

AVIM INVESTMENTS P/L

Versus

HWANGE COLLIERY COMPANY LIMITED

And

ZHONG JIANG (PRIVATE) LIMITED

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 18 JANUARY AND 3 FEBRUARY 2022

Urgent Chamber Application

D. Dube with Miss M Sibanda, for the applicant
V. Majoko, for the 1st respondent
I Goto for the 2nd respondent

MAKONESE J: This is an urgent application for an interdict. The draft order is in the following terms:

“INTERIM RELIEF SOUGHT

Pending the confirmation of the final order, this Provisional Order shall serve as an Interim Order interdicting and directing that:-

1. That the 1st and 2nd respondents, their associates, previous and current employees, business partners be and are hereby ordered to forthwith suspend any mining equipment hiring and coal mining at 1st respondent's Coal Mining Concessions at Chaba Pit.
2. That 1st and respondents, their associates, previous and current employees, business partners be and are hereby ordered to forthwith suspend any

operation of 2nd respondent's machinery at 1st respondent's Coal Mining Concessions at Chaba Pit.

TERMS OF FINAL ORDER SOUGHT

That 1st respondent shows cause why a final order should not be made in the following terms:-

1. That the agreement signed by and between applicant and 1st respondent for mining equipment hiring and labour for coal mining at 1st respondent's Coal Mining Concessions at Chaba Pit be declared to be of no force and effect.
2. That the agreement between 1st and 2nd respondents for mining equipment hiring and labour for coal mining at 1st respondent's Coal Mining Concessions at Chaba Pit be and is hereby set aside."

The application is opposed by the respondents who have raised several preliminary points, which they argue if upheld be the dispositive of the matter.

Factual Background

On 13th March 2018 the applicant and 1st respondent entered into an equipment Hire Agreement wherein 1st respondent hired mining equipment and labour for coal mining from the applicant. The duration of the agreement was 6 years from the effective date. In fulfilment of its obligations applicant transported mining equipment to 1st respondent sometime in April 2018. The equipment included heavy machinery including excavators, dump trucks and bulldozers. Sometime during the first quarter of the year 2019 applicant was unilaterally stopped from operating by 1st respondent. Applicant's contract was alleged to have violated the provisions of the Public Procurement and Disposal of Public Assets (Chapter 22:23) in that applicant's contract did not comply the procurement procedure.

Applicant was ordered to remove its equipment from 1st respondent's premises. At some point applicant awarded the same contract to 2nd respondent purportedly in line with the provisions of the Public Procurement and Disposal of Public Assets. Applicant contends that he only became aware of this arrangement on 5th January 2022 when a report from the police was handed to the applicant. 2nd respondent does not deny that it took over a contract that had been awarded to applicant. Applicant avers that the continued hiring of equipment and mining of coal as agreed by and between 1st and 2nd respondent is causing financial prejudice to the applicant.

I shall now deal with the preliminary objections raised by the respondents.

Urgency

Respondents contend that the matter is not urgent in that the contract in issue was entered into between 1st respondent and applicant in March 2018 almost four years ago. Respondents aver that applicant only became aware that 1st respondent was not a parastatal and as such not an entity regulated by the Public Procurement and Disposal of Public Assets Act on the 5th January 2022. Respondents contend that the lack of action by applicant discloses ignorance and tardiness. It is clear that on the applicant's version which was not seriously disputed, the matter is urgent. The need to act arose on the 5th of January 2002 when applicant received official and written confirmation from the Zimbabwe Republic Police that 1st respondent was not a Procurement Entity. In that letter headed Outcome of Report received, it was stated in part as follows:

“No arrest was made. Investigations were conducted and matter was referred to the National Prosecuting Authority for evidence assessment and opinion where Prosecution was declined for lack of evidence to sustain a fraud charge. Prosecution could not kick off due to the fact that accused company Hwange Colliery is not a Procurement Entity which is bound by tender procedures. The matter was regarded as a civil case which should be pursued through the Civil Division.....”

It is clear that prior to the letter by the ZRP the applicant could not assert his rights as the matter was under investigation for fraud. Applicant became aware on 5th January 2022 that he could pursue civil remedies. In my view urgency is established. Applicant acted when the need to act arose. I would, therefore dismiss this preliminary objection.

LEAVE OF ADMINISTRATION NOT SOUGHT

In urgent matters, and where the applicant seeks the protection of rights there can be no doubt that this court has discretion to entertain the matter. The Administrator in this case, who has an interest in the outcome of the matter could hardly grant the leave sought and contemplated by the provisions of the Reconstruction of State Indebted Insolvent Companies Act (Chapter 24:27). Applicant submits that this court can grant leave to proceed against a company under Administration provided a proper case had been made for leave to sue. Applicant placed reliance on the Supreme Court decision of *Afras Gwaradzimba N.O v Gurta* AG SC 10-15. This case is not on all fours with this matter. I however take the view that in urgent matters this court retains discretion whether or not to grant leave to sue or to hear the matter on the merits. The urgency of the matter demands that the application be heard. The point *in limine* is therefore dismissed.

MISJOINDER OF 2ND RESPONDENT

2nd respondent avers that it was wrongfully joined in these proceedings in that it is not privy to the contractual arrangements between the applicant and 1st respondent. 2nd respondent argues that it ought not to have been joined in these proceedings. Applicant contends that 2nd respondent was properly joined in these proceedings as it has a substantial interest in the matter. Any order this court may grant directly affects the 2nd respondent. Applicant contends that 2nd respondent's assertions on mis-joinder are in contradiction with

its conduct. 2nd respondent has raised strong opposition to the order sought on the merits. In my view, this preliminary objection was not properly taken and ought to be dismissed.

APPLICATION IS FATALLY DEFECTIVE

2nd respondent contends that the order sought by the applicant is not competent. It is argued that the order sought in the interim relief is for a declaratory order and that the order sought in the final order has not been properly pleaded. Applicant contends that this court has a wide discretion to amend the interim or final relief. This preliminary objection was not well taken and has no merit. I would dismiss the point *in limine*.

ON THE MERITS

Applicant argues that the requirements for an interdict have been met. It has not been disputed that applicant and 1st respondent had a Mining Agreement for extraction of coal at Chaba Pit. The contract between the parties has been annexed to the Founding Affidavit. It has not been seriously disputed by respondents that this contract was terminated following allegations that the contract had not gone to tender in terms of Procurement Procedures. 1st respondent unilaterally stopped applicant from operating. Applicant was ordered to remove all its equipment from 1st respondent's premises. The matter was taken to the House of Assembly and referred to the Parliamentary Privileges Committee which deliberated on the matter. The contract was ostensibly cancelled on the grounds that 1st respondent was a Procurement Entity as claimed by the Parliamentary Privileges Committee. That legal position was found to be untrue. Applicant received official confirmation of this position on 5th January 2022.

The requirements for an interdict are well established and well summarised in *Zesa Staff Pension v Mushambadzi* SC 57-02. The requirements are as follows:

- (a) a right which, though *prima facie* established is open to some doubt.
- (b) a well grounded apprehension of irreparable injury.
- (c) the absence of any other remedy.
- (d) the balance of convenience favours the applicant.

See: *Eriksen Motors (Welcom) v Protea Motors and Another* 1973 SA 685 (A)

In this matter the applicant has indeed established a *prima facie* right. The existence of a contract between the applicant and 1st respondent is not denied. The right to extract coal by applicant was disrupted when the contract was abruptly brought to an end on allegations that 1st respondent was a Procurement Entity. The existence of a contractual relationship between applicant and 1st respondent was further confirmed when applicant was hauled before the Parliamentary Privileges Committee on the grounds that procedure requirements had been flouted. As regards a well grounded apprehension of irreparable harm, the applicant has demonstrated that the unilateral revocation of its contract with 1st respondent has caused it financial prejudice. The very same contract for extraction of coal at 1st respondent's Chaba Pit has been awarded to 2nd respondent. This has not been denied by the respondents. The respondents aver that the applicant has an alternative remedy in the form of a claim for damages. This assertion contradicts the respondent's averment that there was no valid contract between applicant and 1st respondent. If damages are an alternative remedy to the relief sought, the question to be asked is how such damages are to be ascertained. Such damages are not easily quantifiable. The balance of convenience favours the granting of the order sought.

The 1st respondent can easily award 2nd respondent a concession to extract coal in another area without any financial prejudice to the 2nd respondent. On the other hand applicant has been severely prejudiced and continues to suffer financial loss.

In the circumstances, and accordingly, the following order is made:

1. The application be and is hereby granted.
2. Respondents are ordered to bear the costs of suit.

Gundu, Dube & Pamacheche c/o Mutatu Masamvu Da Silva-Gustavo, applicant's legal practitioners

Messrs Majoko and Majoko, 1st respondent's legal practitioners

Masiya-Sheshe & Associates, 2nd respondent's legal practitioners