

CURCUMA INVESTMENTS (Private) Limited
versus
ICON ALLOYS (Private) Limited
And
TAKUNDA MJUMI

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 2 & 16 February & 16 March 2022

Urgent Chamber Application

Mr T Chivasa, for the applicant
Mr O Mafa, for the respondent

ZISENGWE J: This is an application brought on an urgent basis for a provisional order interdicting the respondents, pending the return date, from interfering with applicant's mining operations on a mining location situated in the Mashava area of Masvingo district.

The Background facts

Sometime in September 2019 the applicant and the 1st respondent entered into a written contract in terms of which the latter authorised the applicant to carry out mining activities on the said mining location, found within a mine called Prince 3 mine, Registration Number 15124BM. In return the applicant agreed to pay a royalty fee of 18% of the value of the ore it so mined. It was a further term of the contract that it would subsist for a period of sixty months calculated from the date of its signing renewable at the conclusion of that initial period should the parties so agreed. The 2nd appellant is the manager for the 1st respondent.

That agreement soon hit turbulence in October 2021 resulting in the applicant approaching this court, also on an urgent basis, alleging undue interference on the part of the respondents in its mining operations. In that application as in the present one, the applicant alleged that the interference by the respondents was apparently on the pretext that the 1st respondent had terminated the mining agreement. The relief sought and ultimately obtained in that previous application mirrors the present one and although it was initially resisted by the two respondents ultimately an order was granted by consent.

The consent judgement was to the effect of declaring that the initial mining agreement between the parties was valid and binding as between the parties subject to the incorporation of an *addendum* thereto. The said *addendum* was agreed upon by the parties on 27 October 2021. The said consent judgment stipulated that the mining agreement (as amended) would submit for a period of 60 months calculated from the 27th of October 2021. Finally, the consent Judgement obliged the 1st respondent to avail and facilitate the appellant's exploitation of the mineral resource (which in this case is chrome) on the mining site. So far so good.

However, barely had the ink dried on the *addendum*, so to speak, were the parties at loggerheads again and embroiled in a dispute over the implementation of the terms of the contract, which dispute culminated in the present application. According to the applicant the basis of this dispute is an interpretation of clause 4.2 of the *addendum* to the mining agreement. More specifically according to the applicant the issue is whether a proper construction of that clause reveals that the 18% royalties referred to earlier are payable in advance (a view held by the 1st respondent) or after the marketing of the chrome ore by the applicant (a view held by the applicant).

Be that as it may, the applicant avers that in the wake of the divergent views on the interpretation of the clause, the 1st respondent purported to unilaterally cancel the contract and did all it could to frustrate its running options at the site. According to the applicant therefore, this position adopted by the respondents is legally untenable not least if regard to the terms of the consent order referred to each.

It therefore seeks a provisional order in the following terms;

“That pending the determination of the final relief sought herein, the applicant be and is hereby granted the following interim relief: -

(a) The 1st and 2nd respondent be and are hereby ordered to refrain from denying applicant access of the mine claim known as Prince 3 mine, Registration Number 15124BM Mashava, Masvingo Mining District.

- (b) The 1st and 2nd respondent be and are hereby ordered to refrain from barring operation and use of applicants mining equipment at the said Prince 3 mine, Mashava in terms of the mining agreement entered into and signed by the applicant and 1st respondent on 24 September 2019 and amended by the addendum of 27 October 2021.*
- (c) That 1st and 2nd respondent be and are hereby ordered to avail all mine permits required for the mining operations to appellant Prince 3 mine, Mashava, Masvingo Mining District.*
- (d) That the 1st and 2nd respondent be and are hereby interdicted from transporting outside or otherwise disposing of applicant's chrome ore stock-piles on the mining site without applicants written consent.*
- (e) 1st and 2nd respondent be and are hereby ordered and interdicted from threatening to disturb applicants mining activities at Prince 3 mine, Mashava pending the finalisation of this matter,"*

As far as the final order that the applicant will pursue on the return date, it will principally seek a declaration of the invalidity of the purported unilateral cancellation by the 1st respondent of the mining agreement and a concomitant declaration of the validity and enforceability of that same agreement among a raft of other reliefs.

This application is sternly opposed by the 2 respondents, who while acknowledging the urgency of the application, contend in the main that the contract was validity terminated on 21 January 2022. Stemming from such cancellation is the argument that no rights can validity flow therefrom. The respondents claim in this regard that they simply invoked clause 5.7 of the contract which gives them the right to cancel the contract upon the commission of a material breach of the contract by the applicant. In this case, the respondent alleges failure to pay royalties on the part of the applicant as the conduct which constitutes the breach.

Initially, the respondents contended that the application was defective because it amounted to an application for declaratory order. It was argued in this regard that it was incompetent to seek a declarator on a provisional basis. This argument was soon abandoned in light of the wording of provisional order sought which cannot by any stretch of the imagination be termed a declaratory order.

The main thrust of the respondents' objection to the granting of the provisional order is that the mining agreement having been cancelled and such cancellation not having been set aside by a court of law, applicant cannot purport to derive rights therefrom. They further deny that the applicant has managed to establish the prerequisites to the granting of a provisional order especially the existence of a right on its part.

It was contended in this regard the court order on which the applicant relies does not take away respondents' right to cancel the contract in the event of a breach.

It must be stated right from the onset that the purpose of a provisional order is to preserve the position until the rights of the parties can be determined at the hearing of the suit. A party seeking a provisional order must be able to show a sufficiently arguable claim to a right to the final relief in aid of which the interdictory relief sought.

The primary purpose of the issuance of a provisional order is to preserve the status quo pending the return date; *Development bank of Southern Africa (Ltd) v Van Rensburg N.O & Ors [2002] 3 All SA 669 (SCA)*. It serves to regulate and where possible, preserve the rights of the parties pending of the final determination of the matter which is in issue by the court; *American Cyanamid co. vs Ethicon Ltd [1975] AC 396,405 D*. This is the context in which the application will be determined.

What falls to be determined in the present case upon a hearing of the suit (when the application for the final order is determined) is the validity of the cancellation of the contract. The corollary is whether the contract remains valid and binding as between the parties.

What however is up for consideration in this application for the provisional order is whether the applicant is entitled to an interim interdict on terms set out in the draft order or as varied. In order to succeed the applicant must satisfy the following:

- (i) That the right which is the subject matter in the main action and which it seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established through upon to some doubt;
- (ii) That if the right is only *prima facie* established, there is a well-grounded apprehension of irreplaceable harm to the applicant if the interim relief is not granted and it ultimately succeeds in establishing its right.
- (iii) That the balance of convenience favours the granting of interim relief, and
- (iv) That the applicants have no other satisfactory remedy, *Rudolph & Anor v Commissioner for Inland Revenue & Ors 1994 (3) SA 771; L.F Boshoff Investments (Pvt) Ltd v Cape Town Municipality 1969 (2) SA 256 (C), Airfield Investments (Pvt)*

Ltd v The Minister of Lands, Agriculture & Rural Resettlement & 4 Ors 2004 (1)
ZLR 511 (S)

The existence of a right (whether clearly or *prima facie* established).

In this regard the applicant avers that it possesses what it believes is a clear right derived from the mining agreement itself as further reaffirmed by the court order of the under case No HC 308/20.

The contrary position held by respondents is that its cancellation of the contract practically took away any right the applicant may have claimed thereto.

In the face of the cancellation of the mining contract by the 1st respondent the applicant cannot claim to have a clear right. The very question of the validity of the cancellation of the contract constitutes the subject matter of the enquiry on the return date.

The case of *Fanuel Mwayera v Molly Chivizhe & Ors SC 16/2006*, relied upon by counsel for the respondents during oral addresses in court finds relevance. In that case Gowora JA had the following to say at page 8 of the cyclostyled judgement:

*“It is trite that cancellation is a unilateral act which takes effect as at the time of its communication to the other party to the contract. It requires no concurrence from the party receiving notification of the same. **The effect of the cancellation was to put to an end to the primary obligations between the parties. Primary obligations and those related to the performances due by the respective parties under the contract.** In the instant case, once the contract was terminated by the appellant, the entitlement to specific performance by the fourth respondent terminated. In order to obtain specific performance under the cancelled contract, it believed the fourth respondent to first seek an order setting under the cancellation as a basis for the order prayed for.”* (emphasis mine)

What the applicant seeks effectively amounts to an order for specific performance. In the case of *Minister of Public Construction & National Housing v Zescon (Private) Limited 1989 ZLR 311* at 317- 318 the following was said in the context of an application for a final interdict:

“It is trite that an applicant who seeks an interdict to prohibit a breach of contract is in reality asking for specific performance in an indirect way; for in this type of case, as with the case of an employee who has been wrongly dismissed and seeks reinstatement, the relief sought requiring the employer to cooperate in the performance of a contract. Indirectly this amounts to a requirement that the employer renders specific performance. Accordingly, the general principles of the law relating to specific performance apply.”

It is an established principle that in every case for the of an application for an interdict *pedente lite* the court has a discretion whether or not to grant the application. Such discretion is exercised upon a consideration of all the circumstances and particularly upon a consideration among others of the injury which the respondent on the one hand will suffer if the application is granted and he, she or it should ultimately turn out to be right, and that which the applicant, on the other hand might sustain if the application is refused and he, she or it ultimately turn out to be right.

Out of an abundance of caution I invited the parties to submit supplementary heads of argument on the question of balance of convenience and particularly on whether the balance of convenience does not favour an order suspending all mining and related activities by both parties pending the return date. The applicant filed such supplementary heads of argument the high watermark of which was that it (applicant) should be allowed to continue mining given the heavy capital invested in the project and further that there is a danger of the mining pits would be flooded from rain water and underground seepage rendering resumption of mining operations extremely difficult and capital intensive. It therefore expressed an aversion to the granting of an order barring both parties from carrying out any mining or related activities at the mining location in question. The respondents did not file any such supplementary heads of argument.

Ultimately however I find it inappropriate to order specific performance on the basis of a *prima facie* right and secondly as stated in the *Fanuel Mwayera v Molly Chivizhe* (supra) case, the interdict such as the one sought in *casu* can only be made after the cancellation of the contract has been set aside which is clearly not the case and the application for the provisional order therefore falls to be dismissed.

Costs.

The general rule is that the successful party is entitled to its costs and I see no reason for withholding such costs from the respondents.

Accordingly the application for a provisional order is hereby dismissed with costs.

ZISENGWE J

A handwritten signature in black ink, appearing to read 'Zisengwe J'. The signature is fluid and cursive, with a large initial 'Z'.

*P C Ganyani legal practitioners, Applicants' legal practitioners
Mangwana & Partners, Respondent legal practitioners*