OPTIMAX MINING RESOURCES (PRIVATE) LIMITED
and
VUSANI GREY DIAMOND SIBANDA
and
NEXT GEN POWER PRIVATE LIMITED
and
NCD COAL MINING
and
AURORA RESOURCES MDCC
and
MINERALS MARKETING CORPORATION OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 23 and 27 July 2021

Urgent chamber application

B.Chipadza, for 1st applicant
T. Madondo, for 2nd applicant
T. Chinyoka, for 1st respondent
N.Chagwiza, for 2nd respondent

MUNANGATI-MANONGWA J: The applicants approached this court on an urgent basis seeking the following relief:

> "TERMS OF FINAL ORDER SOUGHT
> That you show cause to the Honourable Court why a final order should not be made in the following terms-
> 1. The 1st and 2nd applicant be and are hereby declared the rightful owners of the iron ores described as +/- five million tones and +/- 200 000 tonnes of iron ore fines stockpile situate at Mukwakwe Railway siding in Buchwa.
> 2. The Tripartite Agreement entered into by and between the 1st, 3rd and 4th respondents be and is hereby declared null and void and of not force or effect.
> 3. The 1st and 2nd respondent, the employees, agents, and or anyone acting on their behalf be and are hereby ordered to stop occupying, processing, removing and transporting for export 1st and 2nd applicants' iron ore stock pile situate at Mukwakwe Railway siding in Buchwa and to restore to 1st and 2nd applicants any tonnage that they have already processed from the stock pile.
> 4. The 4th respondent be and is hereby ordered not to process and issue any export permit to 1st and 2nd respondents, their employees, agents, and or anyone acting on their behalf

over any portion or all of 1st and 2nd applicants iron ores described as +/- five million tonnes and +/- 200 000 tonnes of iron ore fines stockpile situate at Mukwakwe Railway siding in Buchwa.

5. The 1st and 2nd respondent be and are hereby ordered to pay costs of this application on a higher scale.

INTERIM RELIEF SOUGHT

Pending the final determination of this present case, it is hereby ordered:

1. The application for prohibitory interdict be and is hereby granted.
2. The status *quo ante* before the spoliation is restored and the 1st and 2nd respondents and anyone acting through them be and are hereby ordered to stop occupying, processing, removing and transporting for export 1st and 2nd applicants iron ores described as +/- five million tonnes and +/- 200 000 tonnes of iron ore fines stockpile situate at Mukwakwe Railway siding in Buchwa and to restore to 1st and 2nd applicants' any tonnage that thy have already processed from the stock pile.
3. The 4th respondent be and is hereby ordered not to process and issue any export documents to 1st, 2nd and 3rd respondent, their employees, agents, and or, anyone acting on their behalf over any portion or all of 1st and 2nd applicants' iron ores described as +/- five million tonnes and +/- 200 000 tonnes of iron ores fines stockpile situate at Mukwakwe Railwaya siding n Buchwa."

The first and second respondents opposed the application. The first respondent raised the following points *in limine*

i) That there is no application before the court.

ii) That the matter is not urgent.

iii) That the applicants have not established a clear right or shown irreparable harm.

iv) That the relief sought is incompetent.

v) That the 2nd applicant has no interest in the matter.

vi) That second respondent's notice of opposition is not properly before the court.

vii) That the second respondent has not been properly cited.

Mr *Chinyoka* counsel for the 1st respondent abandoned the point pertaining to failure to establish a clear right, rightly so. This is because that point cannot be raised as a point *in limine* as it pertains to merits. Thus, the realization came timeously. The first applicant applied to amend the name of the second respondent and I granted the application. This is because the entity exists and there was simply a misdescription of an otherwise existing party.

In considering the points raised *in limine* it is pertinent for a judicial officer to ascertain which of the points raised would be determinant in the disposal of the matter. Going through all

points raised would be a futile exercise where ultimately one or two points can dispose of the matter.

In *casu* the point that there is no application before the court determines whether the case should proceed to be heard or not. The 1st respondent's objection hinges on the founding affidavit filed on behalf of the first applicant and ultimately the affidavit filed by the second applicant.

It is the 1st applicant's contention that the founding affidavit is laden with hearsay evidence thus the content is not in the personal knowledge of the deponent, and that, neither did the information come to the deponent in his capacity as a legal practitioner in the course and scope of his work as the attorney of record. An example was given wherein the deponent speaks of events that allegedly happened in Mberengwa as if he was a witness thereto.

The first respondent further contended that the facts in the affidavit cover a period of over 10 years and the deponent does not state the duration for which he has been acting for the first applicant and how it is that the information is in his personal knowledge.

The counsel for the 1st applicant Mr *Chipadza* contended that the 1st respondent made a broad submission that the averments in the founding affidavit are hearsay. He argued that although not all facts in the affidavit may be relevant, the annexures to the affidavit confirmed the veracity of the contents therein. He referred inter alia to "annexure" 1 confirmation of title and rights of applicant to 5 million tonnes of iron ore dumps, which confirmation was made by the Ministry of Industry, Commerce and Enterprise Development which letter was copied to applicant's legal practitioners, and, a video footage which shows the 1st respondent working on the dumps. Reference was also made to the court order and writ of execution which are part of the annexures. The 1st applicant counsel contended that these are public documents the existence of which cannot be denied. In that regard, he submitted that the first applicant's affidavit was properly before the court hence there was an application.

The High Court Rules, 2021 provide in Rule 58(4)(a) who can depose to an affidavit that accompanies a written application. It provides that:

> "4) An affidavit filed with a written application-
> a) Shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein; and …"

The rule is similar to r 227 (4) of the previous High Court Rules 1971.

This means only a person who can positively swear to the facts or averments is the one entitled to depose to an affidavit. Put conversely, what the deponent states in the affidavit is evidence of facts which if the person were to give oral evidence in court, such evidence would be admissible. It is not in contention that the deponent in *casu* is applicant's legal practitioner. However, that in itself does not, as contended by the 1st respondent, remove the hearsay nature of the evidence placed before court. Generally, the contents of the founding affidavit show that the deponent has no personal knowledge of the facts outside the facts as narrated to him by his client. The legal practitioner is incapable of vouching to the correctness of some of the facts that are stated in the affidavit. Reference is made to the background facts which appear in para 14 to 26 of the founding affidavit. I refer to para 25 which reads.

"In a shocking development, the applicants have a few days ago found people whose further particulars at the time of discovery are unknown to the applicants as they have been evasive, invaded applicants lots and started processing applicants stock piles stating they have an agreement with fourth respondent". The deponent must state the basis upon which he has knowledge of this material fact. Such basis has not been stated hence the evidence remains hearsay. He heard it from his client, he has no personal knowledge of the facts.

Apparently the relief sought is based on the purported unlawful conduct of the first respondent hence the contents of the aforementioned para would have been crucial should the facts have been deposed to by a person with personal knowledge of the facts.

Equally, para 26 is purely hearsay evidence and it reads:

> "The applicants then carried out intensive investigations which showed that the people on the ground are workers of the first and third respondent."

The deponent must aver to facts that are in his personal knowledge and not rely on third party information the veracity of which the deponent cannot vouch to. In *Bubye Minerals (Pvt) Ltd* v *Rani International Limited* SC60/06, the Supreme Court reiterated the fact that a founding affidavit to an application done by a deponent with no personal knowledge of transactions alleged in the application, could not stand despite the fact that the deponent had access to the company documents and had also consulted company employees. It is apparent in this application that the deponent rendered no explanation as to why the applicant could not depose to the facts itself. In *Hiltunen* v *Hiltunen* HH99/08 an agent had deposed to facts that were not in her personal

knowledge and there was no explanation of the basis of her belief that the facts were correct nor the source of her information. The affidavit was thus found to contain hearsay evidence and hence could not stand. This is the case in *casu*.

In essence there is no proper founding affidavit before the court hence there is no valid application as envisaged by r 58 of the High Court Rules 2021. It is trite that an application stands or falls on its affidavit. An affidavit is the heart of every application. It gives life to the application and where the founding affidavit is not valid the application dies with it. It is certainly not the duty of the court to sieve and sift through the contents to see which statements are hearsay and which are not. A founding affidavit should simply be compliant. As regards the second applicant's affidavit, the fact that this applicant did not make an independent deposition, his affidavit cannot escape the fatal consequences. Despite being an applicant himself, the 2nd applicant's affidavit is headed "second applicant's supporting affidavit." It cannot be a supporting affidavit when he is a party to the proceedings.

That aside, the damning fact is that this applicant submitted in para 4 of his affidavit that he "fully associates himself with the contents of *Brendon Chipadza's* affidavit…" *Brendon Chipadza's* affidavit not being properly before the court, and the 2nd applicant's affidavit being deplete of any factual averments on the matter, his affidavit cannot stand.

As there is no valid application before the court, the court cannot proceed to consider the list of the points in *limine* raised because there is no application before it.

Accordingly the matter is struck off with costs.

B. Chipadza Law Chambers, applicants' legal practitioners
Gunje Legal Practitioners, 1st respondents' legal practitioners