AEPROMM RESOURCES (PVT) LTD
versus
SAMUEL MAZOWE
and
PATTERSON TIMBA
and
STEVENSON TIMBA
and
MAGGIE DITIMA
and
TONDESAI KAPONDO

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 20 & 31 August 2010

G.C. Chikumbirike, for the applicant
I. Chagonda, for the respondent

MTSHIYA J: On 20 August 2010 I dismissed this application with costs. The applicant has now placed before me a written request for the full reasons behind my dismissed of its application. The applicant says it needs the reasons because it intends to file an appeal in the Supreme Court urgently. I give here below the reasons for my ruling.

On 12 August 2010 the applicant filed an urgent application in this court seeking the following interim relief:-

"Pending the finalization of the applicant is granted he following relief:

1. The "Notice of "Extraordinary General Meeting", issued by the first respondent, for a meeting to be held on 21 August 2010, is hereby declared null and void.

2. The respondents are hereby interdicted from purporting to act as Directors of the applicant and interfering with and/disrupting the applicant's management.

3. The respondents shall pay costs of this application.

4. That leave is granted to the applicant's legal practitioners to serve this order upon the respondents"

The application was heard and dismissed for lack of urgency by HLATSHWAYO J on 19 August 2010. The result slip in the record confirms as follows:-

"Matter dismissed as not urgent"

On 19 August 2010, the day HLATSHWAYO J made his ruling, the applicant noted an appeal in the Supreme Court. The notice of appeal states that the appeal is against the whole of the judgment of HLATSHWAYO J and grounds of appeal are then given as follows:-

> "1. The learned Judge erred in finding that the applicant's application, HC 5500/10, was not urgent on the basis that there was an inordinate delay between the time the issue of applicant's contested Directorship came to the attention of the applicant's deponent in HC 5500/10 and the time of filing of HC 5500/10. In so doing the learned Jude failed to appreciate the fact that the issue that has instigated urgency in HC 5500/10 is the serving of notices of an Extraordinary General Meeting of the applicant, proposed by the respondents purportedly in their capacity as applicant's Directors. The fact of speculative knowledge about the improper claim to Directorship by the respondents could not ground urgency in that that would essentially amount to creating urgency where none exists. Prior to the issuance of the notice to attend an Extraordinary General Meeting therefore, the dispute as to Directorship could be resolved by way of an ordinary court application. Upon the service of the notice to attend the Extraordinary General Meeting however, scheduled for 21 August 2010, the need arose to interdict the respondents from acting in a manner inconsistent with the position that their status as directors is disputed. Such an interdiction could not be dealt with by way of an ordinary court application. It could only be resolved by way of an urgent chamber application, as such the learned Judge erred in finding that the matter was not urgent.
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> 2. The learned Judge also erred in finding that the averment contained in the Supporting Affidavit of Ann Rushwaya, was evidence of the fact that as far back as the 22 August of June the applicant was aware of its purported change of Directorship. This is so because a speculative suspicion that party has done something unlawful does not ground urgency but the very act of actuating that illegal action, e.g. by calling for an Extraordinary General Meeting, does ground such urgency, thus despite the existence of that speculative suspicion in June 2010, the basis of urgency has only arisen upon the serving of the notices to attend an Extraordinary General Meeting".

The judgment appealed against does not form part of the papers before me.

On 20 August 2010 the applicant filed this application seeking the following interim relief :-

> "Pending the finalization of the applicant's appeal in the Supreme Court (SC 197/10), the applicant is granted the following relief:
>
> 1. The respondents be and are hereby interdicted from holding the purported Extraordinary General Meeting of the applicant, scheduled for the 21st of August 2010.

2. The respondents shall pay the costs of this application".

Clearly the above is the same relief that was prayed for on 12 August 2010.

I heard the application on the same day it was filed and indeed after hearing argument from both counsel I dismissed the application with costs.

The certificate of urgency in support of the application indicated that since the dismissal of the earlier application the issue of an interdict remained alive because the Extraordinary General Meeting proposed by the respondents was likely to be held on 21 August 2010. Furthermore, the certificate went on, the dismissed matter (HC 5500/10) remained *res litigiosa* on account of the appeal noted in the Supreme Court. Accordingly, it was stated, if an interdict was not granted the holding of the meeting on 21 August 2010 by the respondents would stand to ignore the fact that there was pending litigation on the issue. The applicant therefore believed there was need for the matter to be dealt with through an urgent application.

I must hasten to mention that a few hours before the hearing of the application I had asked for heads of argument on whether or not leave to appeal was required in respect of the appeal filed in the Supreme Court on 19 August 2010. I am indebted to Mr *Chikumbirike*, for the applicant, who quickly filed heads of argument which I found useful.

In his heads of argument Mr *Chikumbirike* drew my attention to s 43(2)(d)(ii) of the High Court Act [*Cap 7:06*] which provides as follows:

"(2) No appeal shall lie-

(a) ……..

(b) ……

(c) ….

(i) …..

(ii) ….

"(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) <u>where an interdict is granted or refused;</u>
(iii) in the case of an order on a special case stated under any law relating to arbitration". (my own underlining)

Clearly the relief sought is that of an interdict referred to in exception (ii) above. Mr *Chikumbirike* also advised that upon dismissing the application the judge had intimated that his decision was final and definitive and did not therefore require leave of the judge for purposes of appeal. I concur. (See Mwatsaka ICL Zimbabwe 1998 (1) ZLR 1 (H)).

Mr *Chagonda,* for the respondent, although intimating that leave should have been formally sought, was, however, of the view that since the appeal was already before the Supreme Court, the applicant should have applied to that court for an urgent hearing. He said the applicant could have done so in terms of R 58 of the Supreme Court Rules which provides as follows:-

> "In any matter not dealt with in these Rules he practice and procedure of the Supreme Court shall, subject to any direction to the contrary by the Court or a Judge, follow, as near as may be, the practice and procedure of the High Court".

He said the above rule opened a window for urgent applications to be brought before the Supreme Court and that many cases had been handled through that window.

Without denying the fact that indeed many cases had reached the Supreme Court through that window, Mr *Chikumbirike*, relying on *Lloyd Guwa (2) Hazel Claris Kumire v Willoughby Investments (Pvt) Ltd* SC 31/09, said unlike the High Court, the Supreme Court had no inherent jurisdiction. He said it was a creature of statute whose powers are clearly defined in the Supreme Court Act [*Cap 7:13*]. That being the case there was no opening for urgent applications.

Mr *Chagonda* was of the view that the route taken by the applicant was simply a way of bringing back the same refused application to the same court. This was so because, if granted the effect of the relief sought meant a reversal of the earlier decision of this court. I agree.

Indeed if the interdict is granted the effect is to reverse the earlier ruling of this court. As can be seen, the relief sought is the same as the one earlier prayed for. However, Mr *Chikumbirike*'s argument was that the court's duty was merely to determine whether or not, given the fact that an appeal now lies in a superior court, it could be proper for the respondents to proceed with their proposed meeting on 21 August 2010. In support of that stance, the applicant in its founding affidavit and in line with the certificate of urgency states, in part:

> "6. Pending the determination of that appeal therefore, the issue of the application for the interdiction of the respondents from holding the proposed meeting of the 21st August 2010, remains a matter that is subject of pending litigation.
>
> 7. The applicant has a clear right to have that issue determined before any action as to holding the proposed meeting can take place. This is in line with protecting its right to proper recourse before the law.

8. To allow the meeting to proceed therefore would amount to the sanctioning of the dealing in and with issues that are *res litigiosa*. Such a situation would inevitably cause the applicant irreparable harm as the proposed meeting seeks to make various resolutions in respect of the applicant, which resolutions are intended thereafter to be put into effect. Such a situation must be stopped by this honourable court.

9. The risk of this irreparable harm is very imminent as the proposed meeting is scheduled for the 21st of August 2010 (the day after tomorrow). It is on this basis that the applicant prays for an order interdicting the respondents from holding the proposed Extraordinary General Meeting on the 21st of August 2010, pending finalization of the applicant's appeal in HC 5500/10".

The details relating to the business of the meeting to be held on 21 August 2010 were not given. Whilst I am of the view that it is possible for the Supreme Court to be moved to grant an urgent hearing to an appeal already before it, my assessment in this application is that I am being asked to review the earlier decision of my brother HLATSHWAYO J. That cannot be and is not permissible. That being the case there would therefore, in the main, be no compelling reason for me to have the earlier judgment placed before me. I simply do not have the power to review that judgment.

To the extent that the parties were heard on the merits of the case relating to the sole issue of urgency, I hold the view that this matter is now *res judicata*. I come to this conclusion on the basis that the relief being sought is the same one that was before my brother HLATSHWAYO J. As argued by counsel for the respondents, I believe I am being asked to grant the same relief under the excuse of an appeal now pending in the Supreme Court.

In addition to the above, I also want to recognise that generally in civil matters an appeal to the Supreme Court suspends the operation of the decision appealed against (See *Founders Building Society v Mazuka* 2000(1) ZLR 52P (HC)). However, given the fact that no operational order was ever granted by this court, I do not think the general rule applies. The Judge, after having heard the parties, merely refused to hear the matter on the basis of urgency and there was never any consideration of the merits of the case. There was no executable order issued by the judge. That is why it was not necessary for respondents to make an application for execution pending appeal. In line with its acceptance of that fact, the applicant, in its appeal, prays for the matter to be "remitted to the High Court to be heard and determined on an urgent basis".

All in all and for the reasons I have given above I find myself totally disabled from granting the relief sought. The above conclusions preclude me from going any further because the

appeal in The Supreme Court is indeed intended to direct this court to go into the merits of the matter. The prayer in the appeal specifically reads as follows:

> "That the ruling by the High Court in HC5500/10 be and is hereby set aside, and the matter is remitted to the High Court to be heard and determined on an urgent basis."

It would therefore be improper for me to do what the Supreme Court has not yet directed this court to do.

In light of the foregoing I dismissed the application with costs.

Chikumbirike & Associates, applicants' legal practitioners
Atherstone & Cook, respondents' legal practitioners