HB 340/16
HC 1030/16
X REF HC 2495/15;
3986/12; 2847/15 & 1053/16

NQOBILE KHUMALO

And

FRANCISCA MUFAMBI

Versus

MAONI TRADING (PVT) LTD

And

TRIANIC INVESTMENTS (PVT) LTD

And

THE MINISTRY OF MINES AND MINING DEVELOPMENT

And

THE COMMISSIONER GENERAL OF POLICE

And

THE SHERIFF OF THE HIGH COURT OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 11 NOVEMBER & 1 DECEMBER 2016

Urgent Chamber Application

N. Mugiya for the applicants
S. Chamunorwa for the respondents

MAKONESE J: This matter has a troubled history. No less than six applications have been filed by the respective parties in recent years. I must however state at the outset that these courts will not condone the use of invective, acidic and combative language. The applicant has alleged that 1st respondent has acted fraudulently and that his conduct is criminal. The use of

such intemperate language is frowned upon by this court, moreso when such "fraudulent" and "criminal" conduct is not supported by the averments in the papers.

The applicant seeks the following order against the respondent:

"Interim order granted

Pending the confirmation of the provisional order, an interim relief is granted in the following terms:

It is ordered that

1. The execution of the order in HC 2986/15 be and is hereby stayed pending the finalisation of this matter.

Terms of final order sought

1. The execution of the default judgment in HC 2986/15 granted on the 21st day of April 2016 be and is hereby stayed pending finalisation of the application for rescission of default judgment in HC 1030/16.
2. The 1st respondent be ordered to pay costs of suit on an attorney-client scale."

This matter has come before me by way of urgent chamber application. The application was filed on 27 April 2016. A notice of opposition was filed on 29 April 2016. For one reason or the other, the matter was postponed at the instance of the parties on various occasions. I finally dealt with the matter on 11 November 2016. Essentially, the relief sought by the applicant is a stay of enforcement of the order granted under case number HC 2986/16 on the 21st April 2016. The applicant alleges that 1st respondent obtained the order by fraudulently enrolling the matter on the unopposed roll. It is further alleged that 1st respondent misrepresented to the motion court judge on the 21st April 2016 that the matter was unopposed thereby obtaining default judgment. It is the applicant's contention that I had previously postponed the matter sine die and that the matter ought not to have been set down at all. Applicant avers that when 1st respondent obtained the order, that very same day "thugs" visited the mine at the centre of the dispute in this matter and harassed applicant's employees claiming

that 1st respondent had won ownership of the mine. That is the applicant's version. The 1st respondent firstly excepts to the use of intemperate language against the respondents. Secondly, the 1st respondent contends that the urgent chamber application is predicated on wrong and misleading facts.

1st respondent takes the preliminary point that whether deliberately or through a genuine error the applicants have filed an application based on mistruths. It is argued that their position cannot be sustained. The law is clear that the applicants were not only in default, but were duly barred, and for that reason they are not entitled to the relief they seek. Thirdly, and on the merits, there is no reasonable and credible explanation for the default. No explanation has been advanced by the applicants for the reasons leading to the bar and the default judgment. The relief sought is therefore no merited.

Brief background

By way of a brief background to this application the following facts are common cause. The respondent is the registered owner of Tengold Reef claims named Eric 21. The applicants are former directors of 1st respondent who were dismissed as directors of the company by virtue of a High Court order under case number HC 3986/12. Several applications and counter-applications have been filed relating to this mining dispute. It is sad that this court is being clogged with this one matter. This dispute involves the following case number HC 3986/12; HC 2167/14; HC 2495/15; HC 2847/15; HC 2986/15 and HC 1053/16. What I am called upon to determine in this application is whether the applicant is entitled to urgent relief staying execution of the order obtained on 21 April 2016, under case number HC 2986/15.

In limine

Certificate of urgency is fatally defective

The 1st respondent contends that the certificate of urgency is fatally defective in that it contains false and misleading information. In paragraph 1 of the certificate by Joyce Sithole it is alleged that the *"1st respondent has already approached the Sheriff of the High Court to execute the default judgment which could be executed anytime from now."* This averment is not only inaccurate and misleading but it is not borne out by the affidavit of Nqobile Khumalo. It is not clear where the legal practitioner obtained the information from. It has not been explained in an answering affidavit where such information was obtained from. Where a legal practitioner deposes to a certificate of urgency which contains false and misleading information, the legal practitioner is discredited in the process. This is not desirable. The courts, urge deponents to any sworn statements that are to be relied upon in court to ensure that the information before the court is accurate and credible in all material respects. The 1st respondent denied that they had approached the Sheriff to execute the order. They buttress their stance by pointing out that the order under case number 2986/15 was only uplifted by 1st respondent on 27 April 2016 as appears on the Registrar's stamp on the court order and the receipt issued to 1st respondent upon upliftment of the order. The court has examined both documents which are annexed to the opposing affidavit and is satisfied that the court order could only have been uplifted on the 27th April 2016. The certificate of urgency by Joyce Sithole is dated 26th April 2016. The urgent application was filed on 27th April 2016. The allegation that the applicant had already been approached with a writ of execution, was clearly meant to create urgency, and is not borne out by the facts. It is my view that the fatal defect in the certificate of urgency, the urgency relied upon does not in fact exist.

The principle in application proceedings is that an application stands or falls on its founding affidavit. See Herbstein & Van Winsen *The Civil Practice of the Superior Courts* in South Africa 3rd ed at page 80 where the authors state as follows:

> "The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out."

See also the cases of *Ansterlands (Pvt) Ltd* v *Trade and Investment Bank & Ors* SC-92-05 and *Muchini* v *Adams* SC-47-13.

It is clear that the averments in the applicant's founding affidavit and the assertions in the certificate of urgency are decisively false. The applicant's argument in support of the relief sought in the draft order is based on those false assertions. First respondent has taken the court through the processes. The directives issued by MOYO J and MATHONSI J have been placed before the court. There is a notice of set down for the 21st April 2016. The authenticity of that notice as well as the fact of its service is not in issue. The only conclusion is that the applicants have not told the whole truth. They have chosen to found their application on false information. At the hearing of the matter, there was no attempt by the applicants to set the record straight. The court makes an inference that the intention by the applicant is to deliberately mislead the court. The fate of the applicants is sealed. By choosing to propagate misleading information in the papers and still insist that the court should grant the relief sought is extremely disingenuous.

In *Leader Tread Zimbabwe* v *Smith* HH-131-03 NDOU J page 7 of the cyclostyled judgment stated as follows.

> *"It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as if he had not given evidence at all – see Tumahole Bereng v R [1949] AC 253 and South African Law of Evidence by L H Hoffman and D Zeffert 3rd Ed at page 472. If a litigant lies about a particular incident, the court may infer that there is something about it which he wishes to hide."*

In the instant case, as I have indicated, I am satisfied that the applicants sought to mislead the court. A party approaching the court for equity must do so with the utmost probity. In *Deputy Sheriff Harare* v *Mahleza & Anor* 1997 (2) ZLR 425 (H), the court stated as follows:

> *"People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court …"*

In urgent matters there is particular need for probity. The court is requested to grant urgent relief and the court must in such circumstances be satisfied that all facts placed before the courts are accurate and truthful. In the circumstances the point *in limine* raised by the applicant does have merit. The certificate of urgency is defective. The fact that the founding affidavit seeks to perpetrate the falsehood renders such defect fatal to the application. On that basis alone, this court would dismiss the application.

On the merits

A default judgment was granted on 21st April 2016. There is no explanation for the default. In the place of an explanation is a lie. For the court to grant the applicant any relief, it ought to be satisfied that a case has been made for it to exercise its discretion. In *Deweras Farm (Pvt) Ltd & Ors* vs *Zimbabwe Banking Corporation Ltd* (S) 1998 (1) ZLR 368 (S), the court stated at page 369 as follows:-

> *"The learned judge considered the three factors which are normally taken into account when considering an application for rescission of judgment – the explanation for the default, the bona fides of the application and the prima facie strength of the case. He noted that r 63 of the High Court Rules requires only "good and sufficient cause" as a basis for rescission of judgment. He contracted this with the specific reference to "willful default" in the Magistrates' Court Rules. He considered that the superior courts should be slow to fetter the wide discretion inherent in the phrase "good and sufficient" cause. I agree. While it may generally be true to say that when there is willful default*

there will usually not be good and sufficient cause, I believe we fetter our discretion improperly if we lay down a fixed rule that when there is willful default offered by KING J in Maujeanstla Audio Video Agencies v Standard Bank of South Africa Ltd 1994 (3) SA 801 (c) at 803H – I:

"More specifically, in the context of a default judgment, "willful" connotes deliberateness in the sense of knowledge of the action and of it consequences, i.e. its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be."

In my view, in the absence of an explanation being tendered for the default, the relief sought cannot be afforded. The matter that is completely side-stepped and ignored by the applicants is that, quite apart from the default, they were barred. The provisional order obliged applicants to file opposing papers within 10 days of service of that order upon them if they were opposed to its confirmation. The record shows that the order was served on them on 3rd December 2015. No opposing papers have been filed by them since service of the order upon them. They are barred and were barred as at the date of the default judgment.

Rule 247 (1) (c) of the High Court Rules provides that:

"Subject to sub-rule (3), a provisional order shall –

(a) …
(b) …
(c) Specify the time within which the respondent shall file a notice of opposition if he opposes the relief sought."

Applicants were enjoined to file opposing papers within the time limits specified both in the provisional order and the rules. They failed to do so. Applicants exhibited a cavaliar attitude towards the observance of the rules which cannot be condoned by this court. The applicants have not only failed to explain the default but also the reasons leading to the bar. No explanation has been forthcoming. In such a scenario the applicant is not ordinarily entitled to the relief sought.

I have also had occasion to peruse the various matters related to this application. I observe that an earlier order of the court which has not been appealed or set aside confirms that applicants have been stripped of their positions as directors and shareholders in second respondent. That order is effective until set aside and is still extant. The provisional order which was confirmed prevented the applicants from using certain assets listed in the order. The confirmation does not therefore impose a disadvantage upon the applicants. The applicants no longer have the lawful authority to conduct mining operations. The party that holds the right to conduct mining operations is second respondent. The applicants have no *locus standi* in the matter. The applicants have no substantive basis for the grant of the interdict. The application ought to fail. The costs on this matter have to be on the higher scale. The applicants have approached the court on the basis of a lie. The applicants have sought to mislead the court. The applicants have used intemperate language throughout. They have not justified their claim that the judgment was obtained by "fraudulent" and "criminal" means. The 1st and 2nd respondents have been put out of pocket and they are entitled to recover their full costs.

In the circumstances, I make the following order:

1. The application be and is hereby dismissed.
2. The applicants are to pay costs on an attorney and client scale.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners, respondents' legal practitioners