct its own judgment."

In light of the above it is evident that a provisional order is an interlocutory matter. The court sitting on 8 June 2022 did not deal with the merits. These were for the return date. The court can correct its errors before a final judgment has been pronounced. See *Lloyd Majaya* v *Patience Mudondiro* HH 215/22, *Tiribhoyi* v *Jani & Anor* 2004(1) ZLR (H) and *Rogerio Barbosa De SA* v *Herlandeer Barbosa Desa* SC 34/16. The applicant did not seek leave to institute litigation against the respondents.

Section 213 of the Companies Act states that:

> "In a winding up by the court -
> a) no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose."

The case of *Funding initiative international (Pvt) Ltd* v *Mabaud*i HH 20- 09 cited with approval, in case *Tears Maeresera* v *Viripri Mining Syndicate and Anor* HH 402-22 had the occasion to state that on p 9, of the cyclostyled judgment:

> "The established principle our law is that anything done contrary to a direct statutory prohibition is generally void and of no legal effect. The mere prohibition operates to nullify the act."

Guided by all the authorities above, particularly in *Rio Zim (Pvt) Limited* above, by operation of law all legal processes against the company in liquidation are stayed and can only proceed with the leave of the court.

It is common cause that when the applicant instituted these proceedings, they were aware that the first respondent was under judicial management, and under the management of the second respondent. They did not seek the leave of the court before doing so. Therefore, the

order given in flagration of the clear statutory provision is a legal nullity, as is established in the *Mcfoy case* above, nothing flows from a nullity. Even if we were to proceed to the merits for completeness, the other two reliefs sought, connotes the interference of the doctrine of freedom of contract.

In *Ashanti Gold fields Zimbabwe Ltd* v *Mdala* SC 60 of 2017, this principle was well exploited it was proclaimed that:

> "It is an accepted principle of our law that courts are not at liberty to create contracts on behalf of parties nether can they purport to extend or create any contractual terms."

In *Mazibuko* v *Christian Brothers College Board of Governors* SC 54/2017. The Supreme court had another occasion to pronounce that, it is generally not considered to be the role of courts to re- write contracts for the parties. Freedom of contract prevails.

I therefore, need not labour in unpacking the two reliefs thus sought by the respondents as they clearly speak to the rights of the parties to enter into an agreement or not. It further impedes or impact on their freedom to elect an independent platform for dispute resolution or not to.

See Premier, *Free State and Ors* v *Firedom Free Estate (Pvt) Ltd* 2003 (3) SA 413 SCA, where the court held:

> "An Agreement that parties will negotiate to conclude another agreement is not enforceable because the absolute discretion is vested in parties to agree or disagree."

In the final analysis respondents' preliminary point is dispositive of the matter. The final order is accordingly discharged with costs.

Lovemore Madhuku Lawyer, applicant's legal practitioners
Chiminya and Associates, 1st and 2nd respondents' legal practitioners