REICHLIN RESOURCES (PVT) LTD

Versus

AKJERT MINING (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 27 July 2023 & 24 August 2023

Urgent application

M. Ndlovu, for the applicant
Ms. N.V. Moyo, for the respondent

DUBE-BANDA J:

[1] This is an urgent chamber application for an interdict. The applicant seeks a provisional order couched in the following terms:

> Terms of the final order sought
>
> That you show cause to this Honourable Court why a final order should not be made on the following terms:
>
> i. That the provisional order be and is hereby confirmed.
> ii. The termination of the partnership agreement between the applicant and the respondent signed on the 30th of September 2022 be and is hereby confirmed.
> iii. The applicant be and is hereby granted leave to remove all its equipment as set out in Annexure I hereto, acquired in terms of the partnership agreement signed on the 30th September 2022 and other subsidiary agreements following the termination of the partnership agreement within 48 hours of granting and service of this order upon the respondent, failing which the Sheriff of Zimbabwe or his deputy with the assistance of the Zimbabwe Republic Police if need be, and are hereby granted authority to access the mining gold claims namely 46801 – 09 and 46814 and recover the said equipment.
> iv. The respondent are (*sic*) to pay costs of suit on an attorney-client scale if the relief sought is opposed.

Interim relief

Pending determination of this matter, the applicant is granted the following relief:

i. The respondent be and is hereby interdicted from removing and using any equipment, consumables or assets as set out in Annexure I hereto, acquired by the applicant under the partnership agreement signed on the 30th of September 2022 or any related agreement without the applicant's consent in writing.

ii. The respondent be and is hereby directed to allow applicant's manager and security guards full access to the gold mining claims and premises namely registration numbers 46801 – 09 and 46814 to secure the applicant's or partnership equipment pending the return date and or written settlement agreement between the parties, concerning the removal or disposal or distribution of the assets or equipment.

Service of the provisional order

The service of this provisional order shall be served upon the parties by the Sheriff or applicant's legal practitioners

[2] The application is opposed.

Background facts

[3] This application will be better understood against the background that follows. On 30 September 2022 the applicant entered into a joint venture and partnership agreement with the respondent. The purpose of the partnership was to conduct mining operations on certain mining gold claims being registration numbers 46081-09 and 46814. The applicant contends that the partnership agreement had been terminated by mutual consent. The termination was caused by the fact that the mining venture proved unviable and unprofitable. The dispute turns on the contention by the applicant that it is being refused to remove its equipment from the mining claims.

[4] The respondent contends that the termination of the partnership was not by mutual consent. It is contended further that the equipment in issue was acquired for the partnership, meaning it is partnership property and the applicant has no right to remove it from the mining claims. It is

averred that the applicant removed its assets, and what remains is partnership property, and that it was agreed that should a dispute arise, it shall be referred to arbitration and the decision of the arbitrator shall be final. It is against this background that the applicant launched this application seeking the relief mentioned above.

Preliminary points

[5] Other than resisting the relief sought on the merits the respondent took a number of preliminary points which were also a subject of argument in this matter. The respondent raised the following preliminary points, *viz*; that there is no valid certificate of urgency; that the matter is not urgent; and that there is an invalid notice of court application.

[6] At the commencement of the hearing, I informed the parties that I shall adopt a holistic approach to avoid a piece-meal treatment of the matter. Wherein the preliminary points are argued together with the merits, but when the court retires to consider the matter, it may dispose of the matter solely on the preliminary points despite that they were argued together with the merits. If the court finds that the preliminary points have not been properly taken, it shall then determine the matter on the merits.

[7] First, I consider the attack based on the submission that the applicant had failed to give a correct *dies induciae* prescribed by the rules of court, and therefore that the application was a nullity. I consider this first because, it relates to the gateway to the application, I say so because, if the application is a nullity the attacks on the validity of the certificate of urgency and the urgency of the matter would not arise. I now consider the preliminary points in turn.

Invalid notice of court application

[8] Ms *V.M. Moyo* counsel for the respondent submitted that to the extent that the court application accords the respondent a *dies induciae* of two days renders the application fatally defective. It was submitted further that it was improper for the applicant to stipulate for itself the *dies induciae* within which the respondent should file a notice of opposition. Counsel placed reliance for this submission on the case of *Nyathi v The Trustees for the Time being of the Apostolic Faith Mission of Africa, viz Reverend Rosewell Zulu & Ors* SC 63/22.

[9] Mr *Ndlovu* counsel for the applicant submitted that according the applicant a shortened *dies induciae* is permissible on the basis that this is an urgent case. Counsel argued that *Nyathi* (*supra*) case is distinguishable.

[10] Rule 60. (1) of the High Court Rules, 2021 says:

> A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form No. 25 duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies:
> *Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 23 with appropriate modifications.* (My emphasis).

In turn R 59 (6) says:

> The time within which a respondent in a court application may be required to file a notice of opposition and opposing affidavits shall be not less than ten days, exclusive of the day of service, plus one day for every 200 kilometres or part thereof where the place which the application is served is more than 200 kilometres from the court where the application is to be heard.
>
> Provided that in urgent cases a court application may specify a shorter period for the filing of opposing affidavits if the court on good cause shown agrees to such shorter period. (My emphasis).

[11] A chamber application to be served on interested parties shall be in No. 23 with appropriate modifications. Form No. 23 is used in a court application. R 59 (6) says the time within which a respondent in a court application may be required to file a notice of opposition and opposing affidavits shall be not less than ten days, and there is a *proviso* that in urgent cases a court application may specify a shorter period for the filing of opposing affidavits if the court on good cause shown agrees to such shorter period.

[12] I take the view that in terms of the *proviso* in urgent cases a judge has a discretion to agree to a shortened *dies induciae.* This matter was filed as an urgent chamber application, and therefore a judge has a discretion to agree to a shortened *dies induciae* suggested by the applicant. What exercised my mind was whether a party may specify a shorter period before a

judge agrees, put differently whether a judge may agree to a shortened *dies induciae ex post-facto*. I take the view that a judge may at a case management meeting agree to a shortened *dies induciae* or at a hearing agree *ex post facto*. At the hearing if a judge does not agree to a shortened *dies induciae,* the matter may then be struck off the roll. In this instance and on the facts on this case I agree to a shortened *dies induciae.*

[13] This case is distinguishable from *Nyathi v The Trustees for the Time being of the Apostolic Faith Mission of Africa, viz Reverend Rosewell Zulu & Ors* SC 63/22. I say so because this matter was brought to court by way of an urgent application, while in the *Nyathi* case (*supra*) the matter before court was an application for condonation and extension of time within which to appeal. Generally, there is nothing argent about an application for condonation and an extension of time within which to appeal. This matter is also distinguishable from the case of *Veritas v Zimbabwe Electoral Commission & Ors* SC 103/20. In *Veritas* contrary to the requirements of Form 29, (now Form 23) which are peremptory, there was no attempt to give notice to the respondents of what was required of them to oppose the application. The form excluded those fundamental elements upon which an application was founded, which are material for purposes of giving notice to a respondent of his rights as regards the application. It did not state the *dies induciae* operating against the respondent for purposes of mounting any opposition. In this case there has been strict compliance with Form 23. And although the *dies induciae* given was two days, in the circumstances of this case it is sanctioned by the *proviso* to r 59(6) of the rules. My view is that in such case a judge may lean towards an interpretation that advances the right to access to the courts than the one that which inhibits it. See *Telecel Zimbabwe (Pvt) Ltd v POTRAZ & Ors* HH 446/15; *Eke v Parsons* 2016 (3) SA 37 (CC) at page 53. It is for these reasons that the preliminary point that there is no valid application before court based on the shortened *dies induciae* has no merit and is refused.

Certificate of urgency

[14] Ms. *V.M. Moyo* argued that the certificate of urgency is invalid, in that the deponent is one Shepherd Chamunorwa and yet it was signed by one Coster Dube. Counsel argued that without a valid certificate of urgency, the application must fail. Cut to the bone the respondent attacks the structural formalities of the certificate. Mr *Ndlovu* explained that initially the certificate

was meant to be signed by Mr Chamunorwa, however due to logistical problems it was later signed by Mr Dube. Counsel explained further that there was a valid certificate of urgency on record signed by Mr Dube and therefore the preliminary point was ill-taken and must be dismissed.

[15] It turned out that the respondent's counsel had a copy in her file of a certificate signed by Dube and bearing no name of Mr Chamunorwa. When it became clear that indeed she had a certificate bearing no name of Mr Chamunorwa counsel changed course and argued that the certificate was invalid on the grounds that Mr Dube did not familiarise himself with its contents before signing it. Mr *Ndlovu* submitted that such an argument was premised on speculation. I agree. No evidence was adduced to show that Mr Dube did not author or familiarise himself with the certificate before signing it. Again, the certificate on record bears no name of Mr Chamunorwa, and it was signed by Dube. The certificate complies with the structural formalities of a certificate of urgency. It is for these reasons that the preliminary point that the certificate does not meet the structural requirements has no merit and is refused.

Ad urgency

[16] The leading case within this jurisdiction in relation to urgency is *Kuvarega v Registrar General & Anor* ZLR 1998 (1) ZLR 188, a judgment by CHATIKOBO J. The learned judge had the following to state at p 193F-G.

> "What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is 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 rules. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

[17] In *Dilwin Investments P/L t/a Formscaff v Jopa Engineering Company Ltd* HH 116/98 GILLESPIE J made the following remarks about the notion of urgency:

> A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential

> treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance, where, if it is not accorded, the eventual relief will be hollow because of the delay in obtaining it.

[18] It is against the backdrop of these legal principles that I consider the issue of urgency taken by the respondent.

[19] The respondent contends that this matter is not urgent and must be denied a hearing on the roll of urgent matters. It was submitted that there are no facts that suggests that should the court fail to intervene at this stage, the applicant would suffer irreparable harm. That there is a private security company at the mine, and therefore the security of the assets is not under any threat, and the applicant has not discredited such security arrangements. The equipment is not being used, and therefore there is no fear of depreciation. It was for these reasons that the respondent seeks that this matter be refused a hearing on the roll of urgent matters and be struck off the roll.

[20] The applicant submitted that this matter is urgent, and deserves a hearing on the roll of urgent matters. It was contended that the respondent has taken the law into its own hands, by barring the applicant's representatives from accessing the mine and chasing away the manager and security guards. And as a result, the applicant is unable to safeguard its equipment. It was contended further that if this matter is not accorded an urgent hearing, the applicant's investment and equipment may disappear, more so that the respondent has started to remove its own equipment from the mine. It was submitted that the applicant acted when the need to act arose, and that if the matter is not heard on an urgent basis there may well be no need to hear it in future as the harm sought to be prevented would have occurred.

[21] It is clear from the papers filed of record, that the applicant acted when the need to act arose. The attack on the urgency of this application actually turns on the merits of this matter. Whether the application succeeds or not on the merits is not the inquiry at this stage, the point is that the factual allegations raised by the applicant are such that they cannot be dismissed at this stage of the proceedings. These are factual issues to be considered with the merits of the matter. I take the view that the threshold required to hear this matter on the roll of urgent matters has been reached. It is for these reasons that the attack on the urgency of the matter is refused.

Merits

[22] An interdict is a remedy of a summary and extraordinary nature suitable in cases where a person requires protection against an unlawful interference, or threatened interference, with that person's rights. An interlocutory interdict is one which is granted *pendente lite*. It is a provisional order given to protect the rights of the applicant pending an action or application to be brought to establish the respective rights of the parties. It does, of course, not involve a final determination of the rights and does not affect such determination. The requirements for an interim interdict were aptly stated in *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511(S). The Court cited with approval the case of *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F, CORBETT J (as he then was) wherein the court said an applicant for such temporary relief must show: that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt; that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right; that the balance of convenience favours the granting of interim relief; and that the applicant has no other satisfactory remedy.

[23] In this case it is relevant to deal more fully with the *prima facie* right requirement. As the matter is interlocutory and the relief sought temporary, not decisive of either parties' rights, the degree of proof required is not as stringent or exacting as that required for the grant of final relief. In determining the *prima facie* right issue the court must look not only at applicant's allegations but also at the respondent's affidavits and the contentions contained therein. See *Bombardier Africa Lions Consortium v Lombard Insurance Company* 2021 (1) SA 397 (GP) at [12]. This comes down to the fact that the right relied on need not be shown to exist on a balance of probabilities, it being sufficient if it is "*prima facie* established though open to some doubt". If serious doubt is thrown on the applicant's case, it cannot succeed as the *prima facie* right even open to doubt may not have been established.

[24] The applicant's version is this: that on 30 September 2022 the parties entered into a joint venture and partnership agreement. A copy of the partnership agreement has been placed before court. The agreement relates to the conduct of mining operations in certain gold mining claims, being Reg. 46801-09 and 46814. The applicant says it contributed US$121.208.15 to the mining operations, and acquired mining equipment with no direct contribution from the respondent. However, the reefs did not yield the desired results contrary to reports by the respondent who owns the mining claims and also contrary to objections by geologists and other experts. The mining venture became unprofitable. The parties agreed to terminate the partnership. The applicant avers that while making arrangements to relocate its equipment, the respondent locked out its manager and removed its security guards. Respondent started removing its equipment from the mining claims.

[25] The applicant contends further that in terms of the agreement, if the loan account has not been paid the equipment acquired remains that of the applicant, and the account has not been serviced. The equipment is at the risk of theft as the applicant's security guards have been removed from the mining claims. The applicant contends that a case has been made for the provisional relief sought.

[26] Per *contra* the respondent avers that the termination of the partnership was not by mutual consent, and disputes that the applicant contributed an amount of US$121 208.15. It disputes that it interfered with the applicant's mining operations. Further, the respondent disputes that the applicant purchased the equipment for itself, and contends that the equipment was acquired for the partnership. It was averred that the applicant was not denied access to any of the equipment, and its employees removed all the applicant's assets when they left the mining claims, and the assets that remain at the mine belong to the partnership.

[27] The respondent contends further that there is a private security at the premises guarding the equipment. And that the applicant has not taken into account para 3 of the agreement which regulates the dissolution of the partnership and what is to happen to the partnership assets upon dissolution. And that the applicant ignores the liabilities of the partnership. It was contended that the agreement provides for arbitration in the event of a dispute and the applicant has not

exhausted that remedy. The respondent contends that the applicant has not established the requirements of an interim interdict.

[28] A look at the versions of both parties, the following facts are common cause or not seriously disputed: that the applicant and the respondent entered into a partnership agreement. The applicant contributed some amount of money to the partnership, though the respondent disputes that it amounted to US$121 208.15. There is a dispute whether the termination of the partnership was by consent or not, however what is not disputed is that the applicant wants to terminate or has terminated the partnership. It is not disputed that the applicant purchased certain mining equipment, and that there are assets at the mining claims which applicant claims it owns, and the respondent avers that it is partnership property. The respondent does not dispute that the assets the applicant claims it owns are still at the mine, and that the respondent has removed its own equipment from the mine.

[29] The thrust of the provisional order sought is that the equipment the applicant claims it owns not to be used or vandalised pending the confirmation or discharge of the provisional order. The fact that there are respondent's security guards at the mine is not enough to allay the applicant's fears. The goal is to preserve the *status quo* pending a determination of the vindication of the claims of the litigants. I am satisfied that on a non-stringent test applicable at this stage of the proceedings, the applicant has established a *prima facie* right.

[30] As to the next requisite, irreparable harm is a necessary requirement for a court to grant an interim interdict. Irreparable harm, is harm or injury that cannot be adequately compensated or remedied by any monetary award or damages that may be awarded later. The applicant seeking an interim interdict must show that it will suffer irreparable harm if the interim interdict is not granted. This is because the purpose of an injunction is to prevent harm before it occurs, and once harm has occurred, it may be too late to adequately compensate the injured party. I am prepared to accept that on the face of it, if in fact the applicant is entitled to the equipment it claims, it will suffer at least potentially and perhaps even on the probabilities, the harm which it apprehends.

[31] In respect of the requirement of no other satisfactory remedy, it is certainly so that the applicant has no other such remedy. If the property is used, vandalised or stolen, the applicant may not have satisfactory remedy thereafter. This aspect again must be resolved in applicant's favour.

[32] It seems to me, that the balance of convenience in this matter favour the applicant. I say so because, at least on the test at this stage, the applicant has established a *prima facie* case, even though open to doubt. If the applicant succeeds on the return date, and equipment is stolen or vandalised the applicant will be prejudiced. If the respondent succeeds and the equipment is protected from theft or vandalism, it will suffer no prejudice. Therefore, the requirement of the balance of convenience must be resolved predominantly in favour of the applicant.

[33] The provisional order sought by the applicant has to be varied. I say so because a court cannot grant an order referring to Annexure 1. Such an order would be incomplete and meaningless. An order of court must be complete in itself and not refer to some other document for its completeness. The provisional order is therefore varied to the extant that instead of referring to Annexure 1, the property is Annexure 1 is itemised in the provisional order set out at the beginning of this judgment.

In the result, it is ordered as follows:

The application be and is hereby granted in terms of the provisional order set out at the beginning of this judgment, as amended.

Ndlovu Mehluli & Partners, applicant's legal practitioners
Tanaka Law Chambers, respondent's legal practitioners