HB 77/16
HC 1717/15
X REF HC 1713/15;
HC 390/15; HC 141/15 & HC 2167/15

TRIANIC INVESTMENTS (PVT) LTD

And

REOUVEN MEYER DRAY

Versus

NQOBILE KHUMALO

And

FRANCISCA MUFAMBI

And

THE SHERIFF OF ZIMBABWE, BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 6 JULY 2015 & 10 MARCH 2016

Urgent Chamber Application

R. Ndlovu for the applicants
N. Mugiya for 1st and 2nd respondents

TAKUVA J: This is an urgent chamber application filed on 1 July 2015 and argued on 6 July 2015. The application and relief sought are clear and straight forward. However, the same cannot be said about the history of the numerous cases filed by the same parties in this court. The following exposition will show how thoroughly confusing the situation has become.

The applicant is the registered owner of Tengold Reef claims named Eric 21. The 1st and 2nd respondents are former directors of 1st applicant who were dismissed as directors of the company by virtue of a High Court order under HC 3986/12. On 16 September 2014 the 1st and 2nd respondents filed an urgent chamber application under case number HC 2167/14 seeking to interdict the applicants from interfering with Tengold Reef Mine. Respondents obtained a default interim order. Later, on 15th January 2015 respondents obtained a final order. Applicants

then filed an application for rescission of judgment which was granted on 26 March 2015. The applicants then instructed their erstwhile legal practitioners Cheda & Partners to file a notice of opposition in case number HC 2167/14. Apparently no notice was filed due to problems that bedeviled that legal practice at that time. Applicants then searched for the file which could not be located timeously.

Be that as it may, respondents set the matter down on the unopposed roll and a default judgment was granted on 24 June 2015. There was a notice of opposition filed of record as at that date. In the provisional order under case number HC 2167/14 granted on 26 November 2014, the 1st and 2nd respondents sought a final order in the following terms:

> "a) the respondents be and are hereby ordered not to sell the mine in question
> b) the respondents be and are hereby interdicted from selling mining equipment situated on the mine in question or anywhere else unless in terms of the law.
> c) the respondents to pay costs of suit on an attorney-client scale."

It appears that without first filing and serving applicants' practitioners with a notice of amendment, the 1st and 2nd respondents unilaterally altered the terms of the final order sought by including the following clauses which are not supported by their founding affidavit:-

> "2) The respondents be and are hereby ordered not to interfere with the applicants' operations at the mine and not to interfere with equipment thereat.
> 4) The respondents be and are hereby interdicted from going to the mine known as Eric 21 Trianic Investments (Pvt) Ltd, Filabusi."

Armed with a default judgment incorporating the above clauses, respondents obtained a writ directing the 3rd respondent to evict the applicants from the mine on 3 July 2015. Applicants were served with the notice of eviction on 30 June 2015 and have since filed an application for rescission in this court under HC 1713/15. They also filed this application on 1 July 2015 seeking the following interim relief:-

"Pending the finalization of the matter, the applicants be granted the following relief:-

1. That execution of case number HC 2167/14 be and is hereby stayed pending the finalization of the application for rescission of judgment under case number HC 1713/15.
2. The 3rd respondent be and is hereby interdicted from evicting the applicants or anyone claiming possession through them from Eric 21 Mine."

The application was vigorously opposed by the respondents. The history I have set out earlier helps one to appreciate Mr *Mugiya's* preliminary points. The 1st point *in limine* raised is that the matter is not urgent at all in that the order was granted in September 2004 and applicants waited for doomsday before acting. He referred to the background and explained how the following cases were filed.

(a) HC 141/15 an application for rescission of judgment granted on 26 March 2015
(b) HC 390/15 an urgent chamber application filed on 19 February 2015 for stay of execution. Application dismissed on 19 March 2015.
(c) HC 2167/14 an application for rescission of judgment.
(d) HC 1713/15 an application for rescission of a default judgment issued on 24 June 2015 under case number 2167/14.

When the application was filed all these records were not attached to this record. The court had to request the Registrar to attach them and this took quite sometime. Upon perusing all of them, it became clear that while they explain the historical background they are of little help in deciding the question of urgency. What is critical is how applicants treated this matter after they became aware of the default judgment granted on 24 June 2015 – See *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188 (H) where CHATIKOBO J (as he then was) said "what constitutes urgency is not an imminent arrival of the day of reckoning, a matter is also urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules …"

In this case, applicants became aware of the judgment on 30 June 2015 and they immediately filed an application for rescission under case number HC 1713/15 and this application. In the circumstances it cannot be said that applicants did not treat this matter with urgency. For these reasons, I find that the matter is urgent. The focus should be on the default judgment and respondents' conduct shortly after obtaining the default judgment on 24 June 2015.

The second point *in limine* was that there is no proper application before the court for the following reasons:

(a) application is tainted with fraud in that Mr Chikarara's (the deponent) signature on documents filed is different.
(b) that the deponent to the founding affidavit has no *locus standi* in that annexure A does not state who gave him authority to represent 1st applicant.
(c) that since the main application (that is the one for rescission of judgment) is not in terms of r 449, applicant cannot obtain an order in terms of r 449 by way of an urgent chamber application
(d) that one cannot obtain a relief for stay of execution pending nothing.

As regards issue (a) above, while it is true that viewed with a naked eye, Mr Chikarara's signature on page 11 is different from that on page 38, that does not amount to proof of fraud or forgery. It is common cause that the document on page 11 was signed in 2011 while that on page 38 was signed in 2014. I agree with Mr *Ndlovu's* submission that it is not uncommon that old documents would have a signature different from those signed recently. Also it is common cause that the other court documents signed in 2014 and 2015 have the same signature. Unless respondents produce evidence that these documents were not signed by Chikarara or by R. M Dray the issue falls away.

The 2nd issue relating to *locus standi* is without merit in my view. Annexure A is a company resolution granting Mr Chikarara authority to sign "all court papers" involving the 1st

applicant and the 1st and 2nd respondents. Once such a document is filed of record, in the absence of clear evidence that it is a forgery, it is not the business of this court to conduct a witch-hunt into its authenticity. The court is not concerned with the elegance or sloppiness of the drafting of a company resolution authorizing one of the directors to represent it.

As regards the applicability of rule 449, I find applicants' argument unclear. R 449 can be utilized to "vary any judgment or order." The variation may be done *mero muto* by the court or a judge or upon application of any part affected. The court must be satisfied that all parties whose interests may be affected have had notice of the order proposed. The rule has no other limitations.

The final point that, one cannot stay pending nothing is without merit in that applicant successfully made an oral application to amend his papers to include the citation of case number HC 1713/15 which is the application for rescission of judgment.

For these reasons, all the points *in limine* are hereby dismissed. Costs shall be in the cause.

Messrs R. Ndlovu &Company applicants' legal practitioners
Messrs Mugiya & Macharaga, c/o Messrs Muzvuzvu Law Chambers 1st and 2nd respondents' legal practitioners