DUATLET INVESTMENTS (PVT) LTD
and
PROBADEK INVESTMENTS (PVT) LTD
versus
KNOWLEDGE HOFISI
and
REDWING MINING COMPANY (PVT) LTD
and
BETTERBRANDS MINING (PVT) LTD
and
MASTER OF HIGH COURT

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 6 and 10 January, 2022 and 03 February 2020

Urgent Chamber Application

Ms B.M. Machanzi, for the 1st and 2nd applicants
Mr. L. Zinyengere, for the 1st and 2nd respondents
Ms N. Madzivire, for the 3rd Respondent.
No appearance for the 4th Respondent.

DEME J: The first and second applicants have approached this court on an urgent basis seeking the relief for leave to sue the second respondent in terms of Section 126(1)(b) of the Insolvency Act [*Chapter 6:07*]. In particular, the Applicants' prayer, according to the draft order reads as follows:

> "1. Application for leave to sue the 2nd Respondent be and is hereby granted.
>
> 2. 1st Respondent shall pay costs of suit."

I will proceed to give the brief background of the present application. The second respondent was placed under corporate rescue on 13 July 2020. Mr. Dondo was appointed the corporate rescue practitioner but has since been suspended from his office. Before being suspended, on 15 October 2021, the corporate rescue practitioner entered into joint venture mining agreement with the second applicant, according to the founding affidavit filed. The agreement was reduced into a tribute agreement according to the applicants. The agreement is annexed to the urgent chamber application and is marked Annexure B. The applicants averred

that the tribute agreement was duly registered with the Ministry of Mines and Mining Development. The deponent of the founding affidavit has attached proof of registration to the urgent chamber application and is marked Annexure C. Further, it is the applicants' position that the tribute agreement was also reduced into a Notarial Deed which was registered with the Registrar of Deeds. The notarial deed has been annexed to the urgent chamber application and is marked Annexure D. The first respondent is the interim corporate rescue practitioner of the second Respondent following the suspension of Mr. Dondo.

According to the applicants, at the time the first Respondent was appointed, there were three entities which had competing interests regarding the mining activities on the mining location registered in the name of the second respondent. According to the applicants, the entities included the following:

- The second applicant, by virtue of a tribute agreement mentioned above;
- Prime Royal Africa (Private) Limited with which the second respondent had entered into a mining agreement prior to placement under corporate rescue;
- The third respondent which at one time concluded a mining agreement with the second respondent.

The deponent of the founding affidavit further averred that a resolution was passed at the meeting of creditors on 9 September, 2021 to the effect that a special vehicle was to be registered by the three entities highlighted above. The copy of the minutes has been attached to the urgent chamber application and is marked Annexure F. According to the founding affidavit, the first respondent, on 1 October 2021, directed the cessation of mining activities at the mining location registered in the name of the second respondent pursuant to the agreement for the formation of the special purpose vehicle. The special purpose vehicle was later registered in the name of the company. The first applicant assumed the shape of the special purpose vehicle. At the time when this application was filed. The first applicant was a shelf company. The first applicant was expected to regularise its status through appointment of directors.

Represented by Ms Patricia Mutombgwera and Mr. Stanley Motto, the first applicant concluded a joint venture mining agreement with the second respondent on 29 November, 2021.

In terms of the joint venture mining agreement between the first applicant and the second respondent, the first applicant was to secure proof of funding within two weeks. According to the first applicant, it furnished the second respondent with proof of funding on 15 December, 2021. According to the first applicant, the first respondent rejected proof of funding supplied. Consequently, the first respondent proceeded to cancel the joint venture mining agreement between the first applicant and second respondent. The cancellation of the joint venture agreement, according to the applicants, necessitated the filing of the present application seeking leave to sue the second respondent.

The first, second and third respondents raised points *in limine.* The preliminary points raised include the following:

(a) Lack of urgency.
(b) Incorrect procedure.
(c) Defective board resolution.
(d) Defective draft order.
(e) Material misjoinder of 3rd Respondent.

In relation to the urgency, Mr. L. Zinyengere submitted on behalf of the first and second respondents that the present application is not urgent. According to his submissions, the joint venture mining agreement signed by the second respondent and first applicant compelled the first applicant to furnish the second respondent with proof of funding within two weeks of the signing of the agreement. The agreement was signed on 29 November, 2021 and was subsequently cancelled on 17 December, 2021 due to the first applicant's failure to produce proof of funding, according to the first respondent. The counsel for the first and second respondents further submitted that the first and second applicants were supposed to act soon after 17 December, 2021. The first and second applicants were not supposed to wait until 31 December, 2021 for them to file the present application, according to Mr. Zinyengere's submissions.

On the other hand, the counsel for the first and second applicants Ms B.M. Machanzi submitted that between 17 December, 2021 and 31 December 2021, the first and second applicants were trying to approach the first respondent in order to reach an amicable settlement of the dispute. However, the exercise did not yield any result thereby forcing the first and second applicants to file the present application, according to the submissions made by Ms.

Machanzi. She further submitted that the first and second applicants had to seek legal counsel to file the present urgent chamber application. She also submitted that the delay was also caused by the Christmas festival season. The delay of thirteen days was not irrational in the circumstances according to the first and second applicants.

The issue of whether or not the matter is of urgency has been settled in our jurisdiction. In the case of Kuvarega v Registrar General and Another[1], the court held that:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is urgent if at the time the need to act arise, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

On a balance of probability, I am of the considered view that the applicant's explanation for the delay is reasonable. There was no excessive delay in approaching this Court. In the case of Nzara v Tsanyau and Others[2], the court held that a delay of eighteen days does not amount to inordinate delay. I, therefore, dismiss the point *in limine* for urgency.

The first and second respondents averred that the first and second applicants used the wrong procedure as they were supposed to have sought the written consent of the first respondent before approaching the court in terms of Section 126(1)(a) of the Insolvency Act, [*Chapter 6:07*]. They also averred that the applicants ought to have instituted this urgent chamber application by way of court application as the wording in Section 126(1) (b) of the Insolvency Act suggests that the application must be approved by the court.

The counsel for the first and second applicants submitted that the use of the word "or" between para(s) (a) and (b) of Section 126(1) of the Insolvency Act, [*Chapter 6:07*] is a clear testimony that the written consent of the first respondent is one of the available options in addition to the filing of the present application. The applicants also submitted that the written consent of the first respondent had become impossible as the first respondent refused to have negotiations in this regard. The applicants further averred that the submission that the present application ought to be by way of court application and not urgent chamber application is a misconception.

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[1] 1998 (1) ZLR 188 (H).
[2] 2014 (1) ZLR 674 (H).

Section 126(1) (a)-(b) of the Insolvency Act, [*Chapter 6:07*] reads as follows:

> "During corporate proceedings, no legal proceedings including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum except—
>
> (a) With the written consent of the practitioner; or
> (b) With the leave of the court and in accordance with any terms the court considers suitable;"

Para(s) (a) and (b) of Section 126(1) of the Insolvency Act [*Chapter 6:*07] have been joined by the word "or" which clearly suggests that paragraphs (a) and (b) are disjunctive, they are not conjunctive. Thus, any interested party will be at liberty to choose one of the options specified in these two paragraphs. The applicants chose to institute the present matter in terms of para (b) of Section 126(1) of the Insolvency Act, [*Chapter 6:07*]. There was no need for the applicants to have sought written consent of the first respondent for them to file the present application.

With respect to the issue of whether or not the present matter ought to have been brought by way of court application instead of urgent chamber application. The word "court" specified in Section 126(1) (b) of the Insolvency Act, [*Chapter 6:07*] does not necessarily suggest that the leave must be sought through court application. Court has been used in the broadest sense. In terms of Section 2 of the Insolvency Act, [*Chapter 6:07*], the court has been defined as follows:

> "Court means High Court of Zimbabwe, and in sections 3(b), 20(1), 24, 26, 27, 106 and 107 also means Magistrates Court which has jurisdiction in respect of the matter or offence in question;"

The word "court" has been used in relation to the court having jurisdiction over the matter in question. Reference is made to the definition of "court" highlighted above. Thus, Section 126(1) (b) of the Insolvency Act, [*Chapter 6:07]* confers jurisdiction upon High Court to hear matters where a party is seeking leave to sue a company under corporate rescue.

Further, it is apparent that Section 126(1) (b) of the Insolvency Act, [*Chapter 6:07*] is a substantive provision. This is not a procedural matter. Substantive law is only supposed to specify the court which has jurisdiction to hear the application for leave to sue a company under corporate rescue. Whether or not the matter is to be instituted by way of court application or urgent chamber application is regulated by the Rules of this court. There is nothing that prevents the applicants from approaching this court on urgent basis as long as they have complied with the provisions of the Rules. The applicants have filed certificate of urgency

contemplated in terms of r 60(4(b) of the High Court Rules, 2021. Thus, application for leave to sue may be heard by the Judge in chambers if it is urgent or the court if it is not urgent. In this regard, I dismiss the point *in limine* related to the challenging of the procedure.

The first and second respondents averred that, at the material time, the deponent of the founding affidavit Ms Patricia Mutombgwera did not have authority from the first applicant's board to file the present application. The directors of the first applicant, at the material time, were Ms and Mr. Mabhiza. It was a requirement of the joint venture mining agreement that the first applicant had to be reconstituted. The third respondent also raised this point *in limine.* It was also submitted by Mr. Zinyengere that the deponent could also get approval to represent first applicant from the directors of the first applicant namely Mr. and Ms Mabhiza, the persons who got registered as such when the first applicant was incorporated as a shelf company.

The applicants, in response, highlighted that the first Respondent had to regularise the first applicant's board. According to the applicants, the deponent received the message from the first respondent to the effect that the paper work for the first applicant had been regularised. The applicants further averred that the first and second respondents had, on many instances, accepted the deponent to be one of the representatives of the first applicant. They further averred that the first, and second respondents must be estopped from denying the capacity of the deponent of the founding affidavit.

With respect to the representation of juristic persons before a competent court, Hebstein and Van Winsen[3], commented as follows:

> "since an artificial person, unlike an individual, can function only through its agents, and can take decisions only by passing of resolutions in the manner prescribed by its constitution, it cannot be assumed, from the mere fact that proceedings have been brought in its name, that those proceedings have in fact been authorised by the artificial person concerned."

Thus, the general rule is that any individual purporting to represent a juristic person must have authority to do so. Without such authority, any pleading filed before the court may be disregarded.

However, what is clear from the papers filed is that the juristic person concerned, the first applicant, was at its infancy, at all material time, without regularisation. The first applicant had no directors who could authorise Ms Mutombgwera to depose to the founding affidavit.

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[3] ***The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa, 5 ed: Vol 1 p437***

This case calls for extraordinary measures which are consistent with the provisions of the constitution. If Ms Mutombgwera is precluded from representing the first applicant, then the first applicant's right to a fair hearing established in terms of Section 69 of the Constitution would seriously be impaired as there is no-one with the capacity to represent it. The joint venture mining agreement was cancelled before the first applicant had directors. Section 45(2) of the Constitution is clear that the rights in the Constitution apply to the juristic persons in addition to the natural persons. Thus, the right to a fair hearing equally applies to the first applicant.

It is apparent that the first Applicant, at the time of the filing of the present application, was a shelf company. In terms of Section 293(1) of the Company and Other Business Entities Act, [*Chapter 24:31*] a shelf company is defined as follows:

> "Shelf Company means a shelf company incorporated or registered in the name of a person who intends to sell or otherwise transfer it to another person or persons, who in turn may operate it as an active business entity, Shell Company or a shelf company".

It is important to mention that a shelf company is an inactive company. It does not conduct business in the manner active businesses do. One of the purposes of registering a shelf company is to sell that company to persons who want to register a company as soon as possible. Thus, it is not correct to assume that the persons registered as directors on the constitutive documents of the shelf company may hold meetings to approve the deponent of the founding affidavit to represent it in the current proceedings. Thus, persons registered as directors of the shelf company may best be described as promoters of the company. They have no further business with Shelf Company to which they relate. Their names only appear on company's constitutive documents for purposes of compliance with the Companies and Other Business Entities Act, [*Chapter 24:31*].

At all material time, the first respondent acknowledged the deponent of the founding affidavit to be one of persons representing the first applicant. Rather, a perusal of the joint venture mining agreement between the first Applicant and the second respondent records Ms Patricia Mutombgwera as one of the directors of the first applicant alongside Mr. Stanley Motto. Further, the first applicant was expected to furnish the first respondent with proof of funding within two weeks of the signing of joint venture mining agreement. Reference is made to clause 3.3 of the joint venture mining agreement which provides as follows:

> "the consortium shall, within two weeks of signing this agreement, furnish RMC with proof of funding in the form of cash or a certificate confirming the bank balance or accounts receivable or a bank guarantee or any other form that may be acceptable to RMC and the practitioner:".

Clause 3.1 of the same agreement provides as follows:

> "within three weeks of signing this agreement the consortium shall furnish RMC with its Forms C.R. 5, C.R. 6 and C.R. 11:".

RMC is the acronym for the second respondent. From the provisions of the agreement, it is apparent that the first Respondent expected Ms Mutombgwera and Mr. Motto to source funding before the first applicant was regularised as the first Applicant was supposed to produce proof of funding within two weeks from the date of the agreement. The regularisation of the first applicant's constitutive documents was not a priority to the first respondent as the regularisation of the constitutive documents for the first applicant was only expected to be completed within three weeks from the date of the agreement in terms of Clause 3.1 of the agreement. It is also critical to mention that Ms Mutombgwera and Mr. Motto have been recognised as representatives with power to refer the dispute arising from the joint venture mining agreement to arbitration in terms of Clause 10 of the agreement. For the first respondent to deny that Ms Mutombgwera has no lawful authority to depose to the affidavit on behalf of the first applicant would raise a lot of questions than answers as the first respondent had recognised the same person to be one of the representatives of the first applicant before the regularisation of the first applicant's constitutive documents. Thus, I am of the considered view that Ms Mutombgwera had authority to represent the first Applicant. I therefore dismiss the point *in limine* challenging the authority of founding affidavit's deponent.

The first and second respondents also submitted that the draft order of the present application is defective. They highlighted that the draft order does not have a provisional order contrary to the practice. The draft order is seeking a final order according to the first and second respondents. The first and second respondents further averred that the applicants ought to have sought the interim relief for spoliation or interdict and then mount another case challenging the cancellation of the joint venture mining agreement separately.

The applicants deny that the draft order is defective as they are purely seeking leave to sue the second respondent. They also averred that the present application should not be construed as an application for interdict.

In the case of *Jonga* v *Chabata*[4], the court held that:

"the wording of an order is within the discretion of the court."

I fully associate myself with the court's sentiments in the case of *Jonga* v *Chabata* (*supra*). This case involved the application for leave to execute judgment pending appeal. The Applicant had crafted terms of final order which were similar to the terms of interim order. Similarly, if the applicants were to have their draft order in that manner, they are likely to run into the problem of having drafting terms of final order which are the same as terms of interim order. Thus, applications of this nature may not necessarily have to be crafted in the manner of a provisional order. There is no need for having a return day once the application for leave to sue has been granted.

The counsel for the first and second respondents submitted that the applicants were supposed to have applied for spoliation or interdict. However, the applicants cannot seek the relief for spoliation or interdict against the second respondent without the leave of this court. Reference is made to the provisions of Section 126(b) of the Insolvency Act, [*Chapter 6:07*]. Without this leave, no person may sue a corporate rescue. Only after the leave has been obtained can the applicants make a choice of the nature of application which they wish to institute against the second respondent. In this regard, I dismiss the point *in limine challenging the nature of the order sought.*

The third respondent also raised the point *in limine* to the effect that it ought not to have been joined to present proceedings. Ms Madzivire submitted on behalf of the third Respondent that the third respondent has no direct or substantial interest in the present matter as the applicants are purely seeking leave to sue the second respondent. Ms Machanzi, on behalf of the applicants submitted that the third respondent has direct and substantial interest in the present application as the third Respondent was party to the joint venture mining agreement in dispute which the Applicants seek leave to enforce.

I am of the considered view that the third respondent has substantial interest in the present case for the reasons submitted by Ms Machanzi. The third respondent did not deny that there are party to the joint venture mining agreement. Consequently, the point *in limine* for misjoinder of the third respondent falls away. I accordingly dismiss it.

[4] HH 276-17.

I will now deal with the merits of the application. The present matter is application for leave to sue. The procedure for applying for leave to sue as specified in Section 126(1)(b) of the Insolvency Act, [*Chapter 6:*07] is to ensure that companies under corporate rescue are given sufficient time to rescue itself from a state of financial distress. M. Laubscher[5], postulated the following:

> "These proceedings provide for the temporary supervision of the company as well as a temporary moratorium on the rights of the claimants against the company or in respect of property of their possessions."

Thus, during corporate rescue, a company is protected from rights of many claimants. If this is not done, companies under corporate rescue will find it difficult if not impossible to recover from their financial troubles. Rather, if suits are not controlled, companies under corporate will be driven into the state of liquidation. M. Laubscher[6], Further stated as follows:

> "The court acceded to the fact that generally a moratorium on legal proceedings against a company under business rescue is of vital importance since it provides essential breathing space or respite, at least periodically, to enable the company (in conjunction with the practitioner) to restructure its affairs, in order to formulate a business rescue plan designed to achieve the purpose of the process."

Thus, any decision by this court should ensure that its decision must not disrupt the rescue plan for the company under corporate rescue. Otherwise, the intention of the legislature as specified in Section 126 of the Insolvency Act, [*Chapter 6:*07] will not be achieved. In coming up with this decision, I have been alive to this reality.

The first and second respondents raised a crucial issue that the applicants were supposed to have approached the arbitrator instead of approaching this court. They further averred that arbitration provision in the joint venture mining agreement should be construed as written consent being granted by the first respondent to sue the second respondent. Thus, there was no need for the applicants to seek leave to sue where the first respondent has consented in writing through the written joint venture mining agreement according to the first and second respondents.

Clause 5 as read with clause 10 of the joint venture mining agreement allows the aggrieved party to engage the services of the arbitrator in the event of the emergence of a

[5] http://dx.doi.org/10.4314/pelj.v18i5.
[6] http://dx.doi.org/10.4314/pelj.v18i5.

dispute between the parties. Clause 5.2 of the joint venture mining agreement provides as follows:

> "Each party may invoke clause 10.2 of this agreement for the appointment of the arbitrator to confirm the cancellation of this agreement for a material breach of the terms and conditions set out herein by the other party."

After cancelling the joint venture mining agreement, the first respondent failed to refer the dispute to the arbitrator for confirmation or otherwise of the cancellation of the agreement. Upon being asked why Clause 5.2 was not pursued, Mr. Zinyengere submitted that the first respondent has not been able to invoke Clause 5.2 due to the present application. The cancellation of agreement by the first respondent happened on 17 December 2021. Reference is made to Annexure G.1 of the urgent chamber application. The present application was filed on 31 December 2021. If the first respondent had wanted to invoke Clause 5.2 of the joint venture mining agreement, he would have done so since he had about two weeks to do so. The first respondent's attitude can be inferred from paragraph 24 of his opposing affidavit which is as follows:

> "However, upon cancellation of the JVMA, it would have been illogical and irrational for the first Respondent to review his decision."

The sentiments of the first Respondent fly against the provisions of Clause 10.1 of the joint venture mining agreement which compels parties to hold talks in the event of a dispute arising. Clause 10.1 of the joint venture mining agreement provides as follows:

> "If any dispute arises between the parties, they shall attempt to resolve the dispute by calling a meeting of their respective representatives within five working days of such dispute arising to resolve the dispute in the letter and spirit of this agreement."

Clause 10.2 of the agreement further provides for the referral of the dispute to the Commercial Arbitration Centre if the parties fail to reach an amicable settlement. Clause 10.2 provides as follows:

> "In the event that the representatives fail to reach an agreement within five working days, the dispute shall, within six working days, be referred to Commercial Arbitration Centre in Harare by either party for the appointment of an arbitrator to settle the dispute."

Despite the availability of this dispute resolution mechanism in the joint venture mining agreement, the first and second applicants did not use this facility. It remains a secret why they avoided this avenue. Thus, both parties are at fault for failing to utilise the available channel for resolving the dispute between themselves.

In the circumstances, it is ideal that the dispute be referred to the Commercial Arbitration Centre in terms of the joint venture mining agreement. It is important to respect a mutually agreed dispute resolution procedure adopted by the parties. The Court should not redraft the agreement between the parties. Departing from the agreed position flies against the sanctity of contract. The principle of Sanctity of contract may be summarised in the following way:

> "(a) a valid contract is binding upon the parties. It can only be modified or terminated by consent of the parties or if provided for by the law. The parties to a contract must, unless legally excused from performance, perform their respective duties under the contract ("*pacta sunt servanda*").
>
> (b) A valid unilateral promise or undertaking is binding on the party giving it if that promise or undertaking is intended to be legally binding without acceptance.[7]"

Thus, this court cannot make any other order that may vary the terms of agreement for the parties unless if one of the parties has challenged the lawfulness or otherwise of certain provisions of such agreement. Neither party has challenged the provisions of the contract. Thus, the contract is still binding between the parties to the contract. Parties have no option except to observe the mutually agreed terms and conditions of the contract.

Further, it is in the best interest of the second respondent that the matter be referred to the arbitrator. This will not severely compromise the financial situation of the second respondent. The second respondent will save its resources by engaging the services of the arbitrator unlike being dragged before the High Court. Referral to the arbitrator will drain limited resources from the second respondent. In turn, this will not disturb the corporate rescue plan for the second respondent. However, in the absence of the joint venture mining agreement with no alternative dispute resolution mechanisms, I would have granted the applicants leave to institute its proceedings against the second respondent in this court as the dispute between the parties may, if properly executed, have the effect of resuscitating the second respondent.

In the circumstances, the most appropriate decision is to strike the matter from the roll. Since all parties did not observe the dispute resolution mechanism provisions provided for by the joint venture mining agreement, it is just and equitable that each party may bear its own costs.

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[7] https://www.trans-lex.org › sanctity-of-contracts

Accordingly, it is ordered as follows:

(A) The application be and is hereby struck off the roll.

(B) That each party shall bear its own costs.

Maruwa Machanzi Attorneys, first and second Applicants' Legal Practitioners.
Zinyengere Rupapa, first and second Respondents' Legal Practitioners.
Masiya – Sheshe and Associates, third Respondent's Legal Practitioners.