APATRON MINING (PRIVATE) LIMITED
and
VUSUMUZI OSFAEL MAZIBUKO
versus
JOSPHAT KUDUMBA
and
ELLIOT MUSWITA
and
FINGER TAPERA
and
HEADMAN MHIZHA
and
PETER MUDHUMO
and
RAFAEL SHOKO
and
SOLOMON NDLOVU
and
HAIGWARI SAFARIS (PRIVATE) LIMITED
and
DIRECTOR GENERAL ZIMBABWE PARKS AND WILDLIFE MANAGEMENT AUTHORITY N.O
and
MINISTER OF ENVIRONMENT, TOURISM AND HOSPITALITY N.O

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 5 November 2020 & 21 April 2021

Opposed application

T. Mpofu, for applicants
S. Dlomo, for respondents

TAGU J: This is an application to declare invalid the proceedings instituted by the 1st to 8th Respondents undercover of case number HC 1057/19 and the order obtained in default on the

23rd July 2019, unlawful and illegal. Consequently relief is sought to the effect that the 2nd Applicant be reinstated on the property called Munjungwe Conservancy.

The factual back ground to this application is that in case HC 1057/19 a Summons was issued by the 1st to the 8th Respondents on the 12th of February 2019. The Summons cited the 1st defendant as Vusimusi Masibuko trading as Apatron Mining Fort Rixon, second defendant as Director General, Zimbabwe Parks and Wildlife Management Authority N.O and third defendant as Minister of Environment, Tourism and Hospitality N.O. The Respondents were seeking firstly, a declaratur that the lease agreement entered into between 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Plaintiffs and 3rd Defendant be and is hereby declared to be valid and of full force and effect, that 1st Defendant and any person claiming occupation through him be and are hereby evicted from Mujingwe Conservance and that 1st Defendant be and is hereby ordered to pay the costs of suit on the higher scale as attorney and client. The 1st to the 8th Respondents then obtained a default judgment against the defendants on the 23rd of July 2019. The order obtained in default and the writ of eviction/ejectment subsequently issued on the 19th of August 2019 had an effect of interfering with the 1st Applicant' occupation of Munjungwe Conservancy since on the 10th of December 2019 the Deputy Sheriff proceeded to Mujingwe Conservancy and evicted the 1st Applicant and its personnel from the Conservancy on the strength of the writ of ejectment issued against the party cited as "Vusimusi Masibuko trading as Apatron Mining Fort Rixon" in the Summons proceedings under HC 1057/19 (Harare).

Upon catching wind of the order and writ of execution the 2nd Applicant issued two applications, one for an urgent chamber application under case number HC 10039/19 for an interdict which was dismissed on the basis that the "horse had already bolted." The second was rescission of the default judgment under case number HC 10022/19 which he withdrew on the basis that when he filled it he was laboring under the misapprehension that the Respondents intended to cite the 1st Applicant. However, the Respondents made it clear on para 6 and para 3 of their Notices of Opposition to both applications respectively, that the 1st Applicant Company is not party to the proceedings and that one cannot apply to rescind that which is invalid.

The Applicants now filed the present application on the basis that there is no legal entity that answers to the name VUSIMUSI MASIBUKO trading as APATRON MINING FORT

RIXON or VUSIMUSI MAZIBUKO trading as APATRON MINING FORT RIXON. The deponent to the founding affidavit VUSUMUZI OSFAEL MAZIBUKO averred that he has never answered to the name as cited on the Summons or on paragraph 4 of the Declaration where 1st Defendant is given as VUSIMUSI MAZIBUKO trading as PATRON MINING FORT RIXON. He said even if he were to assume that there was some typographical error on his names, he does not trade as APATRON MINING FORT RIXON and never have. In respect of the 1st Applicant, he said the company was never a party to the proceedings. To them the Summons is therefore void *ab originie*. It is therefore invalid. Consequently, even the order obtained in default is void and of no moment. The Applicants now seek the following order-

"IT IS HEREBY ORDERED THAT:-

1. The proceedings instituted by the 1st to 8th Respondents against a party known as "VUSUMUSI MASIBUKO trading as APATRON MINING FORT RIXON" under cover of case number HC 1057/19 (Harare) be and are hereby declared invalid.
2. The writ of execution issued pursuant to the order in default against the 1st Defendant party in the aforementioned proceedings under HC 1057/19 (Harare) be and is hereby declared invalid and cancelled.
3. The 1st Applicant herein, Apatron Mining (Pvt) Ltd be and is hereby reinstated to peaceful and undisturbed occupation and possession of Munjungwe Conservancy, Mwenezi.
4. The 1st to 8th Respondents be and are hereby ordered to pay costs on an attorney and client scale, jointly and severally, the one paying the other to be absolved."

The Respondents opposed the application. One ABIGAIL MUSHAYABASA deposed to the founding affidavit on behalf of all the Respondents. She stated that she was the legal Practitioner who handled all the cases involving the parties. She gave the chronological events of what happened before and after the legal battles between the parties erupted. The deponent then said at the time that Summons were issued, 2nd Applicant was known to the 1st and 8th Respondents to be trading under the name and style "Apatron Mining Fort Rixon" and was therefore cited in the Summons as Vusimusi Masibuko trading as Apatron Mining Fort Rixon." Hence the declaration stated that "**First Defendant is Vusimisi Mzibuko trading as Apatron Mining Fort Rixon … whose full and further particulars are to the Plaintiffs unknown**." She said further, that it has since been brought to the attention of the Respondents that the Defendant's name on the Summons and Declaration had minor spelling errors namely by having the letter "I" instead of "u" after "s" and "s" before the last letter in Vusumuzi and the letter "s" instead of "z" after "a" in Mazibuko. Further, she said the identity of Mr. Mazibuko, the deponent to founding affidavit is put to issue.

Finally, she said an application requesting a Judge of this Honourable Court to declare as invalid, proceedings which have been concluded by another Judge of this same court is alien to our law. The Applicant ought to have filed and prosecuted an application for rescission. She therefore prayed that the application be dismissed with costs on a legal practitioner and client scale.

In his answering affidavit the 2nd Applicant raised a point *in limine* that the deponent to the founding affidavit of the Respondents did not have authority to depose to an affidavit on behalf of the 8th Respondent, a juristic person without a resolution by the directors and or shareholders of the 8th Respondent to depose to an affidavit on its behalf. Secondly, the deponent to the founding affidavit for 1st to the 8th Respondents does not have authority to depose to a founding affidavit on behalf of the 1st to 8th Respondents in the absence of a power of attorney. He said a legal practitioner can only depose to an affidavit on behalf of a client only in exceptional circumstances. None have been demonstrated in this case. He therefore prayed that this case be determined as an unopposed application. As to the merits he denied most of the allegations in the 1st to 8th Respondents' Notice of Opposing. In particular on his identity he said the issues is not about spelling errors, but non -existent party. Further, he persisted with his submission that one cannot rescind that which is invalid or a nullity. As to jurisdiction of this court he said the Court has inherent jurisdiction and in its exercise of its powers, can declare an order to be invalid.

The Court perceived the following as the issues that arise for determination:

1. Whether there is proper opposition to the court application by the 1st to 8th respondents.
2. Whether the requirements for the granting of a declaratur are established.
3. Whether the Summons and Declaration under HC 1057/19 (Harare) are null and void *ab initio* against the cited defendants.
4. Whether this court has jurisdiction.

Before I deal with the issues it is necessary that I dispose of the point *in limine* raised by the Applicants in their answering affidavit. I saw it necessary to do so because in their heads of argument the Applicants persisted with the same, and in his oral submissions counsel for the Applicants Advocate *T. Mpofu* also persisted with the same point *in limine*.

IS OPPOSING AFFIDAVIT IMPROPER AND INADMISSIBLE

The Applicants' contention was that the purported Affidavit deposed to by the legal practitioner of the 1st to 8th respondents is improper and inadmissible by reason of being hearsay evidence. They said the deponent to the purported Opposing Affidavit did not disclose whether there is any justification for the depositions being placed before the court as hearsay, and not in direct form by the 1st to 8th respondents themselves: See *Church of the Province of Central Africa* v *Jakazi & Ors* 2010 (1) ZLR 246 at p246 F-G.

Mr. *S. Dlomo* for the 1st to 8th Respondents submitted that the deponent to the Respondents' Notice of Opposition's authority is clearly set out on page 114 of the record where it is said-

> "1. I am the legal practitioner of 1st to 8th Respondents and in that capacity I am duly authorized to depose to this affidavit on their behalf.
> 2. I have been seized with the dispute between Applicants and the 1st to 8th Respondents in several High Court records including HC 219/2020, HC 1057/19, HC 10022/19, HC 10039/19 and HC 10288/19. The facts and matters I depose to herein are therefore, well within my personal knowledge and belief, and are true and correct."

The general principle of law is settled that a legal practitioner must not depose to an affidavit on behalf of a client save in exceptional circumstances. In *Mandaza* v *Mzilikazi Investments (Pvt) Ltd* 2007 (1) ZLR 77 (H) E, this Honorable Court, per NDOU J, held that:

> "Generally, a legal practitioner should not depose to a founding affidavit on behalf of a client. However, he may do so if the facts of the case are within his personal knowledge. Even in such exceptional cases the practice should be exercised sparingly."

The counsel for the Applicants who cited the above authority submitted further that while the above quoted principle refers to a founding affidavit, it equally applies to an opposing affidavit. For this contention reliance was had to the case of *Hiltunen* v *Hiltnen* 2008 (2) ZLR 296 (H) at p.296H-207A where MAKARAU JP (as she then was), held that:

> "Generally speaking, affidavits must be confined to such facts as the witness is able of his own knowledge to prove, except in interlocutory motions, in which statements as to belief, with the grounds thereof, may be admitted. It is also a long-standing practice in urgent applications to receive hearsay evidence if an acceptable explanation is given why direct evidence is not available and the source of the information and the grounds for the belief in the truth of the statement are disclosed."

The legal practitioner who purportedly deposed to an affidavit on behalf of the 8th respondent is not an official of the company and has not pleaded any lawful basis for purporting to represent the 8th respondent. In the case of *Antonio* v *Ashanti Goldfields Zimbabwe Ltd Anor* 2009 (2) ZLR 372 (H) at p. 374E-F, the court held that:

> "[I]t is not every employee who can give evidence on behalf of a corporate body…which has a board of directors and an executive management. The employee who gives evidence on behalf of a corporate litigant must be suitably placed within the corporate governance structures to have knowledge of the facts to which they testify."

In this case the legal practitioner is not an authorized and suitably placed official of the 8th respondent, a corporate entity. I therefor agree with the counsel for the Applicants that the court application *in casu* is an ordinary one and not urgent. There was therefore ample time for the 1st to 8th respondents' legal practitioner to take instructions and draft proper affidavit to be deposed to by the litigants themselves. The 1st to 8th respondents' legal practitioner has not disclosed why the litigants themselves, and on the case of the 8th respondent, a duly authorized company official, could not depose to proper opposing affidavits. In respect of the contextual background given by the legal practitioner in paras 4.1 to 4.7.2 all this was not in the personal knowledge of the deponent. It is the story she gathered from her clients. In short this is all hearsay evidence. The legal practitioner's depositions are therefore inadmissible hearsay and ought to be disregarded. Consequently, there is no proper opposition to the court application by all the respondents. This application will be treated as an unopposed application.

Despite the fact that the point *in limine* has been upheld and the application treated as an unopposed application, the court will still decide whether the requirements for the granting of the declatur and the consequential reliefs have been established.

In *MDC* v *The President of Zimbabwe and Ors* 2007 (1) ZLR 257 (H), MAKARAU JP (as she then was) set out the requirements as follows:

> "The considerations that a court has to take into account before issuing a declaratur were, in my view, further expanded and explained in *Family Benefits Friendly Society* v *Commissioner of Inland Revenue and Anor* 1995 (4) SA 120 (T)…The applicant or plaintiff must show that:-
> 1. It is an interested person;
> 2. There is a right or obligation which becomes the object of the inquiry;
> 3. It is not approaching the court for what amounts to a legal opinion upon an abstract or academic matter;
> 4. There must be interested parties upon which the declaration will be binding; and
> 5. Considerations of public policy favour the issuance of the declarator."

In casu the 1st Applicant is APATRON MINING (Private) Limited. The 2nd Applicant is VUSUMUZI OSFAEL MAZIBUKO. The 1st Applicant stand evicted from Mujingwe Conservancy on the basis of a Summons which was issued against a non-existent party cited as

"VUSIMUSI MASIBUKO trading as APATRON MINING FORT RIXON". A tangible and justifiable advantage will flow to the Applicants if the declaratur sought is granted as the Applicants who were apparently not a party to HC 1057/19 are placed in peaceful and undisturbed occupation of Mujingwe Conservancy. The Applicants therefore are interested parties as they have a direct and substantial interest in the declaratur and consequential relief sought in casu. So all the requirements for a declaratur have been established.

The other issue the court has to be satisfied with is whether or not the Summons under HC 1057/19 (Harare) is void *ab initio* against cited defendants.

The 1st Applicant, Apatron Mining (Pvt) Ltd, is a duly incorporated company with limited liability and with capacity to sue and be sued in its own name. The second Applicant is a natural person whose appellations are Vusumuzi Osfael Mazibuko. There is therefore no 1st defendant in the 1st to 8th respondents' Summons under HC 1057/19 (Harare). This position has been pronounced by Courts in a plethora of judgements. In *Ganya Safaris (Pvt) Ltd* v *van Wyk* 1996 (2) ZLR 246 (H) at p. 252 this Honorable Court, per MALABA J (as he then was), held that:

> "The plaintiff is of course, entitled to choose the person against whom to proceed and leave out any person against whom it does not desire to proceed. A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names in the summons as being of the defendants, the summons is null and void *ab initio*."

At p. 253 this Lordship went on to point out that:

> "in this case, the person whom the plaintiff thought it was proceeding as a defendant was non-existent at the time summons was issued. The proceedings and judgment that followed the summons were null and void."

In the present application the Applicants managed to show that the 1st to 8th Respondents' summons in HC 1057/19 was null and void *ab initio*. It is common cause that the 1st Applicant was never party to the proceedings and that 1st Applicant has been evicted using an order obtained in circumstances that violate the 1st Applicant's rights to protection of the law. It is trite that the laws of our country entitle an individual to be heard before an adverse decision is made against him. In this case there was no observation of the *audi alteram partem rule.*

In respect of the 2nd Applicant the summons is invalid as it cites a non-existent party.

I will not labour to deal with the last issue of the jurisdiction of this court in a case like this. I will leave the issue open since it was raised by the 1st and 8th Respondents in their Notice of Opposition which affidavit this court decided to ignore on the basis that it contains hearsay evidence.

In conclusion I found that the Applicants managed to establish a case that justifies the relief they are seeking, hence I will grant it.

IT IS ORDERED THAT

1. The proceedings instituted by the 1st to 8th Respondents against a party known as "VUSIMUSI MASIBUKO trading as APATRON MINING FORT RIXON" undercover of case number HC 1057/19 (Harare) be and are hereby declared invalid.
2. The writ of execution issued pursuant to the order in default against the 1st Defendant party in the aforementioned proceedings under HC 1057/19 (Harare) be and is hereby declared invalid and cancelled.
3. The 1st Applicant herein, Apatron Mining (Pvt) Ltd be and is hereby reinstated to peaceful and undisturbed occupation and possession of Munjungwe Conservancy, Mwnezi.
4. The 1st to 8th Respondents be and are hereby ordered to pay costs of suit on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

Ncube and Partners, applicants' legal practitioners
Mutumbwa, Mugabe and Partners, 1st to 8th respondents' legal practitioners.