AVIM INVESTMENTS (PVT) LTD

Versus

HWANGE COLLIERY COMPANY LTD

And

ZHONG JIAN (PVT) LTD

And

DALE SiTUTU SIBANDA

And

MUTSA MOLLIE JEAN REMBA

And

SALOME RUTENDO CHICHAYA

And

BLAKE MHATIWA

And

BAO JUZHENG

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 8 NOVEMBER 2022 & 4 MAY 2023

Opposed application

T. Sena for the applicant
Adv. T. Magwaliba for the 1st, 3rd, 4th, 5th, & 6th respondents
I. Goto for the 2nd & 7th respondents

MOYO J: This is an application for contempt of court wherein the applicant seeks an order in the following terms:

1. The application be and is hereby granted.

2. The respondents be and are hereby directed to cease and purge the contempt by immediately starting to comply strictly with the court order under cover of HC 40/22 and or judgment number HB-34-22 dated 3rd February 2022.
3. Each of the respondents is hereby fined the equivalent of US$2 000 in Zimbabwean dollars payable at the prevailing market rate as at the date of payment which fine shall be deposited with the Registrar of the High Curt within 2 (two days) of this order, and in default of payment, the respondents shall serve 2 (two) months imprisonment.
4. In addition, the 3rd, 4th, 5th, 6th, and 7th respondents are hereby sentenced to six (6) months imprisonment wholly suspended on condition that they do not hire the 2nd respondent's equipment and conduct coal mining activities at Chaba pit until the proceedings under case number HC 40/22 are finalised.
5. The respondents shall, jointly and severally, pay the costs of suit on a legal practitioner and client scale.

The facts of this matter are that under HC 40/22 the applicant obtained an order against 1st and 2nd respondents which was couched in the following manner:

> "Pending the confirmation of the final order, this provisional order shall serve as an interim order interdicting and directing that:
>
> 1. The 1st and 2nd respondents, their associates, previous and current employees, business partners be and are hereby ordered forthwith to suspend any mining equipment hiring and coal mining at 1st respondent's coal mining concession at Chaba Pit.
> 2. The 1st and 2nd respondents, their associates, previous and current employees, business parties be and are hereby ordered to forthwith suspend any operation of 2nd respondent's machinery at 1st respondent's coal mining concessions at Chaba Pit."

The respondents allegedly filed appeals that were subsequently dismissed for failure to comply with the rules. The applicant's contention is that with the appeals no longer pending respondents had to comply with the order or else they should be found to be in contempt of the order. In fact applicant contends that respondents failed to comply with the order even after they became aware of the dismissed appeals. At the hearing of the matter, the 1st, 3rd – 6th respondents raised preliminary points.

The 1st preliminary point is on failure to seek leave of the administrator in terms of section 6(b) of the Reconstruction Act Chapter 24:27 which provides that:

"A reconstruction order shall have the following effect …

(b) no action or proceeding shall be proceeded with or commenced against the company except by leave of the administrator and subject to such terms as the administrator may impose …"

In paragraph 6 of the opposing affidavit, it is stated as follows:

"1st respondent is a coal mining company under reconstruction in terms of the Reconstruction of State-indebted Insolvent Companies Act Chapter 24:27 since October 2018."

In paragraph 7 the same affidavit objects to applicant's failure to seek leave. In its answering affidavit paragraph 5 and 6 therein, where applicant responds to the averment on failure to seek leave, applicant states that leave was not necessary as the proceedings are related to HB-34-22 wherein the issue of leave was dealt with. Applicant avers that the respondents are raising the same issue twice. A reading of the judgment in HB-34-22 where the court dealt with the failure to seek leave to sue, the court stated that it was dispensing with the issue of leave to sue because what was before it was an urgent matter and the court held the view that it had a discretion to hear the matter on the merits.

Therefore, the court did not hold that leave to sue was not required in terms of the law, the court held that it was exercising a discretion to dispense with the leave on the basis of urgency. That is not the situation here. An application for contempt of court cannot be held as an urgent matter. It therefore follows that in the absence of any other ground upon which I can exercise my discretion to dispense with the leave, I am bound by the statutory requirements provided for in the Reconstruction Act *(supra)*. I have no basis upon which I can exercise my discretion and allow applicant to be heard without complying with the mandatory statutory obligation. I cannot hide behind the findings of the court in HB-34-22 and pretend that they are applicable herein or that the issue was resolved therein, wherein actual fact in that case the court clearly leaned on urgency in exercising its discretion and I do not inherit the exercise of a discretion that was exercised by another court on the basis of urgency in this matter yet I have no urgency to deal with. Applicant has neither given me any ground upon which I could

exercise a discretion in its favour and dispense with the issue of leave. It is my considered view that the Reconstruction Act was promulgated to serve a purpose and its peremptory provisions are not to be taken lightly. The law as provided must be respected by the courts whose job is to apply the law and not to disregard it. My hands are thus tied. Neither has applicant given me any case law authority in its heads of argument where I am allowed to disregard the Reconstruction Act in certain matters. I have already stated why the judgment in HB-34-22 cannot be a precedent for this case for 2 reasons:

1. Firstly I am not aware of a law that allows me to use a discretion in the face of a peremptory statutory provision. Even if there was, for arguments sake applicant has not in the answering affidavit made a case for the existence of such a discretion or valid reasons for its exercise herein.
2. Secondly, whilst in HB-34-22 the court states that it is invoking urgency to exercise a discretion, I cannot go there as there is no urgency here. I would then proceed to strike the matter off the roll as against 1st respondent for the reason of failure to seek leave.

The 2nd remaining point relates to the citation of 3rd to 6th respondents

The respondents aver in paragraph 8 of the opposing affidavit that before holding a party to be in contempt of court, the court must be satisfied that there is a court order which is extant, as against the party alleged to be in contempt. Meaning that one cannot be in contempt of a court order which was not obtained against them. That it is common cause that the judgment being the subject matter of these proceedings was obtained against 1st and 2nd respondents and that 3rd to 6th respondents were never parties thereto.

In response to this averment, applicant states in paragraph 7 of the answering affidavit that the 3rd to 6th respondents do not dispute that they are employees of the 1st respondent. That they are in fact managerial employees and that the provisional order in HB-34-22 is applicable to applicant's employees and that as long as that is the case they are properly cited. It is my considered view that for one to be found to be in contempt of court, a litigant must have been a party to the proceedings resulting in the order they are alleged to have disobeyed. It would not suffice in my view to seek an order against a respondent corporate entity, and without citation and service of the court proceedings on its individual employees, the applicant then seeks an order against such employees. The applicant having named the employees in these proceedings should have also named them in the matter being the subject matter of this

application. I am supported in this view by the decision of the Supreme Court, in the case of *Simba Mukambiwa & 7 Others* vs *The Gospel of God Church International* 1932, SC-8-2014 wherein the Supreme Court held that:

> "The court *a quo* correctly found that the appellants had not established that an order had been granted against all the respondents against whom the order for contempt was sought with the exception of the church."

Clearly, applicant sought an order against the 1st and 2nd respondents both being corporate entities and then decided to have the order bind unnamed employees, assignees and agents, what it means is that applicant designed this ambiguity at its own peril for a contempt of court order is a serious liberty depriving order that the court will not grant lightly where the order whose contempt is the subject is ambiguous. It must be clear and without doubt cast a specific obligation to a specific party who shall be cited by name so that they are either present when the order is being granted or they are in default but are aware of the proceedings. If applicant knew that it intended in the event of failure to comply with the court order, to enforce it against 3rd – 6th respondents and apply for contempt of court against them, it should have cited them in those proceedings. The Supreme Court case I have referred to herein clearly prohibits what applicant wants to do as against 3rd – 6th respondent. In its heads of argument, applicant cites the case of *Masamba & Another* v *ZIMSEC Director* HH-969-16. To start with, that case was about a claim for damages and not for contempt of court. Secondly, in that judgment the director of ZIMSEC was cited in a claim relating to ZIMSEC as a body and its conduct on examinations, the learned judge proceeded to state as follows:

> "The court agrees with the defendant's submissions that the defendant has no direct or substantial interest in the dispute."

The court further held that ZIMSEC was the correct defendant. The court further held that there being no direct legal relationship between 2nd plaintiff and defendant to the extent that defendant could not be compelled to perform or discharge duties. The court found that it was not necessary to join defendant to the proceedings and the claim against him was dismissed.

In paragraph 13 of the heads of argument, applicant submits that 4th respondent is the administrator, 5th respondent is the legal officer, 6th respondent is a mine manager, 3rd – 6th

respondents are employees and are affected by the provisional order and that they have direct and substantial interest in the dispute.

This is not the finding that was made by the court in the Masamba case that applicant cited. If a director of ZIMSEC was found not to have a direct and substantive interest in a matter where ZIMSEC was being sued, neither can a Chief Executive Officer, legal officer, manager or any other employee of an entity. It is not correct that an employee of an entity in whatever capacity, has a direct and substantial interest is the company's rights and obligations. A company is a separate entity from its directors and shareholders, let alone its employees. The 3rd – 6th respondents were thus improperly joined to these contempt of court proceedings.

I accordingly uphold this point *in limine* and dismiss the application as against 3rd- 6th respondents. I will not deal with the 3rd preliminary point on the commission of the answering affidavit by the applicant as I hold the view that I cannot summarily deal with the circumstances under which it was commissioned without the evidence of the Commissioner of Oaths. If I were to attempt to deal with this point, I would be in danger of making findings on the basis of assumptions. I do not have the necessary information to make concrete findings with regard thereto and it is accordingly dismissed.

I will accordingly make the following order.

1. The application is struck off the roll with costs as against 1st respondent.
2. The application is dismissed with costs as against 3rd – 6th respondents.

Chimuka Mafunga Commercial Attorneys, c/o Masiye-Moyo & Associates, applicant's legal practitioners
Dube, Manakai & Hwacha, 1st & 3rd respondent's legal practitioners
Masiya-Sheshe & Associates, 2nd & 7th respondents' legal practitioners