

WENDALL ROBERT PARSON
versus
GILLIAN THERESE JACKSON
and
WILLIAM LORENZO PARSON
and
VINYU TSOKA
and
PROVINCIAL MINING DIRECTOR
MASHONALAND CENTRAL, MINISTRY OF MINES
AND MINING DEVELOPMENT
and
FIDELITY PRINTERS AND REFINERS (PVT) LTD

HIGH COURT OF ZIMBAWE
CHITAPI J
HARARE, 18, 19, 20 and 21 September 2017 & 23 November 2017

Urgent Application

J Samkange with E R Samkange, for the applicant
G R J Sithole with E Mupanduki, for the 1, 2nd and 3rd respondents

CHITAPI J: The first, second and third respondents have through their legal practitioners requested that I prepare and avail my reasons for the provisional order which I granted in favour of the applicant on 21 September 2017. This application is one of those unusual ones where family members fight each other tooth and nail over earthly riches.

The applicant is a son to the first respondent. The second respondent is a brother to the applicant. The third respondent is not related to the applicant, first and second respondents. He is, so far as the applicant is concerned in a business relationship with the other three. At the centre of

the dispute which has split the family rapport is the ownership and control of a company called Wentso Milling (Pvt) Ltd which carries out gold mining operations in Mashonaland Central Province. The company is a family concern involving the applicant, the first and second respondents with the third respondent being the odd man out family relationship wise.

The pre-ambule to the Constitution of Zimbabwe (2013) acknowledges the supremacy of the “Almighty God”. With this understanding I believe that I can properly quote the Bible in 1 Timothy 6 verse 10 where it is stated in the Common English Bible Version, that, “ The love of money is the root of all kinds of evil. Some have wandered away from the faith and have impaled themselves with a lot of pain because they made money their goal.” It certainly was an unfortunate spectacle which I had to contend with where mother and sons could not see eye to eye over money or a mine. Ordinarily, one expects that a family is at one, fighting in support of one another as a unit. This was not to be in this case.

The Parsons family was estranged and alienated because of the mine in question, a situation reminiscent of the movie, “The Gods Must Be Crazy” where a closely knit Bushmen family nearly split over a coke bottle which fell from the sky. Everyone in the family wanted to utilize it. Because of that, endless fights ensued. Harmony only returned to the family after the family head had disposed of the bottle in the seas where none of the family members could find it. Unfortunately in this case the mine cannot be drowned in the seas. The above observations aside, I had to determine the matter on the papers and arguments presented by the parties through their legal practitioners. The application was initially set down for hearing on 18 September 2017 at 4.00 pm in chambers. A notice of opposition incorporating the opposing affidavit of the first, second and third defendants was filed just before the hearing by Messrs Mhishi Nkomo Legal Practice. The legal firm instructed counsel, Advocate T *Zhuwarara* to argue the opposition on behalf of the three respondents aforesaid.

I enquired from the legal practitioners whether they were ready to argue the matter in view of the opposing papers which had just been filed. Mr *Samkange* for the applicant submitted that the legal practitioners for the first, second and third applicants were conflicted because they had previously represented the applicant as well as the company Wentso Mining (Pvt) Ltd which was

at the centre of the dispute. He submitted that there were other litigations before this court in which the aforesaid legal practitioners were representing directly or indirectly the interests of the applicant or the company.

I enquired of Advocate *Zhuwarara* as to whether or not Mr *Samkange*'s allegations were correct and if so, whether he wanted to argue the issue or be given time to discuss the details of the cases which Mr *Samkange* was referring to and to decide whether he considered Mr *Samkange*'s submissions to have merit. The reason why I adopted the approach of having the two legal practitioners discuss the issue was because Advocate *Zhuwarara* professed ignorance of the factual allegations concerning other matters referred to by Mr *Samkange*. Both counsel had also not discussed the issue prior to the hearing. Advocate *Zhuwarara*'s stance was that the issue of conflict of interest had taken him by surprise. He wanted to consult his instructing practitioners, Mhishi Nkomo Legal practitioners on the issue.

I ruled that it was only proper under the circumstances to allow counsel to debate the issue of conflict of interest between them and decide whether there was such a conflict. In the absence of agreement, I would then hear further argument and give a ruling thereon. I therefore postponed the hearing to the following day, 19 September, 2017 by consent of the parties.

On 19 September, 2017 the hearing was reconvened. Messrs Mhishi Nkomo Legal Practice filed a notice of renunciation of agency for first, second, and third respondents. They also wrote a letter addressed to the applicant's legal practitioners of the same date and copied it to my clerk. I directed my clerk to file it on record. It reads as follows in its body;

“RE: WENDALL ROBERT PARSON V GILLIAN THERESE JACKSON AND OTHERS HC 8489/17

We attach hereto our notice of withdrawal of the notice of opposition filed on behalf of the first to third respondent.

We do not think that we are conflicted in this matter and indeed in any matter involving the parties. Be that as it may, we have taken cue (sic) from the Judge's remarks and the need for the matter to be disposed of expeditiously that we have taken this step.

Be guided accordingly

Mhishi NKomo Legal Practice....”

I am not exactly clear as to what the “cue” or “remarks” were which it is alleged I made. As already indicated parties were directed to discuss the conflict of interest issue and reach agreement if possible or argue the same before me for determination. It suffices to record that I did not make any order respecting the alleged conflict of interest. What happened is that following the postponement of the hearing to allow counsel to interrogate the issue of conflict and interest, the first, second, and third respondent’s legal practitioners renounced agency upon their own reflections and not as a result of an order of court made by myself.

Consequent on the renunciation of agency, the three respondents engaged the services of Coghlan, Welsh and Guest legal practitioners. A notice of assumption of agency and a fresh notice of opposition incorporating first, second, and third respondent’s opposing affidavits were filed prior to the resumed hearing which was scheduled for 11.30 am. Miss *Mupanduki* appeared for the three respondents. She submitted that Advocate *Zhuwarara*, the three respondents’ counsel whom they had retained was engaged in the Supreme Court. She had expected that he would be done in the Supreme Court by 11.30 am as per counsel’s indications. It appeared that Advocate *Zhuwarara* had underestimated the time he would be engaged in the Supreme Court. In the absence of Advocate *Zhuwarara* counsel sought a postponement of the matter and I acceded to the request and postponed the hearing to the following day, 20 September 2017 at 10.15 am.

On the following day, the hearing commenced late at 10.50 am. The delay was attributed to Advocate *Sithole* who had now been engaged by the first, second, and third respondents in place of Advocate *Zhuwarara*. He apologised for the delay and submitted that he had another engagement before this court which delayed in its finalisation. The legal teams were now comprised of Mr *J Samukange* with Mr *E R Samkange* for the applicant and Advocate *Sithole* with his instructing legal practitioner Miss *Mupanduki* for the first, second, and third respondents. Advocate *Zhuwarara* apparently had recused himself. The applicant was in attendance. The first, second, and third respondents were not in attendance and their non-attendance was on the application of Advocate *Sithole*, excused. Counsel indicated their readiness to argue the matter and the hearing commenced.

Mr *Samkange* raised a point *in limine* that the first, second, and third respondents' papers consisted of a copy and paste exercise in that despite the renunciation of agency and withdrawal of opposing papers prepared by the conflicted legal firm, the replacement legal practitioners did not independently prepare fresh papers. They simply changed the file cover to reflect new legal practitioners but left the affidavits of the respondents largely as they had been, in material, content and wording. He submitted that in a conflict of interest situation, the new unconflicted legal practitioners should take instructions of their own and prepare their own papers because adopting the papers prepared by the conflicted legal practitioner amounts to a continuation of the conflict. Mr *Samkange* cited the case of *Pertsilis v Calcaterra and Anor* 1999 (1) ZLR 70 (H) a judgment of SMITH J in which the learned judge after discussing at length, the subject of conflict of interest allowed the respondent's legal practitioner despite his firm having previously represented the applicant to argue the urgent application. In allowing the legal practitioner to argue the matter the learned judge noted that the matter was urgent, secondly that there was no allegation made that the respondents sought to use information against the applicant which was in the possession of the conflicted legal practitioner's firm and lastly after considering that the application before the court stood to be argued on the filed papers hence making it impossible for the conflicted legal practitioner to use other knowledge acquired by him from the applicant to the applicant's prejudice.

Mr *Samkange* who incidentally was the legal practitioner who was allowed to argue the urgent application in the *Pertilis* case despite the conflict of interest of his firm, submitted that he considered the present application a proper one for me to exercise the discretion as was granted to him to argue the matter by SMITH J and allow the respondent's counsel to argue the matter on the papers despite the papers being substantially and substantively similar in content to the ones prepared by Mhishi Nkomo Legal firm. The concession by Mr *Samkange* amounted in effect to a withdrawal of his objection that the respondent should prepare fresh papers and not use the ones prepared by the conflicted legal practitioners.

Before I vacate the subject of conflict of interest within the legal profession, I note that the subject is well ventilated in practice and by legal literature including reported and unreported judgments of this court and of other jurisdictions. I however stress that allowing a conflicted legal

practitioner or law firm to act against a litigant who has been his or her client or a client of the law firm to which the legal practitioner is attached should not be permitted. It brings the legal profession into disrepute and portrays legal practitioners as persons without ethics and who will blow with the wind in the direction of money. The legal profession is said to be a noble one which commands honour. It is neither noble nor honourable to act for a client today and turn against him or her tomorrow. The adoption of legal professional privilege and its acceptance by legislation is testimony to the recognition that a legal practitioner and his or her client stand in a special position of trust where the client opens up to the legal practitioner. To then face off against the client in his or her fight against another person simply is dishonourable.

It must follow therefore that despite the concession by Mr *Samkange*, I hold the view that allowing a legal practitioner to use the same papers prepared by a conflicted legal practitioner is irregular and improper. It is only in exceptional circumstances that such a situation should be condoned. In *casu*, I hesitantly allowed the hearing to proceed having considered that the matter was an urgent application and that the other party did not persist in objecting to the use of the papers. For the avoidance of doubt however, I would hold that where a conflict of interest situation has arisen, the conflicted legal practitioner should keep his or her instructions to himself or herself meaning that the file and documents which he or she has prepared should not leave the office or find their way to the unconflicted legal practitioner who has been engaged to take over the prosecution of the claim or the defence of the same. The new legal practitioner should act independently of any influence directly or indirectly of the conflicted legal practitioner.

A copy and paste exercise in terms of which the conflicted legal practitioner simply renounces agency but allows the takeover legal practitioner to use the conflicted legal practitioners' prepared papers save for change of name of the legal practitioner does not cure the prejudice or likely prejudice caused by the conflict. Conflict of interest is not a personal issue. It is not about the identity of the conflicted legal practitioner. It is about information which the conflicted legal practitioner has come into possession or knowledge of as a result of the legal practitioner and client relationship. It is this information that must be protected by legal practitioner and client's privilege. If the legal practitioner uses it against his or her client, conflict of interest

arises. It is therefore irregular for the conflicted legal practitioner to physically vacate or excuse himself/herself from the case but leave information which the legal practitioner has prepared in circumstances of conflict of interest for use by the takeover practitioner.

Reverting to the application before me, Mr *Samkange* submitted that there was no proper withdrawal of the previous notice of opposition because it did not incorporate a tender of wasted costs. It is a trite rule of practice that where a party withdraws a pleading, such party should tender wasted costs. The respondent's counsel tendered the wasted costs.

Mr *Samkange* next applied to amend the relief sought in the provisional order. The original provisional order read as follows:

“TERMS OF FINAL ORDER MADE

- 1.1 That the interim order granted by this honourable court is hereby confirmed as a final interdict.
- 1.2 That the first, second and third respondents be and are hereby ordered and directed to render an account in of all mining activities and gold deposits for the period from 25 August 2017 to the date that mining operations were closed inclusive of a schedule and supporting documents for all expenses incurred on behalf of the company WENTSO MILLING (PVT) LTD and a debasement of the account.
- 1.3 That the first, second and third respondents shall jointly and severally the one paying for the others to be absolved pay all the costs incurred by the applicant in these proceedings on an attorney and client scale.

INTERIM RELIEF GRANTED

- 2.1 That pending the finalisation of the matter determining the authenticity of the alleged resolutions of the first, second and third respondents in Case No HC 8363/17, the fourth respondent be and is hereby ordered and directed to issue a directive that the mining

operations of WENTSO MILLING (PVT) LTD be suspended pending the outcome of Case No. HC 8363/17.

- 2.2 The 5th respondent be and is hereby ordered and directed to refuse any gold deposits emanating from the operations of WENTSO MILLING (PVT) LTD or to pay any funds from any deposit of gold to any alleged representative or agent of WENTSO MILLING (PVT) LTD pending the outcome of Case No. HC 8363/17.
- 2.3 That 5th respondent be and is hereby directed to deposit all amounts due and owing to WENTSO MILLING (PVT) LTD as at the date of this order to the Registrar of the High Court pending the outcome of Case No. HC 8363/17 and into no other account.
- 2.4 That the 1st, 2nd and 3rd respondents be and are hereby ordered not to attend the mine, to carry out mining activities, to tamper with or remove any of the accounts of WENTSO MILLING (PVT) LTD pending the outcome of Case No. HC 8363/17.

SERVICE OF THE ORDER

That service of this order shall be effected by the Sheriff on the respondents

In his application to amend the provisional order Mr *Samkange* applied to amend the interim relief by the deletion of paras 2.1 to 2.4 as worded and the substitution thereof with a synthesized order which provided for the applicant's entitlement to operate the mine and the company without interference from the first, second and third respondents. The amendment also sought to interdict the first, second and third respondents from attending at the mine or to carry out mining activities including tampering or removing the books of accounts of the company. Lastly, Mr *Samkange* sought to include an order directing the Registrar to consolidate case Numbers HC 8363/17; HC 8299/17; HC 1362/17 and HC 199/17 for urgent set down of hearing.

Advocate *Sithole* opposed the amendment. He argued that the interim relief as amended would have the effect of the applicant achieving what he wanted, being the removal of executive

directors and substituting them with non-executive directors. In other words, the argument was that the first, second and third respondents would lose executive authority over the running of the mine in the capacities as executive directors.

He further argued that the relief now sought was prejudicial to the first, second and third respondents because they had not addressed the amended relief when they prepared their opposing papers.

In response, Mr *Samkange* submitted that the applicant's proposed amendment did not raise any new relief outside of the provisional order. He argued that the amendment was intended to synthesize what was already envisaged in the provisional order. He emphasized that the applicant's position was that he was a 60% shareholder of the company and that he had been unlawfully dispossessed of his shareholding. He wanted to exercise the rights he previously enjoyed prior to the alleged dispossession of his shareholding and control of the company.

I was inclined to grant the amendment for two reasons. The first one was that I did not perceive the amendment as seeking relief not arising from the applicant's complaint or cause of action which was essentially the alleged unlawful dispossession of company control and dissipation of his shareholding. Secondly, there was no prejudice which would be occasioned by the amendment in that the amendment did not bind me. Indeed, r 246 (2) of the High Court Rules provides that

"Where in an application for a provisional order the judge is satisfied that the papers establish a prima facie case, he shall grant a provisional order either in terms of the draft order or as varied."

Therefore I still retained the discretion to determine the nature and content of the order to grant taking into account not only the papers filed but also any further information and arguments as the parties considered necessary to bring to my attention. The first, second and third respondents additionally had the option of seeking a postponement to prepare and file any further information to oppose the grant of the amended provisional order. Needless to state that, they did not request time to file any supplementary information. I directed Mr *Samkange* to prepare an amended provisional order incorporating the amendments he had applied to make for good order.

Mr *Samkange* subsequently filed an amended provisional order incorporating changes to the interim relief sought which he couched as follows:

“INTERIM RELIEF GRANTED

Pending determination of the matter under HC 8363/17, applicant is granted the following relief

1. The applicant be and is hereby authorised and entitled to operate the mine and the company without interference from the first, second and third respondents.
2. That the first, second and third respondents be and are hereby interdicted and ordered not to attend at the mine, to carry out mining activities, to tamper with or remove any of the accounts of Wentso (sic) Milling (Pvt) Ltd.
3. The Registrar is directed to consolidate the following cases HC 8363/17; HC 8279/17; HC 1362/17 and HC 199/17 and to urgently set the matter down for hearing.

It will be apparent upon a juxtaposition of the amended interim relief and the provisional order which I then granted that I varied para 3 of the draft filed by Mr *Samkange* because I did not consider it appropriate to consolidate with this matter other cases although referred to in this application without affording parties and/or legal practitioners involved therein, an opportunity to make representations on the proposed order of consolidation. Rule 92 of the High Court Rules is instructive in this regard on the need to involve all interested parties before a consolidation of case can be ordered.

The next issue argued by counsel was the issue of urgency and what was referred to in the respondent’s opposing papers as “material non-joinder of the company.” Dealing with non-joinder of the company first, the respondents submitted in their papers that the company should have been cited because the provisional order sought a stoppage of the mining operations of the company. The point made had merit until the applicant sought an amendment to the provisional or interim relief sought. The point was therefore not persisted in with any conviction by the respondents counsel in argument. It must be borne in mind that in terms of rule 87 of the High Court Rules, the

non-joinder or misjoinder of a party does not defeat a cause or matter because joinder and misjoinder of a party can be ordered by the court at any stage of proceedings through application by any interested party, by any of the parties to the cause or by the court on its motion subject of course to the rider that a party can only be joined as a plaintiff or applicant with such party's written consent.

The other related issue arising from the non-joinder of the company was that the directors and shareholders of the company are the very persons involved in the litigation. It was academic to speak of the company in this case as separate from its directors and shareholders. The dispute before me related to control of the company and did not involve an outsider claiming a stake or control in the company. If one was to pierce the veil of incorporation, the position was simply that it was the company fighting within itself and it was therefore an argument in futility to argue for the joinder of the company under the circumstances. I have already indicated that this argument was not strenuously advanced. A joinder of the company in my judgment was of academic interest of no practical assistance and would have been impossible of enforcement because the company directors who are the shareholders and would have had to pass resolutions to defend or represent the companies were the litigants amongst themselves.

On the issue of urgency, I do not propose to take unnecessary time and space over it. The applicant argued that the matter was urgent because he had been despoiled and dispossessed of control of the company in which he was the majority shareholder and managing director illegally or unlawfully through passage of resolutions which were of no legal effect. It was submitted that fraudulently created, invalid and defective company documents had been generated by the first, second and third respondents to usurp the applicant's rights in the company.

The applicant filed police reports and sought the intervention of the fourth respondent who suspended mining operations but subsequently allowed operations to resume after he had been presented with unlawfully generated or invalid documents, so the applicant argued.

The applicant further submitted that the first, second and third respondents were plundering the assets of the company in the form of gold ore which they were disposing of to the fifth respondent for their personal benefit. The applicant averred that there were pending cases before

the court in which the issue of ownership of the company or its shares awaited determination. However, the first, second and third respondents were not minded to wait for the outcomes of those case. At this juncture it is convenient to advert to the cases pending before this court involving the parties and / or the company. They are referenced in the heading to this application. I caused the relevant records to be placed before me for the perusal and I noted as follows:

- i. HC 199/17 filed on 10 January 2017 – The parties are:

Gillian Jackson : Plaintiff

v

Wentso Milling (Pvt) Ltd : 1st defendant

Wendall Parson : 2nd defendant

William Resonzo Parson : 3rd defendant

Godfrey Tsoka : 4th defendant

The plaintiff seeks a declaratory order that she owns 15% shareholding in 1st defendant and costs of suit. Her legal practitioners are Mhishi Nkomo Legal Practice and the defendants are represented by Matizanadzo & Warhurst. The case is at pre-trial conference stage.

- ii. HC 1362/17 filed on 15 February 2017 - The parties are:

Wentso Milling (Pvt) Ltd : 1st plaintiff

and Wendall Robert Parson : 2nd plaintiff

Gilliam Theresa Jackson : 1st defendant

William Lorenzo Parson : 2nd defendant

Lovemore Katanga : 3rd defendant

The three plaintiffs in that matter seek an order that the defendants should account for proceeds of gold sales allegedly made by the latter to Fidelity Printers for the period, 1 April 2015 to 1 November, 2016. The plaintiff also prays for a debatement of the account of the gold sales and that the defendants provide financial statements of the 1st plaintiff for the period 1 January, 2015 to 1 November, 2016 inclusive of the debated account for the proceeds of sales of gold ore made between 1 April, 2015 and 1 November, 2016. The

plaintiffs are represented by Matizanadzo and Warhurst and the defendants by Mhishi Nkomo Legal Practice. The case is at plea stage.

iii. HC 8279/17 filed on 6 September, 2017. The parties are:

Wendall Robert Parson – applicant

v

Mhishi and Nkomo Legal Practitioners – 1st respondent

Gillian Therese Jackson – 2nd respondent

William Lorenzo Parson – 3rd respondent

The applicant seeks an order confirming him as director of a company called Amurolite (Pvt) Ltd and declaring invalid a resolution of the company dated 18 November, 2016 purporting to remove him as director. The applicant also seeks an order confirming him as Trustee of Amurolite Trust. Although this case does not directly concern Wentso Milling (Pvt) Ltd, the company which is the subject matter of the application before me, the applicant has referred to it and given it as another example in which the same family members “the Parson’s family are at each other’s throat showing just how soured the family and business relationship has become. The application is opposed. The applicant is represented by Matizanadzo and Warhurst and the respondents by Coghlan Welsh & Guest. Notably this application was filed exactly seven days or a week before the date of filing of the application before me which was filed on 13 September, 2017.

iv. HC 8363/17 filed on 8 September, 2017. The parties are:

Wendall Robert Parson – applicant

v

Lovemore Katsiga – 1st respondent

Gilian Theresa Jackson – 2nd respondent

William Lawrenzo Parson- 3rd respondent

Vinyu Tsoka – 4th respondent

The applicant seeks an order that the shareholders meeting of Wentso Milling (Pvt) Ltd held by second, third and fourth respondents on 25 August 2017 wherein resolutions were passed inter-alia, confirming the fourth respondent's purported sell of 30% shareholding in the company to third respondent, confirming that applicant was removed as Executive Director in charge of the mining operations of the company be declared null and void as having been reached in breach of the shareholders agreement. The applicant is represented by Matizanadzo and Warhurst and the respondents by Coghlan Welsh & Guest who have filed a notice of opposition and opposing affidavits therein.

It should be noted that the application before me is predicated on this case in that the applicant seeks an interim order governing the operations of the company pending the determination of this case.

- v. HC 200/17: filed on 10 January, 2017: The parties are:
Gillian Jackson – plaintiff
v
Wendall Robert Parsons: Defendant

The plaintiff claimed against the defendant payment of US\$60 300.00 being repayment of moneys loaned and advanced to the defendant by the plaintiff. At the time hearing of the application before, pleadings had been closed and the matter referred for pre-trial conference set down. The plaintiff was represented by Mhishi Nkomo Legal Practice and the defendant by Matizanadzo and Warhurst.

I shall pass my comments on what I make of the above cases drawn to my attention later in my judgment. Suffice at this stage that the applicant averred in his papers that despite the existence of these pending litigations, the respondents were bent on having their way and elbowing the applicant out of the control of the company which control he enjoyed before the causes of action complained of in the pending cases arose.

The respondent's counsel argued that the application was not urgent because, firstly, the applicant failed to differentiate the different roles and relationships between a company, its

directors and shareholders. It was submitted that as a shareholder the applicant was only entitled to dividends and not all income generated by the company. The thrust of the argument was therefore that the applicant was not the owner of the company and could not claim the order he sought as if the company was his personal property. The applicant could therefore not be prejudiced as his cause of action was base or unsound at law. It was averred that the applicant had also been advised of the changes in the shareholding of the company on 5 September, 2017 by letter which he did not respond to, electing instead to file this application ill-advisedly. The applicant allegedly refused to participate in the discussions.

I was not persuaded that the application was not urgent. On the contrary the application is clearly urgent because there is urgent need to ensure order in the company and its operations where the directors and shareholders are admittedly at each other's throats. The parties are involved in several litigations all centred directly or indirectly on the control and shareholding of a company Wentso Mining (Pvt) Ltd in which the parties are the directors and shareholders. It is like a house which is demolishing. The very persons who make the company are by their actions destroying it. To refuse to intervene would be to sanction and exacerbate an unresolved problem which awaits determination by the court.

Dealing with the merits of the application, the applicant seeks an interim interdict which will govern how the company operations will be controlled pending the return date. Urgent applications allow for a lot of flexibility to ensure that where a *prima facie* case has been made out and a provisional order granted by the judge in his discretion, a party who is aggrieved by the order can immediately return to court and seek that the order be changed, varied or set aside. Where the provisional order is final in nature, the aggrieved party can note an appeal.

Unfortunately, what happens in practice is that instead of taking advantage of the flexibility of the provisional order which allows for a relaxation of time limits for filing pleadings and processes of set down, legal practitioners and parties opt for the route of applying for leave to appeal against a provisional order. Such a course albeit permissible presents itself to me as a very circuitous and expensive route to follow because an application for leave to appeal may be refused in which case the party seeking leave would have to seek such leave from a judge of the appeal

court. Time will be moving with the provisional order being operational, to the prejudice of the dissatisfied party adversely affected by it.

The provisional order clearly provides that a party seeking a revisitation of the order by the court should approach the other party. The parties then arrange a date in consultation with the registrar as to when the provisional order can be revisited. Failing agreement on the first option, the party seeking a re-visitation of the order can make a chamber application for directions from a judge as to when the matter can be argued. Needless to state that the chamber application would naturally be an urgent one,

I have considered it necessary to zero in on the flexibility of the process of revisiting a provisional order because after I had granted the provisional order, I received a letter from the respondents' legal practitioners dated 22 September 2017 requesting for reasons for judgment "at my earliest convenience" since the respondents needed to lodge an appeal. Subsequent to the letter I received a letter addressed to the Chief Justice and copied to me, written by the first respondent. Therein she made a scathing attack against me for what she perceived as my impartiality and bias. She further indicated that my order was causing her and other respondents serious hardships and financial prejudice. I do not intend to dwell on the first respondent's perceptions of bias and wrongful conduct since the appeal court if such grounds are raised will deal with the matters. I just adverted to these developments as it occurred to me that thought was not applied to the flexibility of disposal of provisional orders. The flexibility mechanisms are intended to redress injustices caused by a provisional order. A provisional order means exactly that. It arrests a wrong or temporarily imposes a stop gap measure, without closing the court's doors to revisit the order.

The next development connected with my observations as set out above was that the respondents' legal practitioners, Coghlan Welsh & Guest renounced agency. In, came another firm of legal practitioners, Muringi Kamdeferwe who assumed agency for the respondents. I then received a letter from them following up on the reasons for judgment. In their letter dated 18 October, 2017 they purported that they had perused the court record. They erroneously captured that "the court had indicated that either of the contesting parties can request an urgent set down of the matter and review of the matter" I most certainly did not make such a directive and would

not have had reason to indicate so for the simple reason that the provisional order itself provided for such a course in its wording. The wording is standard. That affected persons can move a judge to revisit the provisional order.

Through the Registrar, the legal practitioner's letter was responded to by letter dated 24 October, 2017 wherein it was indicated that the process of seeking an urgent revisit of the provisional order was to be found in the standard provisional order form in para 5 thereof. The procedure as indicated is to approach the other party and seek an agreed set down in consultation with the registrar, failing which a chamber application for directions would have to be made. That was as far as I could direct the respondents on the need to comply with the procedures. I am not sure whether they were advised to do so.

I have indicated that I would comment on the various cases which were brought to my attention in this application. An examination of the cases shows a failure on the part of the legal practitioners to guide their clients on how best to end their feuding. At the centre of the parties acrimonious relationship was and is Wentso Milling (Pvt) Ltd. All that the legal practitioners needed to do was to advise their clients to arrest their ancillary litigations and petition the court to determine the correct directorship and shareholding of the company. Everything else would then have resolved themselves. It was therefore no wonder that when Mr *Samkange* came into the picture, he realised the source of the dispute and in his application for amendment sought an order consolidating all the listed cases.

I should however hasten to indicate that although I issued an order of consolidation, it was subject to the parties agreeing to the consolidation. When the parties appeared before me as directed to consider the consolidation, the respondents were so incensed by the other aspects of my provisional order granting temporary control of the company to the applicant and barring them from interfering with operations that they advised their legal practitioners that they were not agreeable to discussing the consolidation. For the avoidance of doubt, the proposed consolidation was not therefore agreed to by the respondents and was consequently not ordered. It had been issued as a suspensive order which had to be finalized by consent of all concerned.

The last part of my judgment is to briefly then justify my reasons for granting the provisional order. It was clear on the papers filed of record that the only document which I could rely upon to indicate the shareholding of the company was the Shareholders Agreement attached to the applicant's affidavit. It was prepared by a firm of legal practitioners, Phillips Law Firm. It purported that the applicant was a 60% shareholder of the company with the respondents being in the minority. The agreement provides for the process of transfer of shares. The validity of the transfer of shares subsequent to the signing of the agreement is a subject of pending litigation under Case No. HC 8363/17.

The applicant as was common cause was the one running the affairs and operations of the company until a resolution to relieve him of the powers was reached by the minority shareholders on 25 August, 2017. The validity of the resolution is subject of pending litigation under Case No. HC 8363/17. Indeed the resolution of 25 August, 2017 which the applicant challenges purports to divest him of control of the operations of the company. That part of the resolution can only have been passed because the applicant was until disposed of authority, in control of the company.

In the face of all the evidence before me, I was satisfied that the applicant had proved a *prima facie* right to the relief that he was seeking. It was in my view only fair and justiciable at the time that I granted an order restoring the *status quo ante* the unresolved and pending litigation under Case No. HC 8363/17 being that the applicant had proved that he was in control of the company.

The company documents filed in the Companies Registry were changed post the impugned resolutions. I did not consider that I could properly rely upon them as conclusive proof of a lawful change having been made to the company directorships and shareholding since their validity is challenged under Case No. HC 8363/17. Although the respondents denied the validity of the shareholders agreement, it presented to me as the only document to which, in the absence of other persuasive proof, I was inclined to place reliance upon. The opposing affidavit did not present a contrary document or even a rebuttal from the legal practitioners who purportedly prepared the shareholders agreement that it was not authentic.

The foregoing constitutes my reasons for the provisional order which I granted. I must however express my concern at parties allowing their emotions to get the better of them as evidenced by letters being written vilifying the judges and the court process. There has equally been undue pressures exerted upon me to avail my reasons for judgment with the result that I have had to put aside some other work to get the matter off my hands. Counsel and their clients are reminded that it is improper to exert pressure upon a judge. I certainly must express my disappointment at how the matter has progressed and yet the rules are clear on what a party aggrieved by an order made should do. If rules are not followed, chaos in the justice administration follows and that is when wrong perceptions of bias, malice, favouritism and other conclusions anathemic to judicial values and principles as are expected to be practiced in a democratic system abound.

Venturas & Samkange, applicant's legal practitioners
Coghlan Welsh & Guest, 1st, 2nd, & 3rd respondents' legal practitioners