

ILASHA MINING (PVT) LTD**Versus****YAKATALA TRADING (PVT) LTD
t/a VIKING HARDWARE DISTRIBUTORS**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 4 DECEMBER 2019 & 23 JANUARY 2020

Urgent Chamber Application

J. Ndubiwa for the applicant
Advocate Hashiti for the respondents

MAKONESE J: This urgent chamber application was filed on the 8th January 2019. I was only able to hear full argument in this matter on the 4th December 2019. I reserved judgment. This now is my ruling.

The interim relief sought is in the following terms:

“Pending the finalisation of this matter the applicant be granted the following relief:

1. The ordinary periods of notice to the Registrar and to the respondent are dispensed with pursuant to the proviso to Rule 247 (2) of Order 32 of the High Court Rules, 1971.
2. The respondent be and is hereby ordered to forthwith release to the applicant’s possession the following equipment:-
 - 2.1 250 x seven bitumen bins
 - 2.2 110 x tipper drill rods (1.5m)
 - 2.3 35 x air rubber horses (25m)
 - 2.4 35 x air leg rock drills
 - 2.5 20 x air Diaphragm pumps
 - 2.6 14 x diesel engine air compressor (120 cfm)
 - 2.7 10 x feihe diesel compressor (250 cfm)
 - 2.8 10 x electric wireless
 - 2.9 8 x hammer crushers
 - 2.10 5 x jaw crusher
 - 2.11 5 x gold conveyors
 - 2.12 5 x super salon diesel conveyors
 - 2.13 2 x back hoe loaders

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- 2.14 2 x tractors 4 x 4
2.15 2 x tippers (6 cubic metres)
3. In the event that the respondent does not comply with this provisional order upon service of same upon it, the Sheriff of this court be and is hereby empowered and authorized to seize and deliver to the applicant the mining equipment listed in subparagraph 2.1 to 2.15 above.
 4. The applicant shall pay to the respondent the reasonable cost of storage and insurance premiums within 48 hours of being furnished with the bank account by the respondent.”

On the return day, the applicant seeks final relief in the following terms:

“Terms of final order sought

That you show cause to this honourable court on the return day why a final order should not be made in the following terms:

1. The interim relief granted is confirmed as final.
2. The purported cancellation of the contract of sale breach between the parties by the respondent as conveyed in its letter of 31st October 2019 be and is hereby declared incompetent unlawful out of no force or effect.
3. The respondent to pay the cost of suit.”

This application is opposed.

Background

The brief background leading to this urgent chamber application may be conveniently summarized as follows. Pursuant to a contract of sale concluded between the applicant and respondent this court confirmed the existence of such contract under case number HB 03/18. In terms of this agreement the respondent purchased various mining equipment and consumables utilizing loan funds availed to the applicant by Fidelity Printers and Refineries (Pvt) Ltd totalling US\$1 808 829,00. The applicant failed in its bid to appeal the Supreme Court against the judgment of this court. The parties engaged each other regarding payment of storage charges levied by the respondent as a pre-condition for the delivery of the mining equipment to the applicant. The respondent demanded that applicant effect payment of storage charges before the release of the equipment. On 25th September 2019, the respondent instituted legal action against

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the applicant and Fidelity Printers and Refineries in this court under case number HC 2292/19 claiming storage charges. It is not in dispute that the applicant has since paid into its legal practitioner's trust account the amount equivalent to the storage charges demanded by the respondent for onward transmission to the respondent once the appropriate bank account is availed. The respondent has refused to accept the account of storage charges offered and his changed goal posts at each and every turn. By letter dated 31st October 2019 written by respondent's legal practitioners and addressed to applicant's attorneys the respondent purported to cancel the contract of sale alleging that there was repudiatory breach of the entire contract of sale between the parties. Applicant contends that the purported cancellation is incompetent and unlawful in that the executory part of the sale was fully performed when the purchase price was paid to the respondent and respondent utilized the funds to procure mining equipment for delivery to the applicant. Applicant avers that the issue of payment of storage charges as a pre-condition to the delivery of the equipment by the respondent arose after the contract had been performed and therefore not a material term of the contract of sale so as to ground an allegation of repudiatory breach. The respondent contends that following the respondent's letter of 31st October 2019 purporting to cancel the contract of sale and asserting that the mining equipment now belongs to the respondent, the applicant is reasonably apprehensive of injury and irreparable harm in that the respondent may at any time act perversely and deal with, or dispose of the mining equipment in its possession to the prejudice of the applicant in the sum of US\$1 808 829,00. The applicant petitions this court to grant urgent relief enabling it to take possession of and secure the mining equipment from the respondent against tender of payment of storage charges. The applicant avers that this is a proper case for the court to exercise its discretion under the proviso to Rule 247 (2) of Order 32 of the High Court Rules 1971 and to dispense with the ordinary notice periods to the respondents.

I directed that the urgent application be served on the respondents to afford them the opportunity to respond to the application. At the same time I urged the parties to find each other as the matter clearly turned on the amount of storage charges to be paid to the respondent. The

parties failed to reach any settlement and consequently I have had to consider the issues before me and make a determination on the efficacy of the order sought in the draft order.

I shall first deal with the preliminary objections raised by the respondents.

Urgency

The respondent argues that the urgency alluded to by the applicant is self created. Respondent avers that the issues complained of are within the control of the applicant and applicant should have resolved these issues from the onset. Respondent avers that no storage charges have been paid and that applicant has not attempted to collect the mining equipment. Respondent avers that various requests have been made for the applicant to collect the equipment to no avail. Respondent contends that there is no explanation by the applicant for the delay and inaction. On its part, the applicant has argued that the point *in limine* has no merit. The respondent was saved with the urgent chamber application and on the date of hearing applied to postpone the matter to allow it time to file opposing papers. The court granted a postponement of over a week. The court was advised that the parties would try and resolve the matter and agree on storage charges in order to allow the equipment to be released to the applicant. Upon filing the opposing papers, however, the respondent raised a point *in limine* intimating that the matter was not urgent. It is clear that the hearing of the matter on an urgent basis on the 4th December 2019 did not occasion any prejudice to the respondent. Respondent still raised a point *in limine* on urgency. It is such conduct by legal practitioners that was decried by MATHONSI J (as he then was) in *Telecel Zimbabwe (Pvt) v POTRAZ & Ors* 2015 (1) ZLR 651 (H) at page 659B – E, where he stated:

“.....raising the issue of urgency by respondents finding themselves faced with an urgent application is now a matter of routine. Invariably when one opens a notice of opposition these days one is confronted by a point in limine challenging the urgency if the application, a point which should not be made at all. The costs are spending a lot of time determining points in limine which do not make the remotest chance of success at the expense of the subject of the dispute. Legal practitioners must be reminded that it is an exercise in futility to raise points in limine simply as a matter of fashion. A preliminary point should only be taken where firstly, it has merit and secondly, it is likely to dispose of the matter. The time has come to discourage such waste of court time by making endless points in limine by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their clients defence vis-à-vis the substance of the dispute, in the hope that by chance, the court may find in their favour. If an opposition has no merit it should not be made at all.”

It is my view that the respondent's point *in limine* has no merit. The settled legal position is that a matter is deemed urgent if:-

- (a) It cannot wait the observance of the normal procedures and have limits prescribed by the rules of court in ordinary applications as to do so would render nugatory the relief sought.
- (b) The applicant has treated the matter as urgent by acting timeously when the need to act arose and if there is any delay good and sufficient explanation is given for such delay.
- (c) The applicant has no alternative remedy.
- (d) The relief sought is both interim in nature and proper at law.

See *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188 (H).

The matter *in casu* is clearly urgent in that the respondent's purported cancellation of the contract of sale between the parties on account of alleged repudiatory breach as contained in its letter dated 31st October 2019 is contrary to the papers before the court showing that the applicant has been in negotiations with respondent over payment of storage charges. Respondent has always been aware that applicant was entitled to collect the equipment on payment of storage charges. By its letter dated 31st October 2019, the respondent suddenly changed its well

documented position that the mining equipment belongs to the applicant and that respondent's interest only relates to the payment of storage charges. Respondent has acted in bad faith in its negotiations and by claiming that the equipment belonged to it, applicant was compelled to file this urgent application to protect its interests and secure the mining equipment. The applicant did not refrain from taking legal action and acted on an urgent basis to protect its interests. There was no other suitable remedy available to the applicant.

In *HEM Granite Industries (Pvt) Ltd v Kelly Granite (Pvt) Ltd* 2008 (2) ZLR 123 (S), MALABA DCJ (as he then was) stated as follows at page 131;

“By preventing the removal of the granite blocks from the mining location, the applicant acted unlawfully, vesting the respondent with a course of action to enforce its rights.”

The remarks in the cited case apply with equal force. By parity of reasoning, the unlawful termination of the contract of sale and appropriation of the applicant's mining equipment as indicated in its letter of 31st October 2019, the applicant was enjoined to take urgent steps to protect its rights and interest in the mining equipment. The point *in limine* regarding urgency clearly has no merit and ought to fail.

I shall then deal with the merits of this application.

Purported cancellation of sale

The purported cancellation of sale by the respondent on the basis of alleged repudiatory breach is unlawful and incompetent at law. There is no legal basis for the cancellation on account of repudiatory breach in the circumstances of the case. Repudiation occurs where one party to a contract without lawful grounds indicates to the other party by word or conduct an unequivocal intention that he no longer intends to be bound by the contract.

See *NASH vs Golden Pumps (Pty) Ltd* 1985 (3) SA 1(A) at page 22.

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In this matter, in the aftermath of litigation by the applicant seeking to appeal against the judgment of this court in case number HB-03-18, the respondent retained possession of the mining equipment on the sole basis that it had a creditors' lien for storage costs. Such costs had to be paid before delivery of the equipment to the applicant. The issue of storage charges was only ancillary to take contract between the parties. The respondent's decision to issue summons against the applicant and Fidelity Printers and Refineries in case number HC 2292/19 for the payments of storage charges is consistent with respondent's elected position on the delivery of the equipment against payment of storage charges. The decision by respondents to cancel the contract of sale between the parties on account of alleged repudiation by the applicant is not supported by the facts and all the documents filed of record and is clearly invalid.

Requirements for interim relief sought

In terms of Order 32 Rule 246 (2) of the High Court Rules, this court is empowered to grant a provisional order once it is satisfied that the papers establish a *prima facie* case. The rule provides as follows:

"Where in an application for a provisional order the judge is satisfied that the papers establish a prima facie case, he shall grant a provisional order either in terms of the draft order or as varied."

See; *McLeod v Rolindo* HH-47-02

The applicant seeks an order compelling the respondent to release the mining equipment against tender of payment of storage costs, pending the return date. The real issue before this court is whether the interim relief sought compelling the release of the mining equipment is competent where there is a creditor's lien over the property sought to be released. This question is canvassed and answered by the case of *Massicott v Meyrick Park Motors (Pvt) Ltd* 1989 (3) ZLR 357 (HC) at page 359C where CHIDYUSIKU J (as he then was) held that:

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“It is also my view that it is not the intention of the law, by confirming a lien on the creditor, to enable the creditor to unreasonably keep the owner of a property from the enjoyment of that property. In order to ensure that neither the creditor nor the debtor takes advantage of the other, the doctrine of the courts “equitable discretion” adopted in the above cases plays a pivotal role.”

The relief sought is not final in nature and is therefore competent. The applicant prays that the court exercise its equitable discretion to grant the interim relief sought and compel the release of the mining equipment to the applicant against the tender of payment of storage charges. It is clear that grave and serious inconvenience will be suffered by the applicant if the interim relief is not granted. The respondent is clearly acting unreasonably in refusing to accept the tender of storage costs.

In *Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njainjai & Ors* 2000 (1) ZLR 85 the court held that the party applying for a temporary interdict must establish a *prima facie* right, even though open to some doubt, a well granted apprehension of injury and the absence of some other adequate remedy. Regarding the requirement of injury the court must weigh the prejudice to the applicant if the interdict is not granted against the prejudice to the respondent if it is granted.

I am satisfied that the applicant has established all the requirements for the granting of an interlocutory order releasing the mining equipment to it. The applicant is reasonably apprehensive of injury in that the respondent can deal with and dispose of the mining equipment on the basis of the alleged repudiatory breach. The applicant has no other suitable remedy. The respondent has purported to appropriate the mining equipment as its own. The balance of convenience favours the granting of the interim relief.

In the circumstances, and accordingly the provisional order is granted as prayed in terms of the draft order with costs.

Mashayamombe & Company, applicant’s legal practitioners
Coghlan & Welsh, respondent’s legal practitioners