DISTRIBUTABLE: (42)

MCA VENTURE CAPITAL (PRIVATE) LIMITED
v
(1) SECRETARY FOR MINES AND MINING DEVELOPMENT (2) MINISTER OF MINES AND MINING DEVELOPMENT (3) CHIEF MINING COMMISSIONER (4) COMMISSIONER GENERAL OF POLICE (5) ZIMBABWE ALLOYS LIMITED

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, BHUNU JA & CHITAKUNYE AJA
HARARE 2 OCTOBER 2020 & 13 MAY 2021

S Bhebhe, for the appellant

T Chagudumba, for the fifth respondent

MAVANGIRA JA:

INTRODUCTION

1. This is an appeal against the judgment of the High Court striking off the roll the appellant's urgent chamber application for an interdict against the first, second and third respondents in respect of certain conduct, pending the resolution of any dispute between the appellant and the fifth respondent over certain mining claims.

2. The Provisional Order that the appellant sought in the court *a quo* was in the following terms:

> "**TERMS OF ORDER MADE**
>
> **FINAL ORDER SOUGHT:**
>
> That you show cause to the Honourable Court, if any, why a final order should not be issued in terms of the draft that
>
> 1. The applicant be and is hereby declared the lawfully registered holder of the mining **claims number 14826BM, 14827BM, 14828BM,**

14829BM, 14830BM, 14831BM, 14832BM, 14833BM in Lalapanzi District.

2. The letter dated 10th of April 2019 issued on behalf of the 1st Respondent be and is hereby declared unlawful, null, void and of no force and effect.

3. The respondents shall pay the costs of this application only in the event that they oppose this Application.

INTERIM ORDER GRANTED

Pending the confirmation or discharge of this Provisional Order Applicant is granted the

following relief:-

1. Pending resolution of any dispute between the Applicant and the 5th Respondent in respect of the mining claim, **registration number 14833BM,** or any of the Applicant's claims **registration numbers 14826BM, 14827BM, 14828BM, 14829BM, 14830BM, 14831BM, 14832BM,** the 1st, 2nd and 3rd Respondents be and are hereby interdicted from issuing any orders or directives stopping the Applicant from engaging in mining operations on any of the claims.
2. The 4th Respondent be and is hereby interdicted from enforcing the directive from the 1st Respondent in the letter dated the 10th of April 2019 or any order directing the interference with the Applicant's mining operations.
3. The 1st, 2nd and 3rd Respondents be and are hereby interdicted the (sic) conducting the hearing scheduled for Monday the 15th of April 2019 or from conducting any hearing regarding any dispute relating to the Applicant's claims except in terms of **section 345 of the Mines and Minerals Act [Chapter 21;05]"**

FACTUAL BACKGROUND

4. The background facts are largely common cause. The appellant is a company engaged in mining and processing of chrome in Lalapanzi. It was incorporated and registered in terms of the laws of Zimbabwe. It was incorporated and registered in May 2017 after a foreign investor decided to explore a mining venture in Zimbabwe. The ultimate goal of the investment was to set up infrastructure to beneficiate fine chrome ore into the final metal Ferrochrome. After extensive due diligence with the Ministry of Mines and

Mining Development the appellant entered into an agreement with Mine Mills Trading (Private) Limited (Mine Mills) for the purchase of eight special mining blocks, registration numbers **14826BM, 14827BM, 14828BM, 14829BM, 14830BM, 14831BM, 14832BM and 14833BM** measuring a total of **1143** hectares.

5 Subsequent to the sale and after carrying out full surveys in respect of all the claims, survey certificates were issued after the second respondent had satisfied itself of the boundaries of the claims. The sale and transfer of the eight special mining blocks was duly registered with the second respondent after payment of the prescribed statutory fees. Certificates of registration were issued on 26 July 2017. By letter dated 26 July 2017, the second respondent communicated confirmation of registration to the appellant.

6. Sometime in September 2017, the appellant began explorations on the mining claims and in particular on the claim held under registration number 14833BM which is the subject of the dispute between the appellant and the fifth respondent. The appellant also began its environmental impact assessment process for it to obtain its Environmental License. The facts so far are disputed

7. It is further averred that sometime in January 2018, after the appellant had carried out extensive exploration on the claims, the fifth respondent wrote to the appellant's mine manager concerning the claim 14833BM. The content of the communication in Annexure "K" is in a language other than English or any of the official languages of Zimbabwe. The appellant's alleged response to the fifth respondent was to the effect

that the claim was purchased and registered under registration number 14833BM. There was no further communication from the fifth respondent thereafter.

8. The appellant imported and installed a wash plant and other infrastructure on the claims and began mining on the claim in dispute. On 9 April 2019 the appellant's mine manager was called by the Deputy Provincial Mining Director for the Midlands Province for a meeting on the following day. At the meeting on 10 April 2019, the appellant was advised that the fifth respondent was claiming ownership of the claim 14833BM on which the appellant had ongoing mining operations.

9. On 11 April 2019, the appellant was served with a letter directing both the appellant and the fifth respondent to stop operations on the disputed claim and to attend a hearing on 15 April 2019. It is this conduct of calling for a hearing that the appellant alleges to be *ultra vires* the Mines and Minerals Act [*Chapter 21:05*] (the Act). It was under those circumstances that the appellant approached the court *a quo* on an urgent basis seeking to interdict the first, second and third respondents from conducting the hearing scheduled for 15 April 2019 or any hearing regarding any dispute relating to the appellant's claims, except in terms of s 345 of the Act. The appellant also sought to interdict the fourth respondent from enforcing the directive by the first respondent. It also sought to interdict the first, second and third respondents from issuing any orders or directives stopping the appellant from engaging in mining activities on any of the claims.

10. In its opposing affidavit, the fifth respondent stated *inter alia* that "What is in issue is the geographical location of claim number 14833BM and whether that claim does not

encroach claim number 8383BM which is owned and registered in the name of the fifth Respondent."

PROCEEDINGS IN THE COURT *A QUO* AND THE DECISION OF THE COURT

11. The fifth respondent raised four points *in limine* in the court *a quo*. The court recorded them as being:

> "(a) that the application was unnecessarily bulky and applicant attached documents which had not been canvassed specifically in the founding affidavit.
>
> (b) that the Judicial Manager was not cited.
>
> (c) that the fifth respondent was wrongly cited and,
>
> (d) that no leave to sue fifth respondent was obtained from the court prior to the institution of proceedings."

12. The court *a quo* was of the view that the first three points *in limine* were of no moment to the matter before it. It however held that the appellant ought to have sought leave to sue the fifth respondent in light of the order of the court dated 24 July 2013 and confirmed on 8 January 2014, placing the fifth respondent under judicial management. It therefore struck the matter off its roll on the ground that the matter was not properly before the court, requisite leave having not been sought and obtained.

THIS APPEAL

13. Aggrieved by the decision of the court *a quo* the appellant noted this appeal and raised the following grounds of appeal:

> "1. The Court *a quo* erred in striking the matter off the roll based on the alleged failure by the Applicant to apply for leave against the fifth respondent, a

nominal Respondent in respect of the interim relief sought, when it had already accepted that the cause of action for the Urgent Chamber Application was the letter dated the 10th of April 2019 which the Appellant alleged was ultra vires the 1st to 3rd Respondent's powers in terms of the Mines and Minerals Act [Chapter 21:05].

2. The Court *a quo* erred in law in finding, as it must be taken to have done, that the Urgent Chamber Application was not properly before it when the interim relief sought in the matter before (it) was against the 1st, 2nd and 3rd Respondents.

3. Having found and/or accepted that the matter was urgent, the Court *a quo* erred in law in finding that the Appellant needed to first apply for leave to proceed against the 5th Respondent in the circumstances"

14. The appellant seeks the following relief:

"1. The appeal be and is hereby upheld with costs.

2. The judgment of the Court *a quo* be and is hereby set aside and substituted with the following:
'The preliminary points raised by the 5th Respondent be and are hereby dismissed with costs,'
3. The matter be and is hereby remitted to the High Court for a determination of the matter on the merits."

THE APPELLANT'S SUBMISSIONS BEFORE THIS COURT

15. Mr *Bhebhe*, for the appellant, submitted that the issue that needs to be determined is whether or not the appellant ought to have sought the leave of the court to make the application that it made in the court *a quo*, as the fifth respondent was under judicial management when the application was made. It was his submission that the question was recently answered in *Zambezi Gas v N R Barber and Anor* SC 3/2020 (*Zambezi Gas*).

16. It was counsel's submission that it was not necessary to seek leave as the application was not against the fifth respondent in so far as the interim relief was concerned. With regard to the terms of para 1 of the final relief sought, it was his

submission that on the authority of *Zambezi Gas*, because the relief sought was declaratory in nature, the application was, on that additional account, not against the fifth respondent. He argued that the citation of the fifth respondent as a party did not alter this position. In any event, so his argument went, the matter before the court *a quo* was not for the granting of the final relief but for the interim relief only. Whether or not a declaratur could be granted was not an issue before the court *a quo*. Leave was therefore not sought because the proceedings were not against the fifth respondent.

17. It was counsel's further submission that a further indication that the proceedings were not against the fifth respondent was the fact that the cause of action for the application was the letter by the first to the third respondent's interfering with the appellant's activities. It was this letter that was the cause of the appellant's grievance and no interdict was sought against the fifth respondent. What the appellant sought was for the letter to have no effect.

The interdict that was sought was to be in existence pending the resolution of the dispute between the appellant and the fifth respondent.

18. Mr *Bhebhe* also submitted that *Zambezi Gas* was also authority for the proposition that the order that was granted when the fifth respondent was placed under judicial management staying proceedings and ordering that proceedings be not proceeded with, only applied to proceedings that were pre-existing and not proceedings that were instituted after the order placing a party under judicial management had been granted.

19. Counsel also made submissions on the applicability of the Insolvency Act [*Chapter .06:07*]. This was in response to the contention by the fifth respondent, in its heads of argument, that the Insolvency Act, [*Chapter 6:07*] which was promulgated in GN 413/2018 and repealed the Insolvency Act [*Chapter 6:04*], had replaced "judicial management" with "corporate rescue proceedings." The fifth respondent's contention was that the applicable provision that now binds the appellant is therefore s 126 in terms of which "during corporate rescue proceedings, no legal proceeding, 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 … with the leave of the Court and in accordance with any terms the Court considers suitable." The provision in the judicial management order, so the fifth respondent claimed, which provision was inspired by s 301 of the Companies Act had thus been superseded by the said s 126.

20. The allegedly superseded provision stipulated that "(A)ll actions and applications and the execution of all writs, summons and other processes against the applicants **shall be stayed and not be proceeded with** without the leave of this Honourable Court."

21. Counsel submitted that s 126 of the Insolvency Act, which the fifth respondent sought to invoke in order to bolster its case, was of no avail to the fifth respondent. If the Insolvency Act was relevant, the court in *Zambezi Gas* would have dealt with it as the said Act was in existence at the time of the judgment in

2020. The only argument that the fifth respondent could therefore possibly hazard was that *Zambezi Gas* was wrongly decided.

He prayed for the appeal to be allowed and for the matter to be remitted to the court *a quo* for its merits to be determined.

THE FIFTH RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

22. Mr *Chagudumba*, for the fifth respondent, submitted that the real dispute in this matter is between the appellant and the fifth respondent. The appellant therefore cited the fifth respondent because it was necessary to do so as its interests would be affected by the relief sought. Minerals are finite resources and if the appellant is allowed to continue mining, that would have an adverse effect on the fifth respondent's rights. There was clear need to cite the fifth respondent which cannot, on the facts, be said to be a nominal party.

23. He further submitted that the contention by the appellant that the fifth respondent is a nominal respondent, does not hold in the face of the appellant seeking costs against it in the Provisional Order that it attached to its application in the court *a quo*.

24. On the appellant's contention that the fact that *Zambezi Gas* had not dealt with the effect of the Insolvency Act was an indication of its non-applicability, counsel submitted that it was not dealt with because the issue was not brought up in that case and it is trite that a court deals with pleadings as they are presented before it.

25. It was counsel's submission that there had been two conflicting views in the High Court on the interpretation of s 301 of the Companies Act, which meant that there was a *lacuna* in the law and that that *lacuna* had been cured by s 126 of the Insolvency Act. He urged the court to make a decision that is in line with the law as now, allegedly, clarified by the said Act.

26. Mr *Chagudumba* submitted in relation to the appellant's third ground of appeal that the appellant ought to have combined an application for leave together with the application that it filed and the court *a quo* would have had, of necessity, to determine the issue of leave first. This is so, he submitted, because once a company in judicial management was cited, leave ought to have been sought and granted first because bringing such a company before the court "has the effect of affecting the business in terms of expenses."

THE APPELLANT'S REPLY

27. In reply, Mr *Bhebhe* submitted that the alleged *lacuna* was resolved by *Zambezi Gas* and that whatever doubts arose from the divergent views of the High Court were thereby also resolved. He submitted that *Zambezi Gas* had also resolved the question of whether or not leave was required and made specific reference to pp5-6 of the judgment where the following was stated:

> "Paragraph 3 of the order placing the first respondent under judicial management operated against proceedings pending before any court at the time the order was made. The order prohibited the issuance or execution of any process against the first respondent in respect of the institution of proceedings or the giving effect to relief granted in those proceedings. The determining factor is that the proceedings or processes concerned must be against the first respondent **in the sense of making its financial position worse.**
>
> The application made by the appellant was for a declaratory order declaring that the money it had paid in fulfilment of the judgment debt was a full and final settlement of

the liability owed to the first respondent. The order sought was for a declaration of rights in relation to the appellant's property, which had been attached by the second respondent. The application made by the appellant before the court *a quo* was not prohibited by the provisions of para 3 of the order placing the first respondent under judicial management, as it was not against the first respondent. **The application was, in any case, not a proceeding to be stayed and not proceeded with as a result of the order, because it was made six months after the order placing the first respondent under judicial management was granted.**

In seeking the declaratory order, the appellant sought an authoritative statement on the discharge of the financial obligations it owed to the first respondent in terms of the order of the court *a quo* following payment of the amount of money it considered was at an exchange rate statutorily prescribed for the kind of debt in question.

As the application by the appellant did not fall within the provisions of para 3 of the order, there was no obligation on the appellant to first seek and obtain the leave of the court to involve the first respondent in the proceedings." (the emphasis is added)

28. Counsel further submitted that the fifth respondent cannot benefit from corporate rescue provisions because it is under judicial management. Judicial management is different from corporate rescue. Furthermore, the fifth respondent does not have a business rescue practitioner because it is not governed by the corporate rescue provisions of the Insolvency Act.

29. On the issue of costs, counsel submitted that the fifth respondent cannot in one breath say it is not a nominal respondent and in the next, say that it ought not pay costs because it is a nominal respondent. He submitted that the appellant's prayer for an award of costs against the fifth respondent, if it opposed the application, ought to be given effect to as the fifth respondent had opposed the application as well as this appeal.

WHETHER OR NOT THE COURT *A QUO* ERRED IN FINDING THAT THE APPELLANT HAD TO APPLY FOR LEAVE TO INSTITUTE PROCEEDINGS AGAINST THE FIFTH RESPONDENT

30. It is common cause that the order that placed the fifth respondent under judicial management was confirmed and that paragraph "1e" of the order provides that all actions and applications, *inter alia*, "shall be stayed and not proceeded with without (the) leave of the High Court." The fifth respondent relied on this part of the order in raising its preliminary point. The appellant's contention in response was that there was no need to seek such leave in *casu* as the interdict that it sought was premised on the actions of the first, second and third respondents, with the fifth respondent being only a nominal party.

31. The content of the said paragraph "1e" are a *verbatim* reproduction of s 301(1) (c) of the Companies Act [*Chapter 24:03]* which reads:

> "(1) A provisional judicial management order shall contain
>
> …
>
> (c) such other directions as to the management of the company or any matter incidental thereto including directions conferring upon the provisional judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders, as the court may consider necessary;
>
> and may contain directions that while the company is under judicial management, <u>all actions and proceedings and the execution of all writs, summonses and other processes against the company be stayed and not be proceeded with, without the leave of the court.</u>" (the underlining is added.)

32. In *ZFC Limited v KM Financial Solutions (Pvt) Ltd & Anor* HH 47/15 the High Court interpreted the provision to be applicable only to actions and proceedings (*inter alia*) that were already in existence at the time that the provisional order was granted. On the other hand, in *G.N. Mlotshwa & Company Legal Practitioners v David Whitehead Textiles Limited & Ors* HH 78/17 the court held the provision to be "all-encompassing for the proceedings that had commenced

and those that had not." This is the divergence in interpretation that counsel made reference to.

33. In *Zambezi Gas* the Supreme Court gave an interpretation similar to that in the *ZFC Limited* judgment. That settled the issue of the proper interpretation that must be given to paragraph "1e" cited earlier herein. On that settled interpretation, the application that the appellant filed in the court *a quo*, having been filed after the granting of the provisional order, was not one that required the leave of the court before it could be filed.

34. The fifth respondent sought to escape the effect of this interpretation by arguing that the provisions of the Companies Act and the cases referred to by the appellant are no longer applicable since 25 June 2018, when the Insolvency Act [*Chapter 6:07*] came into effect by virtue of General Notice 413/2018. The said Insolvency Act provides in s 126:

> "(1) During corporate rescue proceedings, no legal proceeding, 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." (the emphasis is added)

35. The fifth respondent's contention was that s 126 of the Insolvency Act replaced s 301 of the Companies Act and that the need for the court's leave was now governed by the provision in s 126. Consequently, no legal proceedings could be commenced, as was done in *casu*, without the leave of the court.

36. It is a fact that the urgent chamber application that was before the court *a quo* was filed after the Insolvency Act came into effect. Its applicability to this matter must however be viewed against the general presumption against retrospectivity and the taking away of vested rights. S 17(1) (b) and (c) of the Interpretation Act [*Chapter 1:01*] provides as follows:

> "17. Effect of repeal of enactment
>
> 1. Where an enactment repeals another enactment, the repeal shall not (a)…
>
> (b) affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed: or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed."

37. The above position of the law was reaffirmed in *Nkomo & Another v Attorney-General & Ors* 1993(2) ZLR 422(S) where this Court stated:

> "It is a cardinal rule in our law, dating probably from codex 1:14:7, that there is a strong presumption against a retrospective construction. See *Agere v Nyambuya* 1985(2) ZLR 336(S) at 338G-339G. Even where a statutory provision is expressly stated to be retrospective in its operation, it is not to be treated as in any way affecting acts and transactions which have already been completed, or which stand to be completed shortly, or in respect of which action is pending or has been instituted but not yet decided, unless such a construction appears clearly from the language used or arises by necessary implication …"

Clearly, s 126 does not apply in retrospect.

38. The appellant commenced proceedings against the fifth respondent after the enactment of the Insolvency Act. At that point the fifth respondent was already under judicial management. The appellant had already acquired rights to proceed against the fifth respondent without first seeking leave. There is no indication in

the language of the enactment of an intention to take away accrued rights including the appellant's right to institute legal proceedings against the fifth respondent without the leave of the court.

39. In my view, the question whether or not the fifth respondent is a nominal respondent is of no relevance and does not in any way affect the appellant's already acquired right to proceed against the fifth respondent without the leave of the court.

40. The appellant having had no need for leave, the court *a quo* ought to have dismissed the preliminary point and proceeded to determine the matter on the merits. Accordingly, the judgment of this court will reflect this position. Costs will follow the cause.

41. It is therefore ordered as follows:

1. The appeal be and is hereby allowed with costs.

2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

> "The preliminary points raised by the fifth respondent be and are hereby dismissed with costs."

3. The matter be and is hereby remitted to the High Court for a determination on the merits.

BHUNU JA **:** I agree.

CHITAKUNYE AJA **:** I agree.

Kantor & Immerman, appellant's legal practitioners

Atherstone & Cook, 5th respondent's legal practitioners