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

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 3, 13, 17, 23, 27 & 29, & 06 December 2017

Opposed Matter

J Samukange, for applicants
M Kamdefwere, for respondents

TAGU J: At the centre of this dispute is a company called WENTSO MILLING (PVT) LTD. The company is duly registered and incorporated in accordance with the laws of Zimbabwe, which company operates a regulated gold mining and milling business in the Shamva area of Mashonaland Central in Zimbabwe. The company though a legal persona was not cited in these proceedings. The company was founded by the applicant WENDALL ROBERT PARSON and the third respondent VINYU TSOKA from where the name was derived- "Wen" for Wendall and "tso" for Tsoka. The applicant claims to be a 60% shareholder and director in the company. The first respondent GILLIAN THERESA JACKSON is the mother to the applicant and is said to be one of the directors of the said company. The second respondent is WILLIAM LORENZO PARSON a brother to the applicant and also a director and shareholder in the said company. The third respondent VINYU TSOKA is also a director and shareholder in the company in issue. A dispute over the shares and ownership of the

company arose resulting in several law suits being instituted in this court. Most of the cases are still pending. These are HC 8363/17; HC 8279/17; HC 1362/17 and HC 199/17. The applicant then filed an urgent chamber application seeking a Provisional Order in the following terms-

"1. 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 1st 2nd and 3rd Respondents be and are hereby ordered and directed to render an account of all mining activities and gold deposits for the period from 25th 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 debatement of the account.

1.3 That the 1st, 2nd and 3rd 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.

2. INTERIM RELIEF GRANTED

Pending the hearing of the matter in Case No. HC 8363/17, the Applicant be and is granted the following relief:

2.1 That pending the finalization of the matter determining the authenticity of the alleged resolutions of the 1st, 2nd and 3rd Respondents in Case No. HC 8363/17 the 4th 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 the 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 Respondent 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.

3. SERVICE OF THE ORDER

That service of this Order shall be effected by the Sheriff on the Respondents."

The respondents filed their notice of opposition.

However, from the written judgment availed on the 27th November 2017 and dated the 23rd November 2017 it is apparent that at the hearing of the matter before CHITAPI J Mr Samukange made an oral application to amend the provisional order above by the deletion of paras 2.1 to 2.4 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. He also 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 and argued that the interim relief as amended would have the effect of the applicant achieving what he wanted, being the removal of the 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. To the respondents the relief now being sought was prejudicial to the first, second and third respondents because they had not addressed the amended relief when they prepared their opposing papers. However, despite the opposition the Judge granted the amendments as sought by Mr Samukange. Another point *in limine* raised by the respondents was the non-joinder of the company as a legal persona since the dispute before the court revolved over the control of the company and the fact that it be temporarily closed. This too was dismissed by the court.

After hearing arguments the learned trial Judge and on the 21st day of September 2017 granted the Provisional Order in favour of the applicant which read as follows-

"TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. The interim order granted by this Honourable court is hereby confirmed as a final interdict.
2. The first, second and third respondents be and are hereby ordered and directed to render an account 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 debatement of the account.
3. The first, second and third respondent shall jointly and severally, the one paying the other to be absolved, pay all the costs incurred by the applicant in these proceedings on an attorney and client scale.

INTERIM RELIEF GRANTED.

That 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 respondent.
2. The first, second and third respondent 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 Milling (Pvt) Ltd.
3. The registrar is directed to invite all the legal practitioners involved in Case Numbers HC 8363/17, HC 8279/17, HC 1362/17 and HC 199/17 and this case to appear before Justice Chitapi in chambers at 4.00pm on the 26th September, 2017 to determine the issues arising from those cases for consolidation and arrangements for set down of the consolidated issues on an urgent basis.

   SERVICE OF PROVISIONAL ORDER

   That service of this order may be effected by the applicant's legal practitioners on the respondents or their legal practitioners."

Dissatisfied by the provisional order the respondents wrote letters of complaint and requested that this matter be set down urgently so that a decision could be made whether to confirm or discharge the provisional order which they felt was prejudicial to themselves. They duly filed their heads of argument in opposing the confirmation. In their heads of argument they reiterated their view that once the provisional order is confirmed it would be prejudicial to them in that the applicant would have achieved indirectly what he wanted in other pending matters. They prayed that the confirmation of the provisional order be set aside and that the court grants the following order-

> "a). An order confirming the resolution passed by the shareholders on the 25th August reinstating 1st and 2nd Respondents as Directors and Applicant remain as a non-Executive Director valid.
> b). An order directing Wentso Milling (Private) Limited to be audited from 1st October 2016 to date upon granting of the order.
> c). The 1st and 2nd Respondents to resume operations of Wentso (Private) Limited and Applicant remaining as a non-Executive Director upon the granting of the order.
> d). The Applicant shall pay all the costs incurred by the 1st, 2nd and 3rd Respondents in these proceedings on an attorney client scale."

On the 1st of November 2017 this file was duly referred to me for set down and hearing of the matter. The court duly set this matter down to be argued on the 3rd of November 2017. However, due to a workshop for judges set for the same day which the court was not aware of when it set the matter down the case could not commence on the 3rd of November 2017. The parties by consent agreed to have the matter postponed to the 13th November 2017. On the 13th November 2017 the matter failed to kick off for two main reasons. Firstly Mr Samukange raised five preliminary points which can be summarised as follows-

1. That the applicant had not applied for the matter to be set down;
2. That Justice Chitapi was the one seized with the matter as he was still writing the judgment;
3. That the rules of court did not authorize the procedure followed in that a Judge cannot pick any dispute that has not been referred to him/her and deal with it;
4. That the respondents if they are unhappy with the provisional order, they ought to make an appeal to the next court; and
5. That the respondents had also not applied for the matter to be stood down.

After hearing submission from both counsels I dismissed all the preliminary points raised by Mr *Samukange* and ordered the parties to address me on the merits. I gave an ex tempore ruling and indicated that my full reasons for dismissing Mr *Samukange*'s points *in limine* will follow later in my judgement. Secondly, Mr *Samukange* then indicated that although he had received the respondents' heads of argument he was not in a position to proceed since he wanted to have sight of Judge CHITAPI's judgement that contains the reasons why he had granted the Provisional Order way back on the 21st September 2017 that had not been availed to the parties. The matter was then postponed on not less than four times since it took Judge CHITAPI a lot of time to avail the judgement for one reason or another until it was availed on the 27th November 2017.

Before I deal with the merits it is pertinent to first give reasons why I dismissed Mr SAMUKANGE's points *in limine* as I had promised. These are they.

1. THAT APPLICANT DID NOT APPLY FOR MATTER TO BE SET DOWN

It is indeed true that the applicant did not apply for the matter to be set down for confirmation or discharge. It is the respondents who caused the set down. In their view the applicant did not and would not set down the matter because the applicant is benefitting from the provisional order at the expense of the respondents. The respondents submitted that the court can *mero motu* set down the matter where another party has raised a complaint. Indeed *in casu* the respondents raised written complaints resulting in the set down of the matter. I therefore found merit in the submissions by the respondents that an aggrieved party may cause the matter to be set down provided the rules of set down as provided for in Order 32 r 247 are followed. The rules do not say in all applications for confirmation or discharge only the applicant can set the matter down. I found no fault in the fact that the respondents caused the

set down of this matter. Any party can cause a matter to be set down. For this reason I dismissed the first point *in limine*.

2. THAT JUSTICE CHITAPI IS SEIZED WITH THE MATTER

Justice CHITAPI in my view became *functus officio* the moment he granted the Provisional Order on the 21st September 2017. It does not necessarily follow that a Judge who granted the Provisional Order remains seized with the matter and then deal with the confirmation or discharge of his own order. Another Judge is competent to deal with the confirmation or discharge of a Provisional Order made by another Judge. The mere fact that Judge CHITAPI was still writing the judgment is neither here nor there. He was writing the judgement well after he had made his order because the respondents had requested for reasons for his order for purposes of lodging an appeal against Justice CHITAPI'S judgement which he had made ex tempore. Many a times judges are requested to write full reasons for their decisions made ex tempore when one contemplates noting an appeal. In that case the judge cannot be said to be still seized with the matter to the extent that an appeal or review court cannot hear the appeal or review. In the case of an appeal or review and or as in this case a confirming or discharging court it can only wait for written judgment and proceed to hear the matter. In this case Justice CHITAPI was supposed to furnish parties with his written reasons and another Judge can then decide to confirm or discharge the Provisional Order. In any case despite the fact that JUDGE CHITAPI had indicated that the parties were to later appear before him in the Provisional Order for purposes of deciding on the consolidation and urgent set down of the various cases the respondents snubbed him because they felt that his order was causing them serious hardships and financial prejudice as they perceived him as being partial and biased. I found no merit in this point *in limine* and I dismissed it.

3. THAT RULES OF COURT DO NOT AUTHORISE A JUDGE TO PICK ANY DISPUTE THAT HAS NOT BEEN REFERRED TO HIM/HER AND DEAL WITH IT.

As I stated elsewhere in my judgment this matter was referred to me by the Judge President through the normal referral channels. I did not pick any dispute between the parties and asked for the file. I did not even know any one of the parties before. In any case the applicant was not even aware that the respondents are the ones who caused this matter to be set down. As I explained above there was nothing untoward for an aggrieved part to ask for the set

down of a matter since he or she is an interested party. It is for these reasons that I dismissed this point *in limine*.

4. **THAT THE RESPONDENTS OUGHT TO HAVE APPEALED TO THE NEXT COURT.**

Mr SAMUKANGE for the applicant submitted that the Provisional Order granted by CHITAPI J was a final order since it was an interdict hence the respondents should have appealed to the Supreme Court. He cited the case of *Romeo Zibani* v *Judicial Service Commission* SC-68-17. Mr KAMDEFWERE for the respondents submitted that the Provisional Order was but just an interlocutory order and could not have been appealed against since the order was not final in nature hence they asked for the confirmation or discharge of the Provisional Order despite that they had requested the Judge to give them his written reasons. In my view while the order may have been appealable it did not stop the respondents to opt to have it set down for confirmation or discharge. I found merit in Mr KAMDEFWERE's submissions and I dismissed this point *in limine*.

5. **THAT RESPONDENTS HAD NOT APPLIED TO HAVE MATTER SET DOWN**

The applicants must be forgiven in making this submission because they were ignorant of the fact that the respondents are the ones who caused this matter to be set down. This point was confirmed by Mr KAMDEFWERE. Mr SAMUKANGE even confirmed having received a copy of the letter written by the respondents to the Registrar of this Honourable Court seeking the consent of the applicant to set down the matter for confirmation and or discharge. Mr SAMUKANGE was not being cooperative because he knew his client was benefiting from the Provisional Order causing the respondents to arrange for set down and even served applicant with their heads of argument. I will not labour much on it hence I dismissed it as having no merit.

Having dismissed the points *in limine* I will now deal with the merits of the application.

AD MERITS

In opposing the discharge of the Provisional Order the applicant in his heads of argument persisted with his claim that the setting down of this matter was graphically unprocedural since neither part had applied to have it set down. He conceded that the respondents had only written a letter to the Registrar of this Court asking for the consent of the applicant for the matter to be set down. The applicant further conceded that he was a majority

shareholder and the Managing Director and was in full control of Wentso Milling Company before the first, second and third respondents through deceit unlawfully convened a meeting from which they assumed control of the mine. According to the applicant the issue for the court to determine is who was in effective control of the mine? In his views he is in control of the mine which right was recognized by JUSTICE CHITAPI hence a spoliation order was granted and that it did not go to the merits of ownership. He prayed that this court should only confirm what justice CHITAPI granted. He further argued that a spoliation order is a final and definitive order. He cited among other authorities on the issue Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa* 4th ed where it was stated at p 1064 that:

> "A mandament van spolie is a final order although it is frequently followed by further proceedings between the parties concerning their rights to the property in question. The only issue in the spoliation application is whether there has been a spoliation. The order that the property be restored finally settles that issue as between the parties."

The applicant therefore prayed that this court should confirm the provisional order with costs on the higher scale.

On the other hand the respondents prayed that this court should discharge the order. It was the first, second and third respondents' contention that the applicant lacked *locus standi* to institute the urgent chamber application *in casu* because he brought the application that forms the basis of the present duel without him being authorised by a resolution of the board of directors of Wentso Milling (Pvt) Ltd. Further they argued that the applicant's conduct is not in the interests of the company which was not cited, and that the provisional order as granted is impeachable. They argued that the provisional order is not in their best interest.

Having had sight of JUSTICE CHITAPI'S judgment I am in total agreement with the respondents' observation captured in their supplementary heads of argument that a careful perusal of the reasons showed that the totality of facts pointed to the granting of a spoliation order. This must have taken the respondents with extreme shock as no prayer for the granting of a spoliation order was made by any of the parties to the present duel. The issue to be decided is whether or not an interim interdict relief should be confirmed as a spoliation order. the tone of the interim relief granted *in casu* pointed to an interim interdict with both mandatory and prohibitory effects. The order was to the effect that the first, second and third respondents were interdicted from interfering with the applicant's operations at the mine. That the applicant was

entitled to operate the mine to the exclusion of the first, second and third respondents. The law pertaining to spoliation was used as a reason why the court granted an interim interdict relief yet an interdict and a spoliation are separate and distinct legal doctrines whose requirements and essential elements are totally different and distinct. I may be wrong but I consider that what has to be set out and proved for an application for an interdict is completely different from what has to be set out and proved for an application for spoliation order. For avoidance of doubt the requirements in an application for spoliation order are clearly set out in the case of *Botha and Another* v *Barrett* 1996 (2) ZLR 73 at 79 (e) to (f) as-

(1) The applicant was in peaceful and undisturbed possession of a property and

(2) The respondents deprived him of possession forcefully or without his consent.

In casu the company at the centre of the dispute was being run by a board of directors inclusive of the applicant, first, second and third respondents. Though there was a heated dispute as to the ownership and shares of each of the shareholders it cannot be said that the doctrine of spoliation applied in this case.

On the other hand the requirements of an interdict are authoritatively set out in the case of *Setlogelo* v *Setlogelo* 1914 AD 221 at 227 as follows-

1. A prima facie right though open to some doubt;
2. The injury actually committed or reasonably apprehended;
3. The balance of convenience must favour the applicant; and
4. Absence of a similar protection by another remedy.

In casu, with the greatest of respect the Honourable Judge did not delve into these requirements to be satisfied that an interim interdict be granted. In fact the Honourable Judge excavated into the doctrine of spoliation which as I said above nobody applied for.

In my view the applicant had originally made a proper application for a provisional order that pending the determination of certain cases pending before this court the mine should have been temporally closed. Such an order would have been for the benefit of all parties and not the one later applied for which is clearly prejudicial to the other parties. This was done in order to obtain the reliefs being sought in other pending matters. If this court were to confirm the provisional order granted on the 21st September 2017 it means that a final order to the effect that first, second and third respondents would be interdicted permanently from setting foot at the disputed mine leaving the applicant as the sole beneficiary of the mining activities. The

applicant's "train literally derailed at the time an application for amendment of the provisional order was made in order to take a shortcut to its destination" hence the only option left is for this court to discharge the order and leave the parties at the position they were before the chamber application was filed, meaning to say all parties should continue mining in the manner they had been doing until their disputes are resolved. Unfortunately the court cannot reinstate the provisional order discarded by the applicant that the mine be temporarily closed. Equally the court cannot grant a different relief prayed for by the respondents in their heads of argument other than to confirm or discharge the provisional order. The duty of the court is to confirm or discharge the provisional order. For the above reasons-

IT IS ORDERED THAT

1. The provisional order granted by this court on the 21st September 2017 is hereby discharged.
2. The applicant to pay respondents' costs on an attorney and client Scale.

Venturas and Samukange, applicant's legal practitioners
Coghlan, Welsh & Guest, respondents' legal practitioners