REPORTABLE (73)

SCRAIVERN NYAMUCHENGWA
v
(1) RAY AND BRIAN ENTERPRISES (PRIVATE) LIMITED (2) LARYSCOPE HEALTH CARE (PRIVATE) LIMITED (3) MINISTER OF MINES AND MINERAL DEVELOPMENT (4) PROVINCIAL MINING DIRECTOR (5) ENVIROMENTAL MANAGEMENT AGENCY

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, CHIWESHE JA & MUSAKWA JA
HARARE: 3 OCTOBER 2023 & 25 JULY 2024

T. Magwaliba, for the appellant.

Ms *K. Nyakura,* for the first respondent.

N. Mandevere, for the second respondent.

CHIWESHE JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) sitting at Harare handed down on 29 January 2023 declining to determine the preliminary points raised by the appellant on the grounds that the matter was "*lis alibi pendens*."

Aggrieved by that decision, the appellant has noted the present appeal seeking relief.

THE FACTS

The first respondent approached the court *a quo* by way of an application seeking an interdict against the appellant and the second respondent barring them from entering its farm in Arcturus, Goromonzi and from laying any rights to a certain mining claim situated thereon. The first respondent also sought an order that the appellant and the second respondent stop all

mining operations at the mining claim. In its founding affidavit deposed to by one Morrison Bimbi, the first respondent averred as follows: It was the owner of a certain piece of land called the remainder of Lot 4 of the Meadows, Arcturus. It uses the land for livestock rearing and general farming. In addition, there were plans to construct a school at the farm. The appellant and the second respondent were engaged in illegal mining activities at the farm. It had written to the fourth respondent requesting his assistance in stopping the illegal mining activities. Despite all its efforts in engaging the authorities, the appellant and the second respondent continued with their mining operations. It was for that reason that it approached the court *a quo* seeking to interdict them from mining at the farm.

However, it must be noted from the outset that following these complaints by the first respondent, the fourth respondent dispatched a letter to the appellant and the second respondent directing that they stop all mining activities at the farm. The appellant appealed that decision to the third respondent. That appeal is still pending

In his opposing affidavit, the appellant took the following preliminary points: He averred that the deponent to the founding affidavit had not been properly authorized to represent the first respondent in the court *a quo* as the papers that were produced only authorized him to represent the first respondent at ZIMRA and not in the proceedings before the court *a quo*. He also averred that there had been fatal non-joinder of the Mining Commissioner of the relevant province and that the office of the Provincial Mining Director was not recognized in the Mines and Minerals Act [*Chapter 25:01*] (the Act). He further averred that the deponent to the founding affidavit had falsely claimed to have written letters which had been authored by other persons. To that end, he averred that such falsehoods could not sustain any valid cause.

On the merits, the appellant defended the suit on the following grounds. Firstly, he stated that the first respondent had not satisfied the requirements for an interdict. He also pointed to the fact that he was the holder of certificates permitting him to mine at the disputed claim and as such he had every right to enter the farm. He could thus not be interdicted from accessing a mining claim lawfully allocated to him. He also averred that it was improper for the first respondent to seek a final interdict instead of an interim interdict. He did not have issues with the ownership of the farm or its use for the purposes alluded to by the first respondent. He noted, however, that it was not all the land at the farm that was suitable or being used for agricultural purposes. A portion of the farm is mountainous and not suitable for farming. It was in that mountainous portion that his mining claim was located. In any event, his mining activities did not in any way interfere with the first respondent's farming activities. He averred further that no proof had been furnished to support the assertion by the first respondent that it had lawfully registered a mining claim on the farm under reference number 44957/44958 or that such claim was in respect of the area covered by the appellant`s claim.

The appellant confirmed receiving a letter from the fourth respondent whose contents he challenged by addressing a letter of appeal to the third respondent. That appeal had not yet been determined. For that reason, he asserted that there was no basis for the first respondent to approach the court *a quo* before the determination of that appeal. The appellant further averred that the first respondent must exhaust the available domestic remedies.

SUBMISSIONS IN THE COURT *A QUO*

Counsel for second respondent raised a number of preliminary issues. Firstly, it was submitted that since the dispute was one between a land owner and a prospector, the correct forum for its adjudication was the Administrative Court and not the court *a quo.* For that

reason, the court *a quo* lacked jurisdiction to hear and determine the fate of the application before it. Section 32 of the Act was cited in support of that submission.

Secondly, it was submitted that since the same matter was pending before another tribunal, namely, the appellant`s appeal to the Minister of Mines the court *a quo* could not entertain the application before it. Reliance was placed on the case of *Chigamhi 2 Syndicate & Others* v *Cleo Brand Investments Private Limited HMA* 14/20 where it was held thus:

> "*Lis pendens* refers to a special plea raised by the defendant that the matter is being determined by another court of competent jurisdiction on the same action and between the same parties. For a plea of *lis pendens* to succeed it must be demonstrated that the two matters are between the same parties or their successors in title concerning the same subject matter and founded upon the same cause of complaint."

For these reasons, it was submitted that the matter was *lis pendens* as it was pending before another tribunal of competent jurisdiction. Thirdly, it was submitted that the remedy sought by the first respondent was misplaced in that following directions from the Ministry of Mines and Mining Development, the second respondent had ceased mining operations. For that reason, there was no basis to seek an interdict against the operations of the second respondent, which operations had already ceased.

In response to these preliminary issues, counsel for the first respondent submitted that the deponent to its founding affidavit was its officer who had knowledge of the facts. Accordingly, the officer was well placed to swear to the facts. Further, by virtue of his appointment with the first respondent, he was authorized to depose to the founding affidavit. Regarding the non- joinder of the Mining Commissioner, the first respondent submitted that such non- joinder was not fatal. For that proposition, the first respondent relied on r 32 (ii) of the High Court Rules, 2021, which provides as follows:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute in so far as they affect the rights and interests of the persons who are parties to the cause or matter."

With regards the jurisdiction of the court *a quo*, it was submitted that the High Court had jurisdiction. In particular it was argued that in terms of s 345 (1) of the Act, the High Court has original jurisdiction in every civil matter, complaint or dispute arising under the Act, unless the parties agree in writing to submit to the mining commissioner`s jurisdiction.

DECISION OF THE COURT *A QUO* ON THE PRELIMINARY ISSUES.

The court *a quo* noted that it was common cause that an appeal was pending before the third respondent. The dispositional paragraph in the judgment of the court *a quo* reads:

> "It is pertinent firstly to deal with the point "*in limine*" which has been called "*lis pendens*" by the first respondent. This Court runs the risk of making a parallel decision since the same matter is pending before the third respondent.
>
> The best approach under such circumstances is to stay the present proceedings until the appeals, which are on pp 81 and 121 of the record, lodged by the first and second respondents that are pending before the third respondent are finalized. Counsel for the first and the second respondents argue that the matter must be struck off the roll. I do not agree with that sentiment. A decision for the removal of the matter from the roll is consistent with the tenets of real and substantial justice under the circumstances. The other points *in limine* raised, some of which are curable matters, will be addressed at the appropriate time if parties decide to come back to this Court after the finalisation of the appeals. In my view, it is inappropriate to deal with the rest of the issues upon realising that there are pending appeals. The parties, I am sure, may take practical steps to make a follow up of the appeals which are pending before the third respondent."

Resultantly, the court *a quo* ordered as follows:

> "(a)The present application be and is hereby removed from the roll pending the determination of the appeals lodged by the first and second respondents that are before the third respondent.
>
> (b) Applicant shall bear the costs on the ordinary scale."

The appellant appeals that decision on the following grounds:

GROUNDS OF APPEAL

"1. The High Court grossly erred in refusing to determine the preliminary points raised by the appellant, namely that the proceedings in the High Court had not been properly authorized, that the non-joinder of the Commissioner of Mines was fatal to the proceedings and that there were material misrepresentations in the founding affidavit, choosing to non-suit appellant by deciding a point that did not have the effect of disposing of the matter; that is "*lis alibi pendens.*"

2. The High Court further grossly erred in misconstruing the preliminary point relating to the failure to exhaust domestic remedies as "*lis alibi pendens*."

3. The High Court further grossly erred in misconstruing the removal of a matter from the roll as the appropriate remedy in the circumstances and granting an order to that effect where neither party had prayed for such relief and even so, without giving any directions as to how the matter could be returned to the jurisdiction of the High Court in view of the appeal procedures and other remedies provided in the Mines and Minerals Act."

RELIEF SOUGHT

The appellant seeks the following relief:

"1. The present appeal be and is hereby allowed.

2. The judgment of the High Court dated 29 June 2023 in case number HC 6307/22 be and is hereby set aside

3. The matter be and is hereby remitted to the High Court for the determination of the preliminary points raised by the appellant.

4. The first respondent shall pay the costs of this appeal."

ISSUES FOR DETERMINATION

The grounds of appeal raise the following issues for determination:

1. Whether the court *a quo* erred in upholding the preliminary point of "*lis pendens*" raised by the first respondent.

2. Whether the court *a quo* erred in not determining the other preliminary points raised by the appellant.

3. Whether the court *a quo* erred when it ordered the removal of the matter from the roll.

PRELIMINARY ISSUES

At the hearing of this appeal, Ms *Nyakura*, for the first respondent, raised a point *in limine*, namely that the order of the court *a quo* was interlocutory in that it did not dispose of the matter on the merits. That being the case, the first respondent submitted that the appellant ought to have sought leave from the court *a quo* to appeal that decision as required by s 43 (2)(d) of the High Court Act [*Chapter 7:06*]. Section 43 (2)(d) provides as follows:

> "43 Right of appeal from the High Court in Civil cases
> (2) No appeal shall lie-
>
> (d) From an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases-
>
> (i) where the liberty of the subject or the custody of minors is concerned
>
> (ii) where an interdict is granted or refused
>
> (iii) in the case of an order on a special case stated under any law relating to arbitration."

The appellant's case not falling under the above exceptions, it was submitted that the appeal was not properly before this Court.

Mr *Magwaliba*, for the appellant, submitted that the order of the court *a quo* was final and not interlocutory. He argued that the court *a quo* had abdicated its duty to make a determination on the issues placed before it, more so when regard is had to the fact that the

court *a quo*, having removed the matter from the roll, did not (as it should have done) give directions as to how and when the matter was to be set down again before it. He opined that if the appeals pending before the third respondent were resolved, they would be subject to appeal or review, thus giving rise to a new cause of action different from the one that was before the court *a quo*. In other words, the proceedings *a quo* might never be revisited. In the circumstances therefore, Mr *Magwaliba* concluded that the order of the court *a quo* must be regarded as having been final and definitive and thus appealable without leave.

ANALYSIS

Mr *Magwaliba* is right that, in form, an order for removal of a matter from the roll appears final, moreso where no directions have been given as to how the matter should evolve thereafter. He is also right in making reference, in his heads of argument, to Practice Directions 3/13, in particular paras 7 to 10 thereof, where the meaning and import of the term "removed from the roll" are spelt out. Paragraph 7 provides that the term "removal from the roll" shall have the same meaning as "postponed *sine die"*. Paragraph 8 provides that "where a court either postpones a matter "*sine die*" or removes it from the roll, the court shall direct what a party must do and the time frames by which the directive must be complied with. Paragraphs 9 and 10 provide as follows:

> "9. On the expiry of the time frames set, the Registrar shall advise a party of the non-compliance and call upon the party to rectify the defect within thirty (30) days, failing which the matter shall be deemed abandoned.
>
> 10. Where directives have not been given in terms of para 8 above, and a matter postponed *sine die* or removed from the roll is not set down within three (3) months from the date on which it was postponed *sine die* or removed from the roll, such matter shall be regarded as abandoned and shall be deemed to have lapsed"

Mr *Magwaliba* seemed to be suggesting that because the court *a quo* failed to give directives on the way forward as required by para 8, its order removing the matter from the roll

assumes the status of finality. Further, the suggestion also is made that after the appeals before the third respondent are resolved, the matter might return to the court *a quo* as an appeal or review, a cause of action different from the one at hand, proof on its own that the order of the court *a quo* was indeed final and definitive.

In light of these submissions, it is important for this Court to define the terms "final" and "interlocutory" in so far as they relate to orders. Firstly, it is not the form but the substance of the order that determines whether an order is final and definitive or merely interlocutory. Thus an order may take the form of a final order when, under closer examination, it is in fact an interlocutory one. The point was succinctly made by MALABA DCJ (as he then was) in *Blue Ranges Estates (Pvt) Ltd* v *Muduviri & Anor* 2009 (1) ZLR 368 (5) at p 376 G-H when he stated as follows:

> "To determine the matter one has to look at the nature of the order and its effect on the issue 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."

Put differently, an order that does not dispose of the issues or cause of action in a matter is not final but interlocutory. The order of the court *a quo* removing the matter from the roll clearly did not, by any stretch of the imagination, dispose of the issues or cause of action between the parties. By upholding the plea of "*lis pendens*" the court *a quo* deferred to the jurisdiction of the third respondent, before whom an appeal, concerning the same matter and the same parties, was pending. Its decision to that effect did not dispose of the matter on the merits nor did its order to remove the matter from the roll. We conclude, therefore, that the order of the court *a quo* was final in its form but interlocutory in its nature. That being the case,

it was required of the appellant to comply with the provisions of s 43 (2)(d) of the High Court Act, by seeking leave to appeal from the court *a quo*, failing which from a judge of this Court. Failure to comply with that mandatory provision renders the present appeal null and void.

In conclusion, it is trite that where a court upholds the plea of *lis pendens* and defers to the jurisdiction of another tribunal, it should give an order staying the proceedings before it. It should not, as the court *a quo* did, order the removal of the matter from the roll, more so without any directive as to how the case should be managed going forward. By staying the proceedings, the court leaves the door open for the possible resumption of the proceedings before it, should that become necessary. The appellant has submitted, in his heads of argument, that the court *a quo* misconstrued the relief of "*lis pendens*" with the requirements that the first respondent must exhaust the internal remedies first before approaching it. In other words, the submission is that the court *a quo* should have dismissed the application on that basis. However, our view is that such a course of action would not change the interlocutory nature of either a stay of proceedings as noted above or a dismissal on the grounds that internal remedies had not been exhausted, as suggested by the appellant. Either way, leave to appeal such interlocutory orders would still be required.

In casu, Practice Direction 3/13 provides that the term "removed from the roll" has the same effect as the term "postponed *sine die*". It cannot be argued that the postponement of a matter "*sine die*" or for that matter to a specific date, has the effect of resolving the issues or cause of action between the parties. An order for postponement does not resolve the dispute between the parties. For that reason, such an order is merely interlocutory.

DISPOSITION

We are satisfied that the preliminary point raised by the first respondent has merit. It must succeed. There is therefore no appeal before this Court. Costs shall follow the cause.

In the result, it is ordered as follows:

1. The preliminary point be and is hereby upheld.
2. The matter be and is hereby struck off the roll with costs.

GWAUNZA DCJ : I agree

MUSAKWA JA : I agree

Magwaliba & Kwirira, appellant's legal practitioners.

Warara & Associates, 1st respondent's legal practitioners.

Kadzere, Hungwe & Mandevere, 2nd respondent`s legal practitioners.