HB 220-18
HC 1019/18
XREF HC 1053/16
XREF HC 2986/15
XREF HC 2847/15
XREF HC 2495/15
XREF HC 2167/14
XREF HC 3986/12
XREF HC 3173/16

NQOBILE KHUMALO
and
FRANCISCA MUFAMBI
versus
MAONI TRADING (PVT) LTD
and
TRIANIC INVESTMENTS (PVT) LTD
and
THE MINISTER OF MINES AND
MINING DEVELOPMENT
and
THE COMMISSIONER GENERAL
OF THE ZIMBABWE REPUBLIC POLICE
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 24 JULY 2018 AND 6 SEPTEMBER 2018

Opposed Matter

N Mugiya for the applicant
S Chamunorwa for the 1st respondent

MOYO J: This is a court application made in terms of rule 449. The basis for the application is as given in paragraph 21 of the founding affidavit wherein applicant avers that:

> "What has prompted me to approach this Honourable Court with the present application is that:

a) This Honourable Court granted the order in HC 2986/15 which contradicts with two court orders of the same court namely HC 2495/16 and HC 2167/14

b) I am advised, which advise I accept that had the court been aware of the two orders in HC 2495/15 and HC 2167/14, it would not have granted the final order in HC 2986/15 as it contradicts with two court orders of the same court.

c) The first respondent failed to disclose to the court the existence of the order in HC 2495/15 and another in HC 2167/14 when it confirmed the provisional order held in HC 2986/15. This resulted in the existence of three orders which contradict each other.

d) The order in HC 2986/15 cannot stand in the face of the two orders in HC 2495/15 and HC 2167/14.

e) That the agreement of sale confirmed in HC 2986/15 is unlawful and wrongful for want of compliance with section 275 (1) of the Mines and Minerals Act [Chapter 21:05].

The first respondent raised points *in limine* being that:

1) Rule 449 was not designed to cater for delays of the nature that the applicant finds himself in as applicant seeks rescission 2 years after the judgment sought to be rescinded was granted.

2) That when it granted the order in HC 2986/15 the court was aware of the concerns applicant is raising currently and that therefore there was no error in granting the final order.

3) That the court was also aware of the attack on the lawfulness or otherwise of the agreement relating to the Mines and Minerals Act as such were mentioned in the opposing papers.

Applicant avers that the delay is not unreasonable and that the court was not aware of the other orders and the unlawfulness of the agreement.

Applicant also raised a point *in limine* relating to the form and contents of the resolution by the company authorizing Onias Claver Masiwa to act on its behalf. The applicant contends that the resolution is not valid due to the manner it is couched and the nature of its contents as well as the signatory. I do not hold the view that three is a prescribed format for a resolution by a company's board of directors in that no such format is prescribed by the rules of this court nor the Companies Act [Chapter 24:03]. I do not believe that the authority cited by the applicant's counsel on this aspect is binding but rather it is persuasive.

In that regard, I hold the view that where an effort has been made to seek authorization from a company to act on its behalf, and a document has been processed in that spirit, I do not believe that this court should attack the form of the document instead of accepting the spirit with which the document was crafted. The document was crafted with the spirit of authorizing the person so authorized to stand for the company in court proceedings. There is no set precedent for such a document. Even applicant's counsel did not submit that there is one in our law. It therefore is up to the court in my view, to find that the document is so flawed as to go to the root of its purpose. This court has time and again emphasized substance over form and I hold the view that where an attempt has been made to acquire the relevant authority, in the absence of glaring anomalies that are fatal to the whole process, this court cannot dismiss the document as being non-existent.

I accordingly hold that the deponent to the opposing affidavit is indeed duly authorized to represent the company in terms of the resolution attached.

On the issues raised by the respondent an application for rescission of any judgment should be made within a reasonable time so that the principle of finality to litigation is upheld.

In this matter it has taken the respondent about 2 years to file an application for rescission of judgment in terms of rule 449. The question that immediately arises is whether the period taken to act is reasonable? I believe whether the delay is reasonable or otherwise depends on the circumstances of each case. Respondents aver that the order sought to be rescinded was granted on 21 April 2016 and applicants only seek to rescind it 2 years later as this application was filed on 4 April 2018. In response to this averment, in his answering affidavit (paragraph 6 thereof) first applicant avers that the two applicants were not aware of the existence of the order as it was never served on them. However, I hold the view that for the applicants to take the court into their confidence, they should have elaborated as to how and when they became aware of the court order as we all know that at some stage prior to the launching of this application, they were then aware of the court order. I hold the view that, faced with a challenge on the unreasonableness of the delay as contended by the respondents, applicants were duty bound to fully ventilate the circumstances in which they became aware of the order and what steps they then took to bring the matter to the attention of the courts. I hold the view that whilst what constitutes an undue and unreasonable delay depends on the facts of each case, it is however the facts of each case that carry the day. In this application we do not have facts to counter the averment by the respondents that the delay was unreasonable. Applicant has failed to show that on a balance of probabilities, given the facts and circumstances of the matter, the delay cannot be held to be unreasonable. It is for these reasons that I will agree with respondent's counsel that indeed a delay of 2 years with no explanation whatsoever to assist the court to enquire into the circumstances relevant to the delay, cannot be held to be reasonable. I accordingly upheld the point *in limine.*

On the issue of the fact that the judgment was not granted erroneously as the court was aware of the other court orders when in confirmed the order in HC2986/15 and that the defence of the provisions of the Mines and Minerals Act was also part of the court record, applicant

submits that it cannot be held that the court was aware of issues that were raised in the opposing papers when it was now confirming the provisional order unopposed, as the court could not have been expected to read opposing papers in matter where they were no longer relevant. I hold the view that for a court to have been found to have acted erroneously due to unawareness of certain facts, such facts should not form part of the court record. I also find it difficult to hold that papers that were filed of record could be held not to have been read by the court that gave a particular order.

The court had the views of the applicant and those of the respondent in the notice of opposition and saw the issues raised by the applicant but still went on to confirm the provisional order.

I am thus inclined to hold that the court itself did not commit any error due to lack of the relevant information. As long as the information that is the basis of this application was part of the court record at the material time, I cannot hold that the court granting the order did not see it. Applicant does not dispute that such information was indeed part of the record. I hold the view that the points *in limine* raised by the respondents are merited and as a result I decline to rescind, an order with no basis having been made for such a conclusion that the order ought to be rescinded.

It is for these reasons that the application is dismissed with costs.

Mugiya and Macharaga Law Chambers, applicant's legal practitioners
Calderwood, Bryce Hendrie and Partners, 1st respondent's legal practitioners