PARKS AND WILDLIFE MANAGEMENT AUTHORITY

Versus

MARTIN PIETERS SAFARIS (PVT) LTD

AND

REGIS CHAWATAMA N.O

AND

SHERIFF OF THE HIGH COURT N.O

IN THE HIGH COURT OF ZIMBABWE
M DUBE J
BULAWAYO 24 & 30 JANUARY 2025

Urgent Chamber Application

W.P Zhangazha, for Applicant
A. Kadye, for 1st Respondent
No appearance for the 2nd and 3rd Respondents cited in their official capacities

DUBE J: This is an urgent chamber application brought forth to stop execution of an order of this court under Judgment number HB 191-24. The said order extended time lines within which the parties had to undergo arbitration proceedings that had been authorized by a previous consent order. Terms of the interim order sought in the present application are:

> "Respondents are hereby interdicted from continuing with the arbitration proceedings scheduled to commence on Tuesday 21st January 2025 at whatever stage of the arbitration this interim order is served on them."

The basis of the application is that on the 24th December 2024 under HB 191-24 this court issued a decision condoning the non-compliance with the time limits in a previous court order under HC[UCA] 9/22 dated 17th February 2023. The order under HB 191-24 read as follows:

"1. *The non-compliance with the time limit in paragraph 1 of the order of this court under HC[UCA]9/23 dated 17th of February be and is hereby condoned.*

2. Paragraph 1 is accordingly amended as follows:

"The parties are to approach an Arbitrator in terms of their agreement dated 28th January 2019 within [30] days of the granting of this order."

3. The respondent shall pay costs of suit of this application"

The Applicant who was the Respondent under HB 191/24 was aggrieved with such decision and filed an application for leave to appeal against the said judgment. They filed their application for leave to appeal on the 14th January 2025 and served it on the 1st Respondent the same day. In spite of the application for leave to appeal, the 1st Respondent proceeded to garner for appointment of an arbitrator. Such an arbitrator was then appointed by the Commercial Arbitration Centre on the 15th January 2025. He is the 2nd Respondent herein. The applicant herein objected to the commencement of the arbitration process citing its pending leave to appeal. The 1st Respondent insisted on continuation with the arbitration process.

This is what prompted the present application on an urgent basis to stay the arbitration process at whatever stage it might be at. Applicant avers that it will suffer irreparable harm if the arbitration process is not stayed, and that it will render its subsequent appeal moot and academic.

This application is vigorously opposed by the 1st Respondent who argues that the sole purpose of this urgent chamber application is to delay the arbitration proceedings. It is further argued that in fact the Applicant herein has no right of appeal.

PRELIMINARY POINTS RAISED

At the hearing of this matter the 1st Respondent rose first and took 5 points *in limine* which shall be discussed herein under.

1. Defective Board Resolution

It was argued on behalf of the 1st Respondent that the board resolution attached to this application authorising Nyasha Mutyambizi to depose to the present founding affidavit is defective as it has two dates i.e the 6th May 2022 and the 17th January 2025. It was argued that such dates create confusion as to the exact date of the meeting of the board members authorising the deponent to institute the present litigation.

It was argued further that the Board Resolution itself also gave a blanket authority as it was not specifically directed at these proceedings. Reference was made to the matter of *Beach Consultancy (Pvt) Ltd v Makonya and Anor* HH 696-21.

It was argued further that the Applicant could not grant general authority for future litigation. As authority for such stand point, the matter of *Leechiz Investments (Pvt) Ltd v Central African Building Society* HH 269-23 was cited. It was argued further that the Board Resolution *in casu* is outdated by 3 years and for that reason it could not have been done in contemplation of these proceedings.

In response thereto *Mr Zhangazha* for the Applicants argued that the dates given on the Board Resolution signifies the date of the actual meeting of the board members i.e the 6th May 2022 and the date of extraction of the minutes and signature by the board secretary i.e the 17th January 2025. He decried the fact that this point was not raised in the opposing affidavit as applicant could have filed an answering affidavit to deal with it in detail.

Mr Zhangazha however argued in the main that the present application is part of a long-standing dispute between the parties dating as way back as pre 2023. He argued further that this Board Resolution was passed at the inception of the dispute and it is still continuing. For that reason, there was no need for a new resolution. He argued that in any event since the parties remain the same, the 1st Respondent herein has not raised this objection in any of the previous proceedings and cannot do so now.

A reading of the *Beach Consultancy* case *supra* shows the various stand points Judges of this and the Supreme Court sought to expostulate the law regarding authority to litigate on behalf a body corporate. I find the following exposition to be on all fours with the present matter;

> "*This case involves execution of an order against the Applicant following the long-drawn litigation between the parties as explained. It can not be argued therefore that the board of the Applicant did not envisage this stage in the litigation being reached between the parties. I thus hold a view that when the deponent was authorized to represent Applicant against the 1st respondent's litigation, it must also have contemplated all stages of the litigation up to execution, which includes the present matter. Thus, the authority granted at the inception of litigation between the same parties suffices for all the stages of such*

litigation, including the present case. In the result the preliminary point ought to be dismissed." (see Beach matter supra)

In the present matter 1st respondent does not dispute that this application is part of protracted litigation between the parties. It therefore cannot be said that Applicant is not aware of this stage of the litigation. More so if 1st respondent has not been objecting to the same board resolution's validity, it cannot be seen to do so now. I therefore do not find merit in this preliminary point. I accordingly dismiss it.

2. Wrong Forum Approached

Mr Kadye for the 1st Respondent argued that the appropriate forum to have been approached for this application is the Arbitral Tribunal where the proceedings have already commenced. He argued further that applicant ought to have sought an interim relief before that same forum to stay such proceedings. He argues that the arbitral tribunal could have made its determination on the application, if the Applicant remained dissatisfied it is only then that it could approach this court.

In opposition to this point it was argued for the Applicant that such an argument is improperly placed since this is an application for stay of execution of this very court's order. It was argued further that this court has jurisdiction to regulate its own processes. For that reason, it would be improper for an arbitrator to stay a High Court order. *Mr Zhangazha* cited Article 9 of the Model Law as permitting the court to grant interim relief. He went on to cite the matter of *Damson v Dzipange & Another* HH 830-22 and *Chibanda v King* 1983(1) ZLR 116 (SC) to buttress the point that the High Court has inherent powers to regulate its own processes.

It is correct that a reading of Article 5 and 9 of the Model Law being a schedule to the Arbitration Act [Chapter 7:15], reflects that pending arbitration a party may approach the High Court to seek an order preserving the status quo. It is therefore not correct that the forum to be approached ought to the Arbitral Tribunal itself. I accordingly dismiss this preliminary point.

3. Applicant Cannot Interdict a Lawful Process

Mr Kadye argued that in essence the relief sought by the Applicant in this matter amounts to an interdict. He argued further that there was an extant order of this court per judgment

number HB 191-24 directing both parties to approach an arbitrator. He argues that such arbitration proceedings are lawful and cannot be interdicted. To further his argument, he cited the matter of *Mbatha v Ncube and 2 Others* HH 38-23 and *Magaya v Zimbabwe Gender Commission* SC105/21

Mr Zhangazha argued in opposition thereto that the current application takes the form of a preservation order to maintain the status quo to allow the court to deal first with the application for leave to appeal pending before it. He argued further that this does not detract from lawfulness of the court order. If anything, the court is retaining for itself the power to regulate its own processes to avoid real and substantial injustice.

I find this point to be related to para 2 above. Article 9 (2)(c) provides specifically for interdict proceedings. A reading of the Mbatha case *supra*, as cited by *Mr Kadye* shows that the Applicant in that matter brought forth an application for an interdict on the basis that he had a pending appeal before the Supreme court. In that matter the appeal had already been heard and dismissed. For that reason, the act of execution by the Respondents was lawful. In the Magaya matter *supra* the facts of those matter are distinguishable from the present. This point *in limine* is therefore also ill taken and It is accordingly dismissed.

4. <u>Lack of Urgency</u>

1st Respondent argues further that this matter is not urgent in that the need to act arose on the 24th December 2024 when this court under HB 191-24 per NDLOVU J pronounced judgment which obligated both parties to approach an arbitrator. If applicant wanted to act it ought to have done so on that day. For that reason, by filing this present application on the 20th January 2025, the Applicant did not treat this matter as urgent. The current urgency alluded to by the applicant is self-made as the day of reckoning has come.

Mr Zhangazha on the one hand argued that the need to act did not arise on the 24th December 2024 but rather on the 15th January 2025. He argues that the need to act only arose after an arbitrator was appointed in the face of a pending application for leave to appeal. He argues that this application was spurred by a letter from the arbitrator seeking to set a date for the arbitration proceedings to start. It is on that date that Applicant filed this present application.

In this regard I refer to the matter of *Wild Goose Safaris (Pvt) Ltd v Sipho Mpofu and Others* HB169-18 in which @ para 3 it was held:

> "*What became clear was that no writ of execution was issued against the applicant. The threat of execution was therefore not real but imagined."*

In the present matter the Applicant accepts that it indeed became aware of the judgment sought to be appealed against on the 24th December 2024. However, an arbitrator was not yet appointed. It is argued that the applicant could not cite an unknown arbitrator and seek to interdict him or her. In fact, the Applicant submits that it filed its Chamber Application For Leave to Appeal to the Supreme Court on the 14th January 2025. They then hoped that upon such filing the 1st Respondent would halt the appointment of an arbitrator. However, in spite of that, the 1st respondent proceeded to request for the appointment of an arbitrator who was then appointed by the Commercial Arbitration Centre on the 15th January 2025. Despite Applicant's protestation 1st Respondent forged ahead. The appointed arbitrator i.e the 2nd Respondent also wrote seeking set down dates. That is what jolted the Applicant into action.

When juxtaposed with the facts of the Wild Goose Safaris *supra*, it becomes clear that, it was only on the 15th of January 2025 that the need to act was not imagined but a reality. In any event prior to that date the identity of the potential arbitrator to be interdicted was not known. I am of the finding therefore that the Applicant indeed, treated the matter with the urgency it deserved, when the need to act arose. I accordingly dismiss the 4th point *in limine.*

5. <u>Matter not Appealable</u>

It was argued on behalf of the 1st Respondent that the order which Applicant seeks to appeal against is not appealable by authority of statute i.e Article 9 of the Model Law and Arbitration Act.

Mr Zhangazha cited Article 9 of the Model Law as the authority permitting the granting of interim relief.

I shall deal with this point as follows:

Article 9 of the Model Law reads as follows:

"*Article 9. Arbitration agreement and interim measures by court*

(1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from the High Court an interim measure of protection and, subject to paragraphs (2) and (3) of this article, for the High Court to grant such measure"

(2) Upon a request in terms of paragraph (1) of this article, the High Court may grant-

(a) an order for the preservation, interim custody or sale of any goods which are the subject- matter of the dispute; or

……

(c) an interdict of other interim order"

On the other hand, Article 5 provides as follows:

"*Article 5- Extent of court intervention*

In matters governed by this Model Law, no court shall intervene except where so provided in this Model Law."

Clearly this point *in limine* is without merit. An application for leave to appeal is governed by the High Court Rules, 2021 and The High Court Act [Chapter 7:06]. It is not done under the Model Law nor the Arbitration Act as leave sought pertains to an order of the High Court itself. For that reason, this point is similarly dismissed.

On the Merits

A. **Submissions for The Applicant**

The Applicant herein contends that it seeks leave to appeal so as to prevent the arbitration process from happening. The reason being that the arbitration stands to be done outside the timelines earlier agreed by the parties and reduced to a consent order. It is argued that, it was agreed that the matter would be referred for arbitration within 7 days and concluded within 30 days. Time was of essence. Instead of referring the matter within 7 days, the 1st Respondent did so after 3 months. The 2nd Respondent who was the arbitrator then terminated the proceedings as they were in violation of the court order.

1st Respondent then spent another 4 months without seeking condonation. Cumulatively the delay became 7 months instead of 7 days. In those intervening 7 months the situation on

the ground changed. Applicant terminated its contract with 1st Respondent and contracted a different entity.

It was only after such inordinate delay that 1st respondent sought condonation and got it. It is that judgment that Applicant seeks to appeal against. The leave to appeal is done in terms of section 43 of the High Court Act [Chapter 7:06] since it is an interlocutory ruling.

Applicant contends that it fears that should the arbitration commence it would be concluded before the appeal is heard. Should that happen both the leave to appeal and or the appeal itself would be rendered moot and academic. Such position would lead to irreparable harm to Applicant's interest.

It is argued that Applicant is the custodian of the natural fauna and flora, while the business of 1st respondent is to conduct hunts. In other words, 1st respondent's business is consumptive as opposed to regulatory and conservative as is that of the Applicant.

B. <u>Submissions for 1st Respondent</u>

On behalf of the 1st Respondent it was contended by *Mr Kadye*, that judgment HB 191-24 per NDLOVU J, is in form of a consent order, the reason being that it amended para 1 of the consent order of the 17th February 2023. He argues that the order sought to be appealed against is a consent order of 17th February amended. The fact that it came by way of an opposed application, which was argued does not detract from the fact that it remains a consent order.

Mr Kadye then argues further that by operation of law, a party can not appeal against an order obtained by consent. He makes reference to section 43(2)(b)(i) of the High Court Act[Chapter 7:06].

He contends further that the February 2023 order obligated both parties to seek arbitration, and the judgment HB 191-2424 maintained that obligation. For that reason, he contends that no party should seek to apportion blame for the delay.

It is argued on behalf of the 1st Respondent that, Applicant had no reason to allocate a third party the disputed concession well knowing that there was outstanding arbitration. Should harm be occasioned on the Applicant then it would be of its own making.

It was contended that the balance of convenience favours the resolution of the dispute between the parties through a process they consented to.

Mr Kadye finally argued that the judgment HB 191-24 is final in nature. Once the parties submit themselves to arbitration there is no need for them to return to court for any further relief. For that reason, he contends that the application for leave to appeal is founded on the wrong law.

C. Replication by Applicant

In replication *Mr Zhangazha* for the Applicant referred to page 34 of the record to the effect that; "*This is an opposed court application*…." He argues in the final that in no way can this be said to be an order by consent. He argues that the original consent order is now varied no wonder Applicant is now challenging it.

Further that the Applicant has no case to take for arbitration. It is the 1st Respondent who is the aggrieved party and it is his business to seek such arbitration. If it did so out of time then it placed itself outside the help of courts.

The Law Applicable

I shall start by dealing with the argument whether the judgment under HB 191-24 is interlocutory or not. I refer to the ruling per MALABA DCJ (as he then was) in the case of *Blue Ranges Estate (Pvt) Ltd v Muduviri and Anor* 2009 (1) ZLR 368 (S) wherein it was held as follows:

> "*To determine the matter, one has to look at the nature of the order and its effects on the issues or cause of action between the parties and not its form. An order is final and definitive because it has the effect of a final determination on the issues between the parties in respect to which relief is sought from the court. An order for discovery or extension of time within which to appeal, for example, is final in form but interlocutory in nature. The reason is that it does not have the effect of determining the issues or cause of action between the parties."*

In the present matter I am of the respectful view that the judgment HB 191-24's sole purpose was the extension of time lines within which to submit to arbitration. In no way did it determine the issues between the parties. For that reason, it is final in form but interlocutory

in nature. I thus find the procedure adopted by the Applicant to file a chamber application seeking leave to appeal to the Supreme court to be correct.

I shall now deal with the prospects of success. In the matter *Zimbabwe Consolidated Diamond Company (Pvt) Ltd v Adelcraft Investments (Pvt) Ltd* CCZ 2/24 the court held that:

> "*The test for reasonable prospects of success postulates an objective and dispassionate decision based on the facts and the applicable law, as to whether or not the applicant has an arguable case in the intended application……. The prospects of success must not be remote but must have a realistic chance of succeeding. In this respect, a mere possibility of success will not suffice. There must be a sound rational basis for the conclusion that*
>
> *there are prospects of success in the main matter. In short the court must be satisfied that the applicant has an arguable prima facie case and not a mere possibility of success."*

D. <u>Disposition</u>

In the present matter I am of the respectful view that the Applicant on his intended grounds of appeal makes out an arguable *prima facie* case. Without usurping the powers of the court seized with the application for leave to appeal, suffice to state that the time lapse between the consent order of February 2023 under case number HC [UCA] 9/23 and the date condonation was sought was inordinately long.

If the arbitration is heard and finalised, the Applicant herein stands to suffer irreparable harm. For the 1st Respondent the only possible harm alluded to is the need for finality in litigation and nothing more. I am of the view therefore that the balance of prejudice favours the grant of this application.

In the result, it is ordered that:

i. The application hereby succeeds as prayed for.
ii. Interim relief be and is hereby granted as prayed for.

Chinogwenya & Zhangazha Legal Practitioners, applicant's legal practitioners.
Mlotshwa Solicitors, 1st Respondents legal practitioners.