

ZIMBABWE NICKEL EXPLORATION COMPANY (PRIVATE) LIMITED
versus
RAIZ-EL NICKEL PROCESSING COMPANY (PRIVATE) LIMITED
and
THE PROVINCIAL MINING DIRECTOR MIDLANDS PROVINCE
and
OFFICER COMMANDING ZIMBABWE REPUBLIC POLICE MIDLANDS PROVINCE
N O

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 31 December 2021 and 13 January 2022

Urgent Chamber Application

Mr T Maanda, for the Applicant
Mr D Mujaya, for the 1st Respondent
Mr L Muvengeranwa (ministerial official), for the 2nd Respondent
No appearance for the 3rd Respondent

DEME J: The applicant approached this court on an urgent basis seeking the following provisional order:

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:

That you show cause to this honourable court if any, why a final order should not be made in the following terms:

1. The first respondent and anyone in its employ or working in concert with or under its instructions be and are hereby interdicted from carrying on any form of mining activities on Welcomeback 18 Mine and from removing slag therefrom pending finalisation of matter in HC 7367-21.
2. Third respondent shall be and is hereby authorised, empowered and directed enforce compliance with this court order.
3. First respondent shall pay the costs of this application at a legal practitioner and client scale.

TERMS OF INTERIM RELIEF

Pending finalisation of the matter in HC 7367-21, the following relief is granted:

1. The first respondent and all those acting in concert with him or under its employ shall suspend all mining operations and activities on Welcomeback 18 Mine including removing slag therefrom.
2. In the event that first respondent and all other persons claiming or acting in concert with it or under its employ do not cease the operations above forthwith, the third respondent be and is hereby authorised, empowered and directed to arrest them and bring them before the court for an inquiry into why they should not be found guilty of contempt of court.

SERVICE OF PROVISIONAL ORDER

Service of this application and provisional order shall be made on the respondents by applicant's legal practitioners and / or the Deputy Sheriff.

A summation of the facts is as follows:

The applicant is a registered owner of Welcomeback 18 Mine. The applicant has annexed to the urgent chamber application its mining certificate which is marked Annexure B. On 29 September 2020, the applicant and the first respondent entered into the agreement of sale in which the applicant sold the slag and slag dump located at Welcomeback 18 Mine Empress Kadoma to the respondent. Copy of the agreement has been attached to the urgent chamber application and is marked Annexure C. The purchase price for the slag and slag dump was US\$ 2 500 000 (two million and five hundred thousand United States Dollars). The purchase price was to be payable in instalments according to the agreement of sale.

The applicant and the first respondent also entered into the tribute agreement which gave mining rights to the first respondent over slag and slag dump. The tribute agreement was approved by the second respondent on 2 August 2021. The first respondent paid US\$ 10 000 (ten thousand United States Dollars) upon signature and did not pay the balance.

The applicant alleged that the first respondent was supposed to process slag and slag dump at Welcomback 18 Mine while the first respondent disputed this assertion. The slag and slag dump were to be processed at Vizier 27, 28, 29, 30, 31, 32, 46, 47 according to first respondent's averment. The first respondent referred me to para 3 of Clause 2 of the agreement of sale. It further drew my attention to the separate tribute agreement which is attached to opposing affidavit and marked Annexure C. The parties to the tribute agreement are the first respondent and Biometallurgical Zimbabwe (Pvt) Ltd. The said tribute agreement was

approved by the second respondent on 13 August 2021. In his submissions, on behalf of the applicant, Mr. *Maanda* did not dispute the existence of this tribute agreement.

The applicant averred that the first respondent breached the term of agreement by failing to pay rent for processing slag and slag dump at Welcomback 18 Mine. The first respondent disputed this and averred that since it was not processing slag and slag dump at Welcomback 18 Mine, there were no rentals which were due to the applicant.

The applicant also averred that the first respondent breached the agreement of sale by failing to pay the balance of the purchase price. The applicant, in para 16 of the founding affidavit, averred that the purchase price was supposed to be paid in hard cash in terms of the agreement. The applicant also averred that the first respondent failed to pay royalties in terms of the agreement of sale.

The first respondent disputed breaching the agreement. Rather, it raised counter-allegations against the applicant in a number of ways. Firstly, the first respondent averred in its opposing affidavit that it sought the banking details of the applicant for purposes of depositing the royalties without success. Secondly, the first respondent further averred that the applicant failed to have the tribute agreement ratified by the second respondent despite the fact that it was the applicant's obligation to have the tribute agreement ratified. The first respondent further averred it was through its efforts that the tribute agreement was finally ratified by the second respondent on 2 August 2021. The first respondent also averred that it could not start the processing of slag and slag dump before the ratification of the tribute agreement as doing so is illegal.

Thirdly after the ratification of the tribute agreement, the first respondent discovered that applicant had also breached the agreement by engaging other miners who were illegally processing slag and slag dump at Welcomback 18 Mine. This act was in contravention of Clause 6(c) of the agreement of sale. The first respondent sought the assistance of the second respondent through the letter dated 13 August 2021 and is marked Annexure D. The letter is attached to the first respondent's opposing affidavit. The second respondent, on 27 August 2021, suspended all mining activities in order to deal with the illegal mining activities that were happening at the mining site. The first respondent was only allowed to start its business on 11 November 2021 after receiving clearance from the second respondent who uplifted the suspension through the letter dated 2 November 2021 and marked Annexure I. The first respondent attached copy of the letter to its opposing affidavit. According to the first

respondent, it did not make any business sense to pay the balance when business was not operational.

The applicant averred that the first respondent has been stealing slag from the mining site by taking the slag and slag dump to an unknown destination and hence it was difficult to ascertain the value of mineral obtained from slag. On the other hand, the first respondent alleged that the first respondent was taking slag to Vizier, the place specified in the agreement of sale. The first respondent further alleged that it was expected to declare the value of the mineral obtained from slag on quarterly basis in terms of the agreement.

The first respondent raised point *in limine* in relation to urgency of the matter. The first respondent's counsel, Mr *Mujaya* argued that the need to act arose on 11 November 2021 when the first respondent occupied Welcomeback 18 Mine and started its mining operations thereat. On the other hand, the applicant was opposing the point *in limine*. Mr *Maanda* submitted on behalf of the applicant to the effect that the need to act only arose on 16 December 2021 when the applicant discovered for the second time that the first respondent was removing slag and slag dump from Welcomeback 18 Mine. Mr *Maanda* further submitted that it was not proper for the applicant to file the present application based on a single act of the slag removal as application for interdict requires an act to have been repeated. The applicant discovered the initial removal of slag on 8 December 2021. He further argued that the first respondent repeated the act of slag removal on 16 December 2021. The two events, according to Mr *Maanda* forced the applicant to file the present application.

On a balance of probability, I am of the considered view that the need to act arose on 16 December 2021 when the applicant discovered the removal of slag by the first respondent. The first respondent did not highlight the date on which it started removing slag. It only mentioned the date when it began mining operations at Welcomeback 18 Mine.

In the case of *Kuvarega v Registrar General & Anor*, the court held that:

“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 arise, 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 by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.”

With the need to act having arisen on 16 December 2021, it took seven days for the Applicant to approach this court. The present application was filed on 23 December 2021.

In the case of *Nzara v Tsanyau and Ors*, the court held that a delay of eighteen days does not amount to inordinate delay. In the circumstances, I dismiss point in limine.

I will now shift my attention to the merits. For the application for interim interdict to succeed, the applicant must demonstrate the following factors:

1. the existence of a *prima facie* case, though open to doubt.
2. irreparable harm/injury actually committed or reasonably apprehended.
3. absence of any other remedy by which applicant can be protected with the same result.
4. that balance of convenience favours the applicant.

See *Setlogelo v Setlogelo*¹; *Flame Lily Investments Company (Pvt) Ltd v Zimbabwe Salvage (Pvt Ltd & Anor*².

Turning to the case of *prima facie* case. Given series of allegations and counter-allegations, I find it difficult to ascertain the establishment of a *prima facie* case by the applicant. Firstly, it is in dispute whether or not the first respondent breached the agreement of sale. The first respondent is disputing having breached the agreement of sale. Instead, the first respondent is accusing the applicant of breaching the agreement in many respects highlighted before. In light of this, it becomes imperative that the question of whether or not the first respondent breached the agreement needs to be resolved before the applicant seeks the relief for interim interdict.

Secondly, the first respondent also alleged that the person, Mr. Tevie Paji, who wrote the letter for the cancelling of the agreement of sale had no authority from the applicant's board. The letter for the cancellation of agreement of sale is annexed to the urgent chamber application and marked Annexure F and is dated 8 November 2021. The applicant insisted that he had authority despite the fact that there was no written evidence to substantiate this. The applicant's board resolution which authorised Mr. Tevie Paji to represent the applicant in the court proceedings is dated 17 December 2021 while the letter concerning the cancellation of agreement of sale was authored by Mr. Tevie Paji prior to this date. In the face of this serious doubt, it makes it impossible for the court to grant the present application without the resolution of the disputes between the applicant and the first respondent.

Thirdly, the first respondent also averred that the agreement of sale and tribute agreement are not supposed to be read as one agreement while the applicant insisted that the

¹ 1914 AD 221.

² 1980 ZLR 378.

life of the tribute agreement is dependent upon the agreement of sale. However, the applicant did not draw my attention to the appropriate provisions for the agreement of sale. For this reason, the applicant's averments remain in doubt. The first respondent's assertion is that by purportedly cancelling the agreement of sale, the applicant cannot claim to have cancelled the tribute agreement since the two agreements were entirely independent of each other.

The applicant has filed case number HC 7367-21 where it is seeking the confirmation of the agreement of sale cancellation. It may be premature for me to determine whether or not there was breach of agreement of sale and breach of tribute agreement. Doing so would deal with the merits of HC 7367-21. What is before me is to determine whether or not the applicant is entitled to interim interdict. The determination of whether or not the first respondent breached the agreement of sale is not before me. At this moment, it is only important to determine whether the applicant has satisfied the requirements for temporary interdict. Had the applicant not filed HC 7367-21, I would have proceeded to determine the question of breach and then thereafter I would determine whether or not the applicant is entitled to the interim interdict as prayed for.

Though the standard of proof for *prima facie* case may be open to doubt, the doubt surrounding the breach of contract in the present matter is of high magnitude. The type of the doubt does not entitle the applicant to the protection applied for as the doubt is so serious. I am of the considered view that the applicant has failed to satisfy the requirements of *prima facie* case.

With respect to the irreparable harm, I find it extremely complicated to conclude that the applicant has reasonable apprehension of suffering actual harm or injury given the serious disputes in the present application. Whether or not the first respondent has breached the agreement of sale remains in dispute with particular attention being had to accusations and counter-accusations made by the applicant and the first respondent against each other. After considering the seriousness of the disputes, it becomes apparent that the remedy of approaching the court on an urgent basis was not the only available remedy. The best available remedy for the applicant is to have the issue of breach of contract determined first. Otherwise, it is difficult for the court to offer the applicant protection in the form of interim interdict when it is not clear whether breach of contract occurred as alleged.

It is very difficult for the applicant to argue that the scales for balance of convenience tilt in its favour since it has failed to establish a *prima facie* case. Only after the question of

breach has been ruled in its favour can the applicant be favoured by the scales of balance of convenience. Consequently, the present application must be dismissed for want of merits.

With respect to costs, the first respondent prayed for costs on an attorney and client scale on the basis that the applicant mounted a hopeless case. This is not a sufficient justification for such costs. I am of the considered view that costs on an ordinary scale are just in the circumstances. This court may only award costs at a higher scale in exceptional cases where the degree of irregularities, bad behaviours and vexatious proceedings necessitate granting of such costs. Reference is made to the case of *Crief Investments (Pvt) Ltd & Anor v Grand Home Centre (Pvt) Ltd & Ors*³. The applicant must be punished for prematurely instituting this matter and misrepresenting certain facts.

In the circumstances, I dismiss the application with costs.

Maunga Maanda and Associates, Applicant's Legal Practitioners
Mawadze and Mujaya Legal Practitioners, 1st Respondent's Legal Practitioners

³ HH12/18.