BIKITA MINERALS (Pvt) Ltd

versus

AURION RESOURCES (Pvt) Ltd

and

THE OFFICER IN CHARGE Z.R.P CID CRIMINAL
FLORA & FAUNA UNIT MASVINGO

and

THE OFFICER COMMANDING MASVINGO
PROVINCE ZRP.

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 15 January & 13 February, 2024

F. Chinwawadzimba, for the applicant
C. Ndlovu, for the 1st respondent
T. Undenge, for 2nd and 3rd Respondents

OPPOSSED APPLICATION: INTERDICT

ZISENGWE J: The boom in lithium mining in Zimbabwe owing to the mineral's newly found status as a much sought after commodity on the world market has seen the mushrooming of lithium mines across the length and breadth of the country. As its core this present matter is a dispute over the origins hence ownership of a consignment of Lithium ore seized by police on the 8th of May 2023.

The applicant and 1st respondent are both duly registered companies and are both into lithium ore mining. In addition, the 1st respondent claims that it also sources lithium ore from small scale miners.

The facts of this matter are fairly straight forward and for the most part common cause. On 5 May 2023 the applicant got wind from the police that some lithium ore suspected to have been extracted from its mine was in the possession of the 1st respondent at the latter's premises. Those premises are situated at No. 4284 Westview Complex Westview Industrial Site, Masvingo. Three days later, on 8 May 2023 the police seized the said Lithium on suspicion of it having been stolen.

It was subsequently agreed as between the parties (the applicant, the 1st respondent and the Zimbabwe Republic Police) that samples be subjected to metallurgical testing by a government assayer to establish if the lithium ore seized belonged to the applicant. The test was done. A reading of the report shows that the test involved a comparison of the lithium ore in question with samples originating from both the applicants' mine and the 1st respondent's mine. It is also apparent from the report there are 3 types of lithium ore namely Petalite, Spodumene and Lepidolite.

On that occasion the test was conducted by one Netsai Makanga who gave her designation as Metallurgical technician attached to the Zimbabwe Government of Metallurgy. She holds a National Diploma in Applied Chemical technology.

Her conclusions were as follows:

> "1. From the analysis only spodumene and Lepidolite samples can be compared since there were no labelled Petalite samples under Aurion received.
> 2. As starred in the results table Spodumene results collected from the warehouse match with 2 results collected from Aurion.
> 3. As for Lepidolite samples the sample from the warehouse is approximately the same as the one collected from Aurion using allowable variance of -/- 0.25%."

In plain language therefore, the report as far as Spodumene and Lepidolite are concerned, did not support the applicant's claim that the ore in question originated from its (i.e. applicant's mine)

Meanwhile criminal proceedings were instituted against the person who had been found in possession of the Lithium ore. It is also instructive to note that the ore was seized by the second respondent on the basis of it having been stolen and that it would be required *inter-alia* as evidence

during the Criminal trial. However, it is common cause that the criminal court upon representations made to it, declined to order a further retention by the second respondent of the lithium ore in question.

No doubt alarmed by the turn of events wherein the Criminal Court had basically ordered the release of the contested lithium ore to the first respondent, the applicant approached this court on an urgent basis seeking an order that the second respondent be allowed to retain the lithium ore pending a second opinion on the chemical composition/ origins of the lithium ore.

That urgent chamber application was heard on 29 June 2023. After much haggling the parties forged out to a provisional order by consent in the following terms:

INTERIM RELIEF GRANTED

1. That pending the determination of this matter on the return day, the applicant be and is hereby granted the following relief:
   1.1 The 2nd Respondent is directed to retain custody of the lithium ore it seized on the 8th of May 2023 which is at a warehouse situated at number 4284 Westview Complex, Westview, and Masvingo pending the return date.
   1.2 The 1st Respondent is interdicted from repossessing and interfering with the lithium ore seized by the 2nd respondent on the 8th of May 2023 which is at a warehouse situated at Number 4284 Westview Complex, Westview, and Masvingo pending the return date.
2. a) The 2nd and 3rd respondent shall permit the 1st respondent access and use of its premise at 4284 Westview Complex, Westview, Masvingo.
   b) Reasonable step be taken by the parties to clearly mark and safeguard and separate the Lithium ore in question from any other Lithium ore that the 1st respondents might bring out the premises at 4284 Westview Complex, Westview, Masvingo.
   c) The applicant, the 2nd and 3rd respondent must take all reasonable steps to obtain the 2nd report within 21 days of this order.

It would be the formulation by the applicant of the terms of the final order sought that would subsequently be the subject of intense debate on the return day. It reads:

TERMS OF FINAL DRAFT SOUGHT

1. That the respondents show cause to this Honourable court on the return day why a final order should not be granted in the following terms:
   1.1 The 1st Respondent be and is hereby interdicted from recovering the lithium ore seized by the 2nd respondent on the 8th of May 2023 at its warehouse situated at No. 4284 Westview Complex, Westview Industrial Site Masvingo until a second opinion is obtained by 2nd respondent.
   1.2 The 1st Respondent shall pay costs of suit.

As it turned out, a second opinion has since been obtained. On this occasion the test was conducted by one Glenda Farirepi, the Chief Chemist in the Zimbabwe Government's department of Metallurgy. She holds a Master of Science in Analytical Chemistry.

She gave tabulated results of her analysis and concluded as follows:

- Only Spodumene and Lepidolite were compared as Aurion Resources had no Petalite samples submitted.
- For the analyses an acceptable error margin an allowable variance of $\pm$ 0, 25 % Li_2O was used.
- Spodumene samples from Palace Green Warehouse which recorded an assay value of 3.41% and 3,66% matches with samples 3,36% and 3,74% from Aurion Resources, respectively, Bikita minerals with the grade 3,18% falls out of range by 0,02% Li_2O.
- Lepidolite sample with the assay value 3.36% from Palace warehouse tallies with Aurion Resources sample with assay value of 3,43% Bikita Minerals sample with the grade 3,10 % falls out of range by + 0,01% Li_2O.

Therein lies the problem because whereas the applicant alongside the second respondent insist that the second report does not constitute a second report *per se* given that it was obtained from the same institution which conducted the first test and filed the first report (i.e. the Zimbabwe Government's department of Metallurgy), the first respondent contends contrariwise. The latter

contends that the second report was precisely that, namely a second opinion on the origins of the disputed consignment of Lithium ore.

Broadly, however, the ultimate question was whether the applicant managed to satisfy the requirements for the granting of a final interdict with the question of whether the applicant had established a clear right taking centre stage. This in return was dependant on the status of the second report in the entire scheme of things. The following were the positions articulated by the parties.

The applicant's position

It was submitted on behalf of the applicant that all the pre-requisites for the granting of a final order were met. Regarding the existence of a clear right, it was averred that at the time of the granting of the interim order, there was consensus as between the parties that the second opinion contemplated was one from South Africa. It was argued therefore that the purported second opinion provided by the Zimbabwe government's department of Metallurgy did not qualify as a second opinion as it was from the same department using the same analytical methods and tools. Counsel for the applicant dismissively referred to the second report as merely "*another*" opinion and not a second opinion.

In response to a question by the court as to why the final order sought as captured in the draft did not specifically refer to a second opinion from South Africa, counsel retorted that the court is at liberty to include that specific averment in the order.

When questioned on the apparent vagueness of the term "*from South Africa*" without reference to a specific institution and the metallurgical method contemplated, counsel repeated that the court could use its "*inherent jurisdiction*" to amend the terms of the final order sought to incorporate those omitted elements as well.

It was further averred that a discharge of the provisional order with the concomitant consequence of the release of the Lithium ore would jeopardise the criminal trial which depended *inter alia* on the availability of the Lithium ore as an exhibit.

As far as the availability of alternative remedies, it was averred on behalf of the applicant that no such satisfactory alternative remedy exists. The court requested counsel comment on the first respondent's position that the applicant could always fall back on a claim for damages in the event that in future it manages to prove that the Lithium are belonged it. In response counsel rather

surprisingly responded by suggesting that such remedy was not available because the first respondent could be wound up before it (i.e. applicant) could recoup its losses from it.

The second and third respondents' position

For all intents and purposes what the second and third respondents filed purportedly as "opposing affidavits" were nothing more than "supporting affidavits' buttressing applicant's position. The propriety of doing so is questionable in light of what was said in Nelson *Chamisa v Emmerson Dambudzo Mnangagwa* CCZ 21/19. In that case it was held that once an opposing affidavit purports to support an application under the guise of opposing it, it ceases to be an opposing affidavit and lends itself to be expunged from the record. The first respondent however did not take issue with the second and third respondents' affidavits in this regard and I therefore refrain from making further comments on the subject.

Be that as it may, the second and third respondents reiterated the position articulated by the applicant that a second report is awaited from South Africa and that the second report obtained from the Zimbabwe Government's department of Metallurgy could not in the '*strict sense*' be regarded as a second opinion.

As with the applicant, they insisted that such a report ought to be obtained from an entirely different institution than the one which complied the first. It was further averred that the timeline for the obtainment of a report from South Africa could not be met because of the red-tape involved I government systems aimed at obtaining cabinet authority for samples to be taken abroad for analysis.

The first respondent's position.

The first respondent insists that it owns the disputed Lithium ore and that the applicant only filed a police report under the mistaken belief that the ore belonged to it. More importantly it avers that the applicant is constantly changing goal posts in the sense that what was agreed was that a second opinion be obtained to determine the origins of the disputed lithium ore in question and that this was not necessarily one from South Africa.

It further avers that the applicant has to date not sent the Lithium ore to South Africa.

The requirements for the granting of an interdict are well known, they are:

a) A clear right on the part of the applicant.
b) An injury committed or reasonably apprehended; and

c) The absence of any other satisfactory remedy available to the applicant.

See *Setlogelo v Setlogelo* 1914 AD 221; *Econet Wireless Holdings v Minister of Information* 2001(1) ZLR 373 & *Airfield Investments (Pvt) (Ltd) v Minister of Lands & Ors* 2004(1) 511

Whether the applicant managed to establish a clear right.

This term clear right has been interpreted to mean *"a right clearly established at law."* In Erasmus *"Superior court Practice,"* 2nd edition at D6-12-13 the following is stated:

> "It is submitted that what is meant by the phrase (clear right) is a right clearly established. Whether the applicant has a right is a matter of substantive law, whether that right is clearly established is a matter of evidence. In order to establish a clear right, the applicant has to prove on a balance of probability the right which he seeks to protect."

In *Masimba Charity Huni Fuels (Pvt) Ltd v Kadurira & Anor* SC 39-22 MUSAKWA JA in discussing the meaning of a clear right had this to say;

> "As regards a clear right, again the authors *Herbstein and Van Winsen* at page 1459-60 define the meaning of clear right as it relates to interdicts as:
>
> > "...the word 'clear" relates to the degree of proof required to establish the right and should strictly not be used to qualify "right" at all. ...a clear right must be established on a balance of probabilities"
>
> From the authorities, it is clear that where a final interdict is sought, a clear right as opposed to a *prima facie* right must be established. Thus the word "clear" in the context of right in an interdict does not qualify such right but rather expresses the extent to which the right must be established by evidence on a balance of probabilities. *Herbstein and Van Winsen* also state that a right that is sought to be protected by an interdict arises from substantive law. The right can derive from any branch of substantive law to which one must have recourse in order to resolve the dispute involved.

In the context of this case therefore the question is whether or not the applicant has a clear right to yet another opinion on the origins of the disputed Lithium ore. When viewed in reverse the question is whether or not the opinion of the Zimbabwe Government's Chief Metallurgical Officer was the second opinion in the contemplation of the parties. Put yet differently, the question

is whether or not when the parties agreed on a second opinion what was in their contemplation was an opinion from South Africa to the exclusion of any other such opinion. From the evidence I find that the applicant has not been able to prove the existence of such a clear right, here is why.

Firstly, Annexure E, which is a letter from applicant's legal practitioners dated 29 May 2023 does not in the least refer to the second opinion having to be obtained from a geological institute in South Africa. The concluding two paragraphs of that letter read:

> *"As a result, our client demands that these samples be redone. Representatives of interested parties be allowed to* ***accompany the samples to the Department of Metallurgy,*** *have the samples examined in their presence, to the satisfaction of the parties.*
>
> *In the meantime, we request that the recovered ore remains in police custody until the said examination is done" [emphasis added]*

Reference to the Department of Metallurgy clearly controvert any pretence that what the parties have always intended was a second opinion from South Africa.

Secondly, and related to the above, is the fact that the second examination was conducted in the presence of representatives of the second respondent. Mr Ndlovu for the 1st respondent also weighed in during oral submissions in court that as a matter fact all parties were represented at the Department of metallurgy in Harare when the second metallurgical examination was conducted by the Chief Metallurgical officer in Harare? If what was intended and agreed as between the parties to settle the dispute of the ownership of the lithium ore once and for all was a report from South Africa, why did the applicant through its representatives and the second respondent participate that exercise? Why did it not object or distance itself right from the onset from that process? In any event the final order sought clearly spells out that it was the second respondent who was to obtain the second opinion, not the applicant.

Both the letter referred to earlier and the attendance of the applicant's representatives at the second examination lend credence to the 1st respondent's assertions that the second opinion was not confined to one from South Africa-

Thirdly, there is the express wording of the final order sought. No reference whatsoever to a second opinion having to be sought from South Africa. If that is what was intended then why was it omitted from the draft order. Something as key and central as that could not have been omitted through oversight or inadvertence. This would have constituted the centre piece of the order.

Although a court may appropriate cases amend the wording or contents of a draft order, (see *Sekard Learning Development Solution (Pvt) Ltd v Routhy World Education Adventure & Anor* HH 247-17), this does not in the least afford parties a blank cheque to amend their papers as they proceed.

The applicant cannot escape the consequences of the sloppiness of the crafting of its prayer purportedly on the basis that a court is at liberty to amend the draft order. In *Nzara & others v Kashumba N.O & Others* SC 18/18 the court said the following act p.13.

> *"*The function of a court is to determine the disputes placed before it by the parties through the pleadings, evidence and submissions. The pleadings include the prayers of the parties through which they seek specified orders from the court. Each party places before the court a prayer he/she wants the court to grant in its favour. The rules of court require that such an order be specified in the prayer and the draft order....."

The need, therefore, to exercise utmost care in drafting court documents cannot be over-emphasised. This is because the purpose of pleadings is to define issues and enable the other party to know what case he was to meet and to prepare accordingly. This also enables the court to be informed of the issues so that it may know of the limits of the dispute before it. See *Keavney & Another v Msabaeka Bus Service (Pvt) Ltd* SC 22/18 & *DD Transport (Pvt) Ltd v Abbort* 1988 (2) ZLR 92.

In the present matter Ms Chinwawadzimba, for the applicant, moved, from the bar, for the amendment of the draft order as it relates to the final order sought to include South Africa as the sole source of the second opinion. It is trite that the power to make a material amendment is limited by considerations of prejudice or injustice to the other party, See *Union Bank of South Africa Ltd v Woolf*; *Union Bank of South Africa v Shipper* 1939 WLD 222. The first respondent objected to any such amendment. The objection is well founded. One gets the impression that this is an attempt by the applicant to build its case as it goes and to constantly change goal posts. Applicant will not tire until it gets a report favourable to its suspicions of the Lithium having been stolen from its mine.

More pertinently, however, the question is not so much about whether or not the court may amend the contents and/or wording of a draft order as it is about the ascertainment of the intention of the parties at the time the agreement was arrived at. The wording of the draft order in this case

provides an invaluable insight into the mind of the applicant at the time of demanding via its application of a second opinion. The applicant could not, by any stretch of the imagination have neglected to include that the second opinion sought was exclusively to be from South Africa.

Not only in South Africa being supposedly its sole source of the intended second opinion, but also the method/ technique to be employed in South Africa and the Institute conduct the examination conspicuous by their absence from the wording of the draft order. Surely the vague reference to "*South Africa*" as the exclusive source of the second opinion is untenable. It is meaningless.

Separately, in paragraph 28 of its founding affidavit, leading to the granting of the provisional order the applicant sought 7 days within which to obtain the second opinion but ultimately got 21 days in the provisional order. More than five months have since lapsed since the granting of that provisional order. No application for the extension of that period was sought. No proof whatsoever that the samples have been sent to South Africa should applicant's version be believed. Only some oblique reference was made on behalf of the second respondent to the vicissitudes of government bureaucracy hindering the transmission of the samples to South Africa for a second opinion.

To summarise this part therefore, the applicant seeks the indulgence of the court to make the following amendments to its draft order –

i) The insertion of South Africa as the exclusive source of the second opinion.
ii) The insertion of a yet unnamed institution in South Africa as the destination of the samples of the disputed lithium ore.
iii) The insertion of the applicant's preferred metallurgical method in obtaining that second opinion.
iv) The insertion of a different time frame for the obtainment of the second opinion than the one initially agreed upon.

Such a wholesale attempt to amend the terms of the order sought can only mean one thing – that such a course of action was never in the contemplation of the parties when they agreed to a second opinion in respect of the Lithium ore samples. Ultimately therefore I do not believe the applicant has established a clear right to have the samples sent *exclusively* to South Africa for a

second opinion. A second opinion has already been procured albeit one not favourable to the applicant. The application therefore stands to be dismissed on that basis.

Before concluding, however, a word needs to be said about whether or not a claim for damages can be regarded as an alternative remedy to deny the application for an interdict. Although counsel for the applicant was particularly vocal in expressing view that on a claim for damages is not an alternative remedy to deny an interdict, the correct position, however, is that in appropriate cases it may amount to an alternative remedy.

In Erasmus, *Superior Court Practice* 2nd edition at p D6-15 the following is stated.

> *"*The court will not, in general, grant an interdict when the applicant can obtain redress by an award for damages, (*Rivas v The Premier (Transvaal) Diamond mining co*. Ltd 1929 WLD 1; *Transval Property and Investment Co. Ltd SA Townships mining &Finance Corp Ltd* 1938 TPD 512; *Van der Merwe v Fourie* 1946 TPD 389; *Fourie v Llys* 1957 (2) SA 125 (c); *Van Wyk V Steyn* 1963 (4) SA 814 (GW*); UDC Bank Ltd v Seacat Leasing and Finance Co (Pvt)* 1979 (4) SA 682 (T) at 695 D- 696 C.

In *Calisto Chirenje* HH4-2006, CHATUKUTA J (as she then was) on the requirement that there be no other remedy before granting an interdict has this to say:

> *"*The requirement is well explained in *Neptune (Pvt) Ltd v Venture Enterprises (Pvt) Ltd* HH 127/89. At page 8 ADARUS J quotes Lewis J in *Reserve Bank of Rhodesia v Rhodesia Railways* 1966 RLR 451 that-
>
> > "NATHAN in his well-known works on Interdicts, states the position as follows at p32:-
> > Lastly as Van der Linden says, there must be no other ordinary remedy by which the applicant can be protected with the same result..... The most familiar example, however, which comes to a Lawyers mind is that of damages. It is clear that, if the applicant will have adequate compensation by the award of damages he will have another ordinary remedy.... Generally speaking, however, the fact that the applicant has a remedy by way of action for damages is sufficient to bar an interdict where the interference or breach of a right is capable of measurement in money"
> >
> > The operative part of the quotation in fact the essence of it, really- is that there is an existing remedy for the protection of the applicant "with the same result" ... if that is the situation, then so it seems to me, the interdict should be refused"

> Taking all the factors into account, there does exist the reasonable probability that at the trial the right sought by the applicant would be vindicated"

The quantity of the Lithium ore in dispute is known. A claim for damages against the 1st respondent presents a viable option should the applicant in future succeed in establishing ownership of the same.

The half-hearted attempt to suggest that such a claim for damages may be frustrated by the winding up of the first respondent is untenable because it is wildly speculative and merits no further discussion. Similarly, the contention that the discharge of the provisional order will unduly prejudice the pending criminal proceedings over the same Lithium ore is without merit given that the same criminal court refused a continued detention of Lithium are by second respondent. In the final analysis therefore the application for an interdict is hereby dismissed on account of the failure of applicant to establish a clear right. Even if he had established a clear right the application would still have failed on the basis of the failure by the applicant to show absence of an alternative remedy.

Accordingly, it is hereby ordered as follows:

The application for a final interdict is hereby dismissed and provisional order granted by this court on 29 June 2023 is hereby discharged with applicant meeting first respondent's costs of suit.

ZISENGWE J

Makombe &Associates; Applicants Legal Practitioners
Ndlovu & Hwacha; 1st Respondents Legal Practitioners
Civil division of the Attorney General's Office; 2nd and 3rd Respondents Legal Practitioners.