Judgment No. HB 145/04
Case No. HC 2937/04

GLOBAL MINERAL TRADERS LTD

versus

EXAMPLER TRADING (PVT) LTD t/a
LUNA MINING

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 8 OCTOBER AND 9 DECEMBER 2004

Ms P Dube for the applicant
J James for the respondent

Urgent Application

NDOU J: On 8 October 2004 I dismissed the application with costs. I indicated that my reasons for doing so will follow. These are the reasons. The application in this matter is for an interdict. Effectively, what is sought is an interdict prohibiting the respondent company from moving or dissipating its assets, and from continuing with its operations at Jessie Halfway Mine, West Nicholson. The applicant also seeks to freeze funds in the respondent's account with Royal Bank and with the Reserve Bank. The latter prayer was overtaken by events as the Royal Bank was placed under curatorship by the central bank. In any event if the order is to be granted in terms of the draft, both the Royal Bank and the Reserve Bank had to be cited. This was not done. Briefly, the facts reflect that the parties entered into an agreement in January 2004. In terms of the said agreement, the applicant was to pay US$300 00 to the respondent, and would then be entitled to a fifty (50) per centum share of the profits reaped by the respondent from the mine. The applicant would also be entitled to a transfer to its name of fifty (50) per centum of the shares in the respondent company. It is common cause that the applicant paid part of the contracted amount i.e. US$194 000 rather than the US$300 00. In the applicant's

founding affidavit there is a misleading averment that the entire amount has been invested. However, after opposing papers were filed, which exposed this untruthful averment, the applicant concedes that only US$194 000 was invested. This is a material misrepresentation. The parties proceeded to enter into a second agreement in June 2004. The agreement was still essentially an investment agreement. It was now a tri-partite agreement between the applicant and another company called Dagan Investments (Private) Ltd and the respondent. The purport of the latter agreement was that the respondent, whose shareholders control Dagan, would transfer all its fixed assets to another company called Zungwini Investments (Private) Ltd. Further, the respondent would transfer fifty(50) per centum of the shareholding of Zungwini to the applicant. It was, in this way agreed that the applicant and the respondent would become equal shareholders in Zungwini and would thus, presumably, jointly own the mine and be entitled to equal shares of the profits. The gravamen of the applicant's case is that the respondent has effected neither the transfer of the assets nor the transfer of the shares since the parties entered into the second agreement in July 2004. In other words, the applicant complains that in both agreements the respondents has committed only on paper, has continued running the mine and its business, employing the applicant's money, but for all intents and purposes as if the applicant were not an interested party or shareholder at all. The applicant complains that its representative who was to keep an eye on the joint venture has been dismissed by the respondent. The applicant submitted that the relationship between the parties is currently not working. Whether under the old or the new, it was submitted that the respondent has not met its obligations. Therefore, it is necessary, so to speak, to freeze the picture, and take a close look at it, and decide what position each of the parties should be

placed in. That, in effect is what the applicant is asking the court to do – to freeze the business, funds and assets while this court examines the agreements, the parties' obligations and rights thereunder and decide what ought to be done with the shares in the respondent company. The respondent's case is that in terms of paragraph 2 of the agreement, the applicant should have opened an account in its own name and transferred US$300 000 into this account in Zimbabwe. This was not done by the applicant due to constraints placed by legislation on banking. It was then agreed that a joint bank account would be opened, and it was indeed opened. The applicant's director, Taleb Mohamad, on account of his resident status in Zimbabwe, did not have capacity to be a signatory to the account. The applicant was entitled to, and still is entitled to appoint a Zimbabwean to sign on its behalf. The respondent avers that a suggestion was made, and it was accepted that a legal practitioner represents the applicant in this regard. The respondent produced bank records to establish that there was no dissipating of funds. The respondent also points out that the mine, by its very nature cannot be easily disposed of to the detriment of the applicant's interests therein. More importantly, Mr *James* for the respondent strongly submitted that there are material disputed of fact which cannot be resolved on paper. This dispute is the root of the matter. Mr *James*, submitted that the applicant should have known of this dispute of fact. The applicant, has already issued summons in respect of this dispute. Although it should be pointed out that these summons have since been withdrawn but without the applicant tendering costs. The applicant has, however, indicated intention to file fresh summons. It is clear that the applicant seek an interdict *pendete lite*. An interdict is an extra-ordinary remedy which is granted when certain requirements are met. For the applicant to succeed, it must first establish existence of

a clear or *prima facie* right. In light of the applicant's investment of US$194 000 it is beyond dispute that the applicant has a clear right – *Boadi* v *Boadi & Ors* 1992(2) ZLR 22. Having established this right, the applicant must further show –

(a) an infringement of the said right by the respondent or at least awell granted apprehension of such an infringement. If on the one hand, I believe the applicant, it has met this requirement. If on the other hand, I believe the respondent, the applicant failed to establish this requirement. There is a material dispute of fact on this issue. It is not capable of resolution on the papers filed.

(b) The absence of any other satisfactory remedy. In this regard I associate myself with the approach of the court in *Knox D'Archy Ltd & Ors* v *Jamieson and Ors* 1996(4) SA 348 AD. At pages 372J to 373C Grosskopf JA said-

> "It is often said that an interdict will not be granted if there is another satisfactory remedy available to the applicant. In that context a claim for damages is often contrasted with a claim for an interdict. The question is asked: should the respondent be interdicted from committing the unlawful conduct complained of, or should he be permitted to continue with such conduct, leaving the applicant to recover any damages he may suffer? The purpose of the interdict is not to be a substitute for the claim for damages but to reinforce it – to render it effective."

However, the learned judge of appeal held that the question was thus purely whether, in principle and on authority, such an interdict should be granted in cases where the respondent is in good faith disposing of his assets, or threatening to do so, and has no intention of rendering the claimant's claim nugatory. In this case there is another remedy besides the damages. As alluded to above, there is a facility agreed upon

whereby, the applicant is entitled to nominate a signatory to the respondent's accounts. It has not done so because of its own ineptitude. The documentary evidence of the respondent's accounts does not show that the respondent has been disposing assets *mala fide* with the intention of rendering the applicant's claim nugatory. Besides the money, the other assets comprise the mine itself and heavy mining equipment. These cannot be easily moved or concealed. There is no evidence of the respondent having acted surreptitiously in the disposition of assets or use of the money. There is no basis for the suspicion on the part of the applicant.

(c) The balance of convenience favours the granting of an interlocutory interdict: The applicant has failed to establish this requirement. The applicant seeks to freeze the entire mining operations of the respondent. The mine services other small miners. Gold can only be sold to the Reserve Bank by the respondent. In such circumstances it would be easy for the applicant to ascertain the extent of the profits made. Before the applicant injected its US$194 000 the mining by the respondent was operational. The balance of convenience favour the continuation of the operations pending the resolution of the contractual disputed between the parties.

Accordingly, I hold the view that the applicant has failed, on a balance of probability, to satisfy the requirements in (a), (b) and (c), supra, and the application must therefore fail – *Setlogelo* v *Setlogelo* 1914 AD 221; *Knox D'Archy Ltd and Ors* v *Jamieson and Ors* 1995(2) SA 579(W); *Gideon* v *Ngumo* 1973(2) RLR 197; *Flame*

Lily (Inv) Co (Pvt) Ltd v *ZM Salvage* 1980 ZLR 378; *Watson* v *Gilson Enterprises* 1997(1) ZLR 324; *Econet (Pvt) Ltd* v *Ministry of Information* 1997(1) ZLR 342 and *Dube and Ors* v *Siyaphambili Collective Farming Co-operative Society* HB-6-04. There is nothing in the papers that point in the direction of the respondent being insolvent. In the papers the applicant does not allege that it asked its shares and denied by the respondent. The respondent has close to Z$700 000 000,00 in the bank, it has equipment, vehicles etc in the event of insolvency. The applicant failed to establish its case.

Lazarus & Sarif applicant's legal practitioners
James, Moyo-Majwabu & Nyoni respondent's legal practitioners