HB 72/19
HC 901/19

ZVISHAVANE-MBERENGWA MINING ASSOCIATION

Versus

ZIMBABWE MINERS FEDERATION

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 9 & 16 MAY 2019

Urgent Chamber Application

T. Tavengwa for applicant
T.*S.T. Dzevetero* for respondent

MAKONESE J: This is an application for leave to execute a judgment of this court pending the hearing of an appeal before the Supreme Court. The application has been filed under a certificate of urgency. The application is opposed by the applicant.

Brief background

On 21 March 2019, the Honourable MOYO J, handed down judgment under case number HB-37-19. In that matter the learned judge confirmed a provisional order granted on 14 June 2018. It was the view of the court that the notice of opposition and opposing affidavit were not properly before the court. Further the deponent to the opposing affidavit was not authorized to depose to such affidavit. Dissatisfied with the outcome of the proceedings, the respondent noted an appeal against the whole judgment of MOYO J at the Supreme Court on the 4th April 2019. The notice of appeal was duly served on applicant's legal practitioners on the 8th April 2019. The applicant has now brought this application on an urgent basis seeking to execute the judgment appealed against pending the appeal. It is worth highlighting at this stage that the order sought in the draft order by the applicant is in the following terms:

"Interim Relief Granted

(a) The decision taken by the respondent through its General Council on the 11th April 2019 to endorse Henrietta Rushwaya and her associates as the National Executive be and is hereby declared null and void *ab initio* and is accordingly set aside.

(b) The respondent be and is hereby interdicted from mandating the National Executive led by Henrietta Rushwaya and Wellington Takavarasha to represent its affairs in any forms outside Zimbabwe."

Points *in limine*

The respondent has raised the following points *in limine*, which it was argued would dispose of the matter without delving into the merits of the case.

1. Relief sought is not consistent with the facts

The respondent contends that the relief sought by the applicant and as indicated in this judgment is not supported by the facts set out in applicant's founding affidavit. I have carefully considered the relief sought and I have no doubt that what the applicant is seeking in essence is a fresh order for an interdict against individuals who were not cited as parties in the judgment appealed against. The application purports to be an application for leave to execute a judgment pending appeal, but in reality the court is being asked to make a determination on facts not before the court, and then grant an interdict under the guise of an application for leave to execute pending appeal. This, in my view is not only undesirable but borders on dishonest conduct. If the order sought were to be granted in the present from it would mean that the court would have granted an order against persons not before it and against persons who have not been afforded the right to be heard. This is against the basic tenants of justice and fairness. On this basis alone the this application is not properly before the court, and should not succeed.

Urgency

The respondent contends that the matter is not in fact urgent. The notice of appeal under SC-199-19 was filed on the 4th of April 2019. The applicants were aware of this appeal on the 8th of April 2019 upon being served with a copy of the notice of appeal. Applicant alleges that the application has been brought because in its view, the notice of appeal was filed for the sole purpose of frustrating execution of the judgment. The need to act arose when the applicant was

served with a notice of appeal on the 8th April 2019. Applicant did not act immediately and chose to wait until the 16th April 2019. What prompted the applicant to act was not the filing of the notice of appeal. It is trite law that the filing of an appeal suspends the operation of the judgment appealed against. No explanation has been proffered why the applicant chose to wait. There is a string of cases that set out the test to be applied in ascertaining urgency. See ; *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188.

It is my view that the application before me is not urgent. In any event the order sought in the draft order is not competent as it is not supported by the averments in the founding affidavit. In his submissions, *Mr Tavengwa,* appearing for the applicant sought to argue that the application for leave to execute pending appeal was not being pursued at this stage and that the only relief sought is for an interdict. It was clear that not much thought was put in preparing and filing this application. The application in its present form is fatally defective. On 21 March 2019 MOYO J confirmed the provisional order that was being sought under case number HC 1682/18. An appeal has been noted against that ruling. The matter is now before the Supreme Court. The applicant indicates that this court must grant an interdict essentially regarding the same dispute. This approach smacks of abuse of court process. Such conduct should be discouraged. The respondent has been put out of pocket in opposing this claim. Respondent is entitled to recover their costs in full.

In the result, the application is dismissed with costs on an attorney and client scale.

Mutuso, Taruvinga & Mhiribidi Attorneys, applicant's legal practitioners
Messrs Antonio & Dzevetero c/o Messrs Mashhayamombe Attorneys, respondent's legal practitioners