

STANMARKER MINING (PRIVATE) LIMITED
vs
METALLON CORPORATION LIMITED
PEMBERTON INTERNATIONAL INVESTMENTS
(PROPRIETARY) LIMITED
and
INDEPENDENCE MINING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHINHENGO J,
HARARE, 5, 8 and 25 March, 2003

A B Chanake for applicant
S Moyo for respondents

CHINHENGO J: The applicant intends to sue the first and second respondents for damages for breach of contract in the sum of US\$27 315,979. The first and second respondents (hereinafter called "Metallon" and "Pemberton" respectively) are *peregrini* defendants. Metallon is a South African registered company operating from 161 Rivonia Road, Sandton, Johannesburg, South Africa. Pemberton is a company incorporated in terms of the laws of the British Virgin Islands and operates from 5 Pelican Drive, Columbus Centre, Road Town, Tortola, British Virgin Islands. In the founding affidavit the applicant was not certain as to the above facts in relation to Pemberton hence it stated in para 4 of the founding affidavit that Pemberton is owned by Metallon and "its address for service is care of 161 Rivonia Road, Sandton, Johannesburg, South Africa". The correct position with regards to where Pemberton is incorporated and operates from was disclosed by Metallon

in its opposing affidavit and that has not been disputed by the applicant. Metallon and Pemberton are indisputably *peregrini* defendants.

This application was made *ex parte* and on an urgent basis. I directed that the respondent be served and I agreed to hear it as an urgent application. The application is made in terms of Order 6 Rule 45 of the Rules of this Court as read with Section 15 of the High Court Act [Chapter 7:06]. The applicant seeks an order to confirm this Court's jurisdiction by attaching the respondent's property or other proprietary interest in Zimbabwe. It also seeks an order authorising the service of the summons on the respondents in South Africa and a further order interdicting the respondents from alienating or encumbering their right and interest in the third respondent ("Independence") which was cited "merely for the purposes of advising its directors of the potential negative impact this Application may have on its assets".

The question for my determination is a simple and straightforward one. It is whether this Court has jurisdiction in the matter. I must sketch the background to this application for the easier understanding of my decision.

The applicant and Metallon entered into an agreement in terms of which they agreed on the modalities or procedures for their mutual acquisition of Independence through the establishment of a company to be known as Newco, which was to be incorporated in Zimbabwe.

Independence operates five gold mines in Zimbabwe, namely, How Mine, Shamva Mine, Arcturus Mine, Mazowe Mine and Redwing Mine. It owns these mines and their assets. Independence is owned one hundred per cent by Cableair Limited, a company registered in the United Kingdom. Cableair Limited is in turn one hundred per cent owned by Lonmin Plc, another United Kingdom based company. It was Lonmin Plc which intended to dispose of its shareholding in Cableair Limited and consequently divest itself of its interest in Independence.

The applicant and Metallon agreed that they were to jointly negotiate with Lonmin Plc the joint acquisition of all or a part of the share capital, assets or business of Independence or Cableair Limited. In terms of clause 11.1 of their agreement the applicant and Metallon agreed that -

"From the signature date and for a period of 3 months thereafter, neither party shall, without the prior written consent of the other party, engage in or enter into discussions with any other party with an interest in acquiring the share capital or business of Independence or its immediate holding company and/or engage in or enter into discussions with any other party desirous of achieving similar objectives than, or competing with, Newco".

The applicant averred that Metallon breached this clause by holding discussions with Lonmin Plc outside the framework of the agreement and by submitting through Pemberton, during the period of three months from the date of signature of the agreement, a bid for the acquisition of Independence's business for its own benefit and thereby

procuring that the bid so submitted was accepted by Lonmin Plc. It is on this basis that the applicant seeks to institute an action for breach of contract and claim damages from Metallon.

The applicant was correct in labelling its application as one to confirm this court's jurisdiction. It, indeed, is so because the agreement was concluded in Zimbabwe when the applicant's deponent accepted the terms of the agreement by signing it in Zimbabwe, thereby providing the *causa jurisdictionis* separate from an attachment. Though the respondents did not agree that the contract was made in Zimbabwe when the representative of the applicant signed the agreement following upon a telefacsimile transmission of the contract document, I am of the view that the contract was concluded in Zimbabwe. See *Jamieson v Sabingo* 2002 (3) ALL SA 392 at 395 e-i and at 397 a-f.

In terms of s 15 of the High Court Act, the court's jurisdiction can be founded or confirmed by the arrest of the person of the defendant or by the attachment of the defendant's property but the court has a discretion whether or not to order an attachment. Section 15 provides that -

"In any case in which the High Court may exercise jurisdiction founded or confirmed by the arrest of any person or the attachment of any property, the High Court may permit or direct the issue of process, within such period as the court may specify, for service either in or outside Zimbabwe without ordering such arrest or attachment, if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached, and the jurisdiction of the High Court in the

matter shall be founded or confirmed, as the case may be, by the issue of such process".

The clear intention of this provision was explained by MALABA J (as he then was) in *Monarch Steel (1991) (Pvt) Ltd v Fourway Haulage (Pty) Ltd* 1997 (2) ZLR 342 (H) at 345C-346A where he said -

"Although s. 15 altered the common law to the extent that it gave the court a discretion not to order attachment of the property belonging to a peregrine defendant or to order his arrest but to elect *in lieu* thereof to found or confirm jurisdiction over the *peregrinus* by issue of process, it did not discharge the plaintiff from the burden of having to satisfy the court, before the issue of process that the *peregrinus* was present within the country for arrest or had property within the country capable of attachment".

It was in the sense that s 15 is no longer necessary for the court to order the arrest of the *peregrinus* or an attachment of his property that SANDURA JP in *Clan Transport Co (Pvt) Ltd v Govt of the Republic of Mozambique* 1993 (3) SA 795(Z) said at 797F:

'Although under common law there must be an arrest of the defendant *peregrinus* or an attachment of his property within the territorial jurisdiction of the court in order to found or confirm jurisdiction that position has been altered by s.15 of the High Court of Zimbabwe Act 29 of 1981'.

The learned JUDGE PRESIDENT did not suggest, as was argued by Mr *Carter* for the plaintiff, that it was no longer necessary to show to the court before issue of court process for purposes of s.15 of the Act, that the *peregrinus* was present within the court's jurisdiction or had property therein capable of attachment. The court's discretion lies in having to determine whether or not to order the arrest of a peregrinus who must be within the country or order the attachment of his property which must also be within the country. That discretion is also available to a judge before whom a chamber application is placed in terms of Order 6 r 45.

The above construction of the provisions of s.15 of the Act receives authority from the decision of BECK J (as he then was) in *African Distillers Ltd v Zietkiewicz & Ors* 1980 ZLR 135 (G), from which the JUDGE PRESIDENT in *Clan Transport's* case, *supra*, quoted with approval at p 136 F-H..."

It must be clear from the above remarks that s.15 of the High Court Act does not dispense with the need to show that the Court has jurisdiction which may be founded or confirmed by the attachment of property or the arrest of the defendant. That is the single issue which the applicant had to deal with before he could obtain other associated relief.

The background facts which I have outlined indicate quite clearly that Metallon has no property in Zimbabwe. Its connection, if any, with Independence is through the ownership by Pemberton of the shares in Cableair Limited which, in turn, owns the shares in Independence. It must always be kept in mind in matters of this kind that we are here dealing with corporate entities which have separate legal personalities from each other and from the persons who act on their behalf. The owner of the assets in Zimbabwe which it is proposed to attach is Independence. Those assets are company assets. Independence is not a party to these proceedings, nor would it be a defendant in any suit between the applicant and Metallon the two parties to the agreement whose breach is alleged to have occurred. Independence is a separate legal entity whose shares are owned by Cableair Limited. And Cableair Limited's shares were owned by Lonmin Plc. Whatever relationship exists between Metallon and Pemberton, or whatever interest Metallon may have in Pemberton, it cannot be such a relationship or such an

interest, as the case may be, as would convert the assets of Independence into the assets of Metallon. The applicant seems to me to have derived some comfort from para 7.4.3 of Metallon's opposing affidavit wherein it is conceded that Metallon and Pemberton have a beneficial interest in Independence. Similar comfort seems to have been derived also from Annexure J to the founding affidavit wherein Metallon states that it "acquired 100% of Independence Gold Mining Zimbabwe from Lonmin Plc". Counsel for the applicant accordingly submitted in para 8 of his heads of argument that

"---the existence of s 15 of the High Court Act --- means that a physical attachment of the property belonging to the 1st respondents in Zimbabwe is not necessary. The applicant merely must show that the 1st respondent was or has a substantial beneficial interest in assets that are situate in Zimbabwe in respect of which the judgment in favour of the applicant may be enforced or over which this Honourable Court can exercise jurisdiction".

I do not think that this submission is valid at all particularly in a situation, as in this case, where a corporate entity owns the assets and where the defendant may only at best indirectly benefit from the business of that corporate entity. Thus apart from the fact that Independence, as a corporate entity is the owner of the mining assets, within Zimbabwe, the interest which Metallon may have through either Pemberton or Cableair Limited is not, to my mind, the kind of interest which may be attached to confirm jurisdiction or in respect of which the discretion of the court granted by s.15 of the High Court Act may be

exercised. That interest is at best dependent on whether Independence and Cableair Limited declare a dividend in favour of those entities which own shares in them. On the facts placed before me it is quite facetious to argue that Metallon has any interest in Independence. The doctrine of effectiveness on which the issue of jurisdiction depends (*Forbes v Uys* 1993 TPD 369) could never find application if jurisdiction were to be confirmed in any case whose facts are similar to this case. The result is that there is no property belonging to Metallon within the jurisdiction of this court which can be attached to confirm jurisdiction. That being the case the associated relief sought by the applicant cannot also be granted.

The application is dismissed with costs.

Kantor & Immerman, applicant's legal practitioners
Scanlen & Holderness, first respondent's legal practitioners