

CHIGAMI 2 SYNDICATE & 2 OTHERS
versus
CLEO BRAND INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 11th March, 2020

Opposed Application

Mr T. Nyahuma for the applicant
Mr V. Makuku for the respondent

ZISENGWE J: The parties to this dispute can loosely be described as “business partners” in a joint mining venture. In a contract whose interpretation now forms the subject matter of the dispute, the applicant appears and have agreed to permit the respondent to "work" on three of its mining claims in return for certain sums of money as consideration. I deliberately used the word “appear” for the simple reason that the parties are now bitterly divided over the meaning and import of the terms of the contract and ultimately its validity.

The main operative provisions of the contract are captured in paragraphs 2 and 3 which 1 reproduced below:

"2. *Nature of agreement*

This agreement is an option agreement entitling the 2nd party to work on the 1st party's mine.

3. *Consideration for the option agreement*

It is hereby agreed that during the subsistence of this option agreement, the 2nd party shall pay USD 3000.00 (three thousand united states dollars) to the first party in consideration for the option agreement for 6 months from the date of this agreement on condition that January and February's instalment shall be paid as a lump sum of USD 6000.00 upon signature hereof with the next instalments being due in March 2019.

After the expiration of 6 months, the 2nd party would commission the mine at its cost and would now start to pay USD 10 000.00(ten thousand dollars) as its consideration for the option agreement from the 7th month pending a geological report for full assessment of the mine value"

What is apparent from the papers filed of record is that the relationship soon ran into problems as evidenced by the fact that no sooner had the contract been operationalised did fissures emerge over its continued existence culminating in the dispute spilling over into the courts. In one such case the respondents made an application before the High Court sitting at Bulawayo for an order restraining the applicant from interfering with its (i.e. respondent's) "*exclusive and undisturbed occupation*" of the mining claims in question.

In the present matter reference will only be made to the parties' averments regarding the validity or otherwise of the contract in broad brushstrokes because same do not form the basis of the judgement I gave *ex - tempore* on 11 February 2020, rather it was upon a point raised in *limine* by the respondent which constitutes it.

The applicants contend in this application that the contract is in fact invalid and unenforceable because its key operative terms are vague for a number of reasons. Firstly they contend that the terms of the contract are at variance with what it purports to represent and at any rate do not constitute an option agreement as such. They point out that the essential ingredients which characterize an option agreement are conspicuous by their absence.

Secondly, it was averred that some of the key terms of the contract are downright contradictory. They further refer to the apparent absence of the time limit within which the supposed option had to be exercised as a telling indicator of want of conformity with the requirements of an option agreement.

Thirdly, it was contended that the agreement is in essence a "tribute agreement" the terms of which do not in any event comply with the express provisions of part XVIII of the Mines and Minerals Act [*Chapter 21:05*].

The applicants therefore sought an order in the following terms:

Whereupon after reading the papers filed of record and hearing counsel:

IT IS ORDERED THAT:

(1) The application is granted.

- (2) The agreement signed by the parties in January 2019 under the heading ‘Memorandum of an option agreement’ in respect of the Mining claims known as Antelope Mine 1 registration Number 19143, Antelope Mine 2 Registration Number 19050 and Antelope Mine 2 Registration 19051 is hereby declared invalid and inconsequential.
- (3) Consequently, respondents’ occupation use and enjoyment of the mining claims in terms of and pursuant to provisions of that agreement are declared unlawful.
- (4) Respondent, its privies, employees, agents, assigns and all those claiming occupation through it be and hereby ordered vacate from the above mining claims within 48 hours of this order.
- (5) The Sheriff of this court is directed to ensure that respondent complies with the above and at any rate the Sheriff shall cause compliance with paragraph [4] of this order within 72 hours of this order.
- (6) Respondents shall pay costs.

The respondent opposed the application and asked the court to dismiss it and find that the contract is alive and well and binding as between the parties. It was argued in this regard that the applicants, for reasons best known to themselves, are deliberately misinterpreting the basis upon which the agreement was entered into and are putting a spin to same unintended by the parties in a bid to resile from the contract.

Respondent further contends that the salient terms of the contract constituting as they do an undisputable and unambiguous mining option agreement are:

1. That the applicants did grant the rights and interest in the mining claims to the respondent for use and exploitation.
2. That the applicants were to be given consideration of US \$3 000 for the use during the first 6 months and thereafter US\$10 000 pending a geological report.
3. That a geological report would be produced for the assessment of the mine.
4. Thereafter the parties were to negotiate a sale agreement.

The respondent therefore expressed dismay at what it perceives as applicants’ attempt at attaching some other meaning alien to that conveyed by the plain wording of the agreement.

When the matter was heard the application did not progress to the arguments on the substantive merits of the dispute because the respondent raised what I considered to be meritorious point in *limine*. It pointed out (and the applicants did confirm) that there is a similar matter pending between the parties before the High Court in Harare in case No. HC 8171/19. The argument by the respondent therefore is that the current applicant is unnecessary as it is a duplication of HC 8171/19 and therefore should be dismissed on the grounds of *lis pendens*

It is common cause that in HC 8171/19 the respondent issued summons against the applicants seeking an order that the very same contract which forms the subject matter of the current dispute be declared valid and binding as between the parties. It is further common cause that the applicants entered appearance to defend and what is outstanding is dependant's plea. The respondent averred that it elected to pursue the matter by way of action proceedings given that there are some factual disputes attending this dispute rendering same incapable of resolution in applicant proceedings.

It therefore challenged the applicants to fight their cause in its dispute by filing a claim in reconvention instead of pursuing parallel process as it did in the current matter. In HC 8171/19, the respondents (as plaintiffs) sought an order in the following terms.

"Wherefore the plaintiff's claim against the defendant's jointly is for: -

- (a) An order declaring that the option agreement signed on the 23rd of January 2019, Annexure "A" to this declaration, is valid and biding on the Plaintiff and defendants and its members and partners.*
- (b) Costs of suit"*

After some initial ambivalence, counsel for the applicants conceded that the current application is in fact a mirror image of the pending matter in HC 8171/19. The original position was that the cases were related but completely different which position, needless to say was wrong.

That the two cases mentioned by the parties are opposite sides of the same coin can hardly be disputed; whereas the respondents seek via action proceedings in HC 8171/19, an order declaring the contract valid and binding, the applicants on the other hand, via this current application seek an order in the reverse. A finding in either necessarily disposes of the other.

Asked why it was felt necessary to institute an essentially parallel process when the option was available to join issue with the respondents in HC 8171/19 by (say) filing a counter claim, the explanation proffered by counsel was that action proceedings are unnecessarily lengthy and time consuming. It was further argued that there are in fact no factual disputes between the parties as suggested by respondent hence the decision to pursue application proceedings in *casu*. Thirdly, it was averred that on account of the prohibitively congested roll in Harare, unlike what obtains in Masvingo it is more expeditious and less costly not only to pursue a parallel process by way of application but also pursue same in Masvingo.

IS THE PLEA OF LIS PENDENS APPLICABLE?

Lis pendens refers to a special plea raised by the defendant that the matter is being determined by another court of competent jurisdiction on the same action and between the same parties. For a plea of *Lis pendens* to succeed it must be demonstrated that the two matters are between the same parties or their successors in title concerning the same subjects matter and founded upon the same cause of complaint (*see Diocesan Trustees for Diocese of Harare v Church of the province of central Africa 2009(2) ZLR 57(H); Nestle (SA) Pvt Ltd v Mars incorporated (2001) 4 A SA 315 (SCA), Geldenhys v Kotz 1964(2) SA 167 (0)*)

That the current matter satisfies all the prerequisites of the plea of *lis alibi pendens* is hardly in dispute; the parties are exactly the same, the subject matter is exactly the same; namely the question of the validity of the contract entered into between the parties and both complaints are founded upon the same cause of complaint (albeit the one being the converse of the other).

In Erasmus, *Superior court Practice*, (2nd edition) at D 1-280 the following was stated:

“The requirement that the parties be the same does not entail that the same plaintiff should have sued the same defendant in both proceedings. The plaintiff in the first proceeding could, as a defendant in the second, raise the plea of his *Lis pendens* (*see Caesar stone Sdot-Yam Ltd v World Marble and Granite 2000 CC 2013 (6) SA 499(SCA) at 505 E-G, 506 B-C and 509 D-F*)

This is precisely the situation that obtains in *casu*; the respondent is the plaintiff in HC 8171/19.

The only bone of contention is what course of action to take in these circumstances. In Erasmus (*ibid*) the learned authors refer to the discretion that the court enjoys to either stay the current proceedings or to proceed regardless of the pendency of the other matter, thus:

"The court may stay an action on the ground that there is already an action pending between the same parties or their successors in title, based on the same cause of action, and in respect of the same subject matter. The defendant is not entitled as of right to a stay in such circumstances the court has a discretion whether to order a stay or not, and may decide to allow the action to proceed if it deems it just and equitable to do so or where the balance of convenience favours it. As the later proceedings are presumed to be vexatious, the party who instituted those proceedings bears the onus of establishing that they are not, in fact vexatious. This must be done by satisfying the court that despite all the elements of *Lis pendens* being present, justice and equity and the balance of convenience are in favour of those proceedings being dealt with (*see Keyter NO v Van de Menlen and Another NNO 2014(5) 215 (ECG) at 218 C-D*

In the present case the applicant woefully failed to discharge the onus reposed on him as explained above. As alluded to hereinbefore, counsel attempted to explain applicants' presumed vexatious conduct of filing a parallel case on the basis that there are no disputes of fact as between the parties hence it was inappropriate for respondent to have resorted to action proceedings which in the usual run of things take longer to reach finality.

What counsel could not explain was why it was not deemed necessary to utilize any of the available provisions built into the rules designed to curtail proceedings (or such of their number as are necessary). In particular counsel was at pains to justify why, if there are in fact no disputes of fact as contended, it was not deemed prudent and expeditious to have the matter proceed by way of a stated case as provided for in terms of rule 199 of the High Court rules, 1971. As a matter of fact a perusal of the contents of the applicant's papers on why this parallel process was sought undoubtedly demonstrates that the option of the use of rule 199 completely eluded them.

The applicant placed himself in an unnecessary "catch 22" situation. If the argument, on the one hand, is that there are no disputes of fact (a position adopted by the applicants) then proceeding by way of stated case would have been the most expeditious and least costly course to follow. If however there are material disputes of fact (a position adopted by the respondents) then the respondent was justified as it did to proceed by way of action proceedings. Therefore

whichever way one looks at it there would have been no justification on the part of the applicants to pursue a parallel process elsewhere.

It is my most considered view that in the usual course of things it is more expeditious and indeed more expedient (contrary to the avowed position adopted by counsel for the applicant) to have case No. HC 8171 proceed as a stated case as opposed to filing a parallel process by way of application proceedings (if indeed there are no disputes of fact as alleged)

The rules designed to curtail proceedings provided in order 126 also present opportunities to the parties to *inter alia* narrow down the scope of disputation; an avenue the applicant could have employed rather than mounting a parallel process on the same issue.

Further, the twin considerations of the need to have finality in litigation on the one hand and the need to avoid the unnecessary duplication of matters on the other hand when applied to this case ultimately persuaded the court to give the decision it eventually did.

In *Nestle (SA) Pvt Ltd v Mars incorporated* (supra) the following was stated:

"The defence of Lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle which in that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata). The same suit, between the same parties, should be brought only once and finally. There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence) to end the dispute authoritatively. In the absence of any of the elements there is no potential for a duplication of actions."

The courts are loath to encourage the unnecessary duplication of cases for to so amounts to encouraging a proliferation of cases across the country which cases emanate from the same cause of action between the same parties. It is untenable to support the proposition that where a party perceives a particular seat of the current seats of the High Court to be supposedly congested then he will be justified to take flight midstream to some perceived less congested seat. To accept that argument would by necessary implication mean a party would be justified (for instance) in mounting four simultaneous or successive applications and/or actions in each of the four

geographical seats of the High Court and await which of them handles the same most expeditiously. If applicants' position were pursued to its logical conclusion, what would stop the respondent, for instance, from rushing off to (say) Mutare to launch its own similar (albeit reverse) application there ostensibly premised on its perception that the wheels of justice turn faster there.

I earlier mentioned that I gave an *ex-tempore* judgment when this matter was argued by the parties wherein I found in favour of the respondent. From the foregoing discourse it is apparent that I do abide by that basic decision. However, I do concede that the wording of the order which I gave wherein it was stated that the application was "*dismissed with costs*" gave the impression that the matter had been dismissed on the merits, which of course was not the case. The probable consequence of the wording was that the applicant could not pursue HC 8171/19 because the matter was supposedly *res judicata* when of course that is incorrect (a plea of *lis pendens* is in any event dilatory in nature). As a matter of fact but for the notice of appeal filed, it was my intention to invoke Rule 449 of the Rules of Court to rectify the situation to reflect that the point in *limine* was upheld and the matter was thereby stayed pending the decision in HC 8171/19. Now that an appeal has been noted that avenue is no longer available, that anomaly can only be corrected by an appropriate order by the Appeal Court as sought in Paragraph 1.1 of the appeal. Needless to say that from the foregoing I believe ground 1.2 of the grounds of appeal unmeritorious.

Nyahuma's Golden Stairs Chambers, applicant's legal practitioners
Makuku Law Firm, Respondent's legal practitioners