

**HWANGE COAL GASIFICATION COMPANY
(PRIVATE) LIMITED**

Versus

HWANGE COLLIERY COMPANY LIMITED

And

ZHONG JIAN INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 25 JUNE AND 29 OCTOBER 2020

Urgent Chamber Application

Ms B Rupapa, for the applicant
B Ndlovu, for the 1st respondent
T Kuchenga, for the 2nd respondent

MABHIKWA J: This matter appeared before me on 18 June 2020, *Ms B Rupapa* appeared for the applicant whilst *Messrs B Ndlovu* and *T Kuchenga* appeared for 1st and 2nd respondents respectively. After hearing the parties on that day, the parties requested for and an order to the following effect was made by consent that;

- (1) The matter be postponed to 25 June 2020 at 1000 hours.
- (2) The parties are directed to file further submissions and documents, if any, referred to in the submissions.
- (3) 1st respondent is directed not to bar 2nd respondent from delivering coal to applicant pending the determination of this application.

The brief facts of the matter are that the applicant applied for an interdict. It alleged that it had an agreement with 2nd respondent for the supply of coal. It had paid for a substantial supply of same. Second respondent does not dispute that fact. Applicant avers that on 11 June 2020, it requested 2nd respondent to supply the coal which it had paid for. 2nd respondent then advised that its hands were tied because 1st respondent had directed that no coal should be supplied to applicant.

The applicant averred that this action by 1st respondent was unlawful. It also averred that as a result of the instruction, applicant would suffer irreparable harm if not interdicted. Applicant averred that the said coal was required for the functioning of its battery plant. The said battery was supposed to continue running at all times. In the event that it stops due to lack of coal supply, the battery would be damaged. It would require US\$40 000 000 to repair it.

Applicant also averred that it had no other remedy to protect its rights than to approach this court and seek that 2nd respondent be interdicted from interfering with applicant's coal supplies from 2nd respondent. Secondly, applicant requested an order that the 2nd respondent be compelled to proceed and supply it with coal in terms of the agreement between them. (applicant and 2nd respondent)

I must say at this stage that from the reading of the papers and submissions, it was not in dispute that the battery plant in question needed a constant supply and once it stopped running due to lack of supply of coal, it would be damaged. It was also apparently not disputed by the respondents that if it stopped, very costly damages would occur to it. This is mainly the reason probably, that the parties agreed that 2nd respondent be allowed temporarily continue to supply the coal.

On 18 June 2020, 2nd respondent indicated that though served on short notice, it would abide by any order of the court in the matter. Counsel for the 1st respondent indicated also that he was terribly handicapped having been instructed at very short notice. The parties agreed to have the matter postponed to 25 June 2020. Following clause (3) of the consent order of 18 June 2020, the applicant filed its heads of argument on 3 July 2020. The 1st respondent filed the "main agreement" also known as the "Chaba Block Concession area" Interim Contract Mining agreement on 30 June 2020. 1st respondent also filed its response to the "M-Block Contract agreement on the same day following the filing of the "M-Block Contract by 2nd respondent on 29 June 2020. The 1st respondent then filed its heads of argument, invoices and other documents on 23 June 2020 and finally its supplementary heads on 7 July 2020.

I must mention also, that in stopping the 2nd respondent from supplying coal to the applicant, 1st respondent allegedly claimed *inter alia* that applicant owed it some money. The applicant on the other hand denied owing . It instead insisted that it is the 1st respondent that

owed applicant money. In my view, that was not the gist of the matter at hand. In any event and as applicant argued, even if that fact were to be accepted as true, it would not give 1st respondent any legal right to prohibit another contracted and paid supplier from delivering coal paid for. Ultimately, applicant complained that 1st respondent was in the habit of resorting to bullish conduct and unilateral self help tactics whilst breaking the law. It claimed that all efforts to resolve the matter amicably with 1st respondent had remained in vain hence this application.

In opposition 1st respondent raised the point *in limine* that the application was not properly before the court on the basis that it was under “Reconstruction.” The applicant according to 1st respondent had not sought the permission of 1st respondent’s administrator to institute the proceedings in terms of section 6(b) of the Reconstruction of State indebted Insolvent Companies Act Chapter 24:27.

Secondly, the 1st respondent raised the preliminary point that MS Feng, the deponent to the founding affidavit, had not been authorized by the company to depose to an affidavit and or, to institute these proceedings. 1st respondent claimed to be a significant shareholder in the applicant which is a joint venture company. 1st defendant averred that it had not been asked for such authorization and believed that none had been granted and no resolution had been made for the institution of these proceedings.

The 1st respondent argued that there was no urgency in the matter. It argued that applicant allowed for that dangerous situation by not keeping enough stocks of coal because on 11 June 2020, it indicated by letter to 2nd respondent that it had a one day supply of coal to run its battery. 1st respondent also averred that between 12 and 14 June 2020, it delivered 595 tones of coal it owed to applicant which are not subject to a pending court case. It argued that the fact that the battery had not seized running meant that the matter had not been or at least had no longer become urgent. It urged the applicant to settle its account with the 1st respondent in order to continue getting coal legally from it (1st respondent)

On the merits, 1st respondent simply denied the applicant’s averments. The bulk of its amendments are centered on the fact that it claimed to be owed ZWL\$14 975 426.09 worth of coal supply by the applicant. It also claimed that 2nd respondent, who is also customer to it had gone behind its back and contracted with applicant for the supply of coal. 1st respondent says in terms of its contract with 2nd respondent, 2nd respondent cannot enter into a contract to

supply the applicant unless that contract has 1st respondent's blessings. The argument was that 2nd respondent could deal with the applicant in the supply of coal only with the written approval of the 1st respondent. It was therefore 1st respondent's contention in the main that what applicant was seeking was an order for it and 2nd respondent to be allowed to perpetuate an illegality in breach of the laws of contract.

1st respondent counter accused the applicant of being a bully instead of engaging. It insisted that as far as it was concerned, its actions were lawful and that an interdict was not available to interdict a lawful act.

The second respondent mainly did not oppose the application. It chose so to abide by the decision of the court in the matter. *Mr T Kuchenga* for 2nd respondent added that there were in fact two (2) different contracts between the two parties. He said there was the "M-Block" contract which did not require authorisation which he also ultimately filed. There was also allegedly the "Chaba Block" contract which required authorization before sub contracting, or supplying coal to another. I must say that the argument of whether or not 2nd respondent was legally supplying coal to applicant went on and on and took centre stage. The voluminous contracts referred to above were also filed for the benefit of the court. However, it appears to me that the issue of subcontracting and its legality was really not a matter for the court to entertain and decide at this stage.

Ms B Rupapa for the applicant argued on the first point *in limine* that the point was unfortunately being raised in bad faith. She argued that the conduct being complained of in the urgent chamber application had been made direct by a Dr. C Zinyemba in his capacity as Acting Managing Director without the alleged administrator's involvement. She urged that 1st respondent be stopped from seeking to involve the administrator as an excuse and involve him only where it suits it to do so.

In fact at the time the point was raised on the first hearing, *Ms Rupapa* had also referred to separate litigation going on between the parties in particular MANGOTA J's judgement in case No. HC 10766/18 which had set aside the reconstruction order issued by the High Court on 2 February 2020. At the time, *Mr Ndlovu* himself was not sure whether or not there was a change of the Reconstruction status at Hwange Colliery Company or not. This was one of the reasons why 1st respondent sought a post-ponement apart from the fact that he needed to file other documents after taking full instructions. He needed also to

confirm the Reconstruction status after the submission about the MANGOTA J judgement. The matter was post-poned to 25 June 2020 where further submissions were made.

It was only when he filed his heads of argument on 23 June 2020, That *Mr Ndlovu* ,having checked with the company and the courts, revealed that the Minister of Justice Legal and Parliamentary Affairs appears to have appealed to the Supreme Court concerning the Reconstruction matter, and that the appeal case is still pending.

This court, in its discretion and in the interest justice in terms of Rule 4C of the court rules condoned the applicant's non-compliance as submitted. The court was fortified in that discretion by the fact that on the first appearance on 18 June 2020, the parties themselves had appreciated the urgency of the matter should the plant sieze due to lack of coal supply. It is because of that appreciation that the parties agreed that in the meantime, 1st respondent should be directed by the court not to bar 2nd respondent from delivering coal to applicant pending the hearing.

Secondly, the court notes also that it was for the same reason and appreciation of the urgency that 1st respondent itself submitted that in fact from between 12, 13 and 14 June 2020, applicant had been given 595 tonnes of coal after sending a letter of request.

It was clear also as submitted by Rupapa that Feng Guo had always represented the applicant company by resolution and also that the facts deposed to in her affidavit were facts being within her personal knowledge in her capacity as the Managing Director of the applicant. She could legally be allowed to depose to the facts notwithstanding the absence of the particular company's resolution in respect of this urgent matter. See Rule 227 of Order 32 of the Court Rules.

On the 3rd point of the final and Interim orders being essentially the same, the court was correctly refered to and guided by the comments of MAFUSIRE J in *Amalgamated Rural Teachers Union of Zimbabwe & Anor vs ZANU (PF) & Anor* HC 263-18 where MAFUSIRE J pointed out that;

"In casu, it is trite that the interim relief sought in the original draft order was almost identical to the Final order sought on the return day. In essence this relief was the interdict to restrain the respondent from continuing with the activities complained of but my view is that the principle or requirement that the Interim relief in an urgent chamber application should not be the same as the Final relief to be sought on the

return day is not cast in stone. Every case depends on its own facts. In appropriate situations, it may be that the relief sought on the Interim may all that the applicant was concerned with yesterday, today and tomorrow. He may want it today on an urgent basis. That does not stop him from wanting again on a permanent basis on the return day....”

The above finding in my view portrays exactly the scenario we have in the current case and from the foregoing, the court dismissed the 3 points *in limine*.

It is now a well known trueism and that of our law that a matter is urgent when it cannot wait but is allowed to jump the queue of others.

See Kuvarega v Registrar General & Anor – 1988 (1) ZLR 188 (H)

In casu, the court is satisfied that the applicant acted when the need to act arose. Faced with a battery that could sieze and be damaged at any time if coal had not been supplied, and realising that 1st respondent was not budging to lift the bar stopping 2nd respondent from supplying the said coal to it, applicant acted and filed this application on a Sunday. Even then, and as already stated above, 1st respondent concedes that it has intervened and supplied to applicant 595 tonnes of coal on 12, 13 and 14 June 2020 inspite of the alleged disputed none payment. They could only have done so to avoid the “packing” of the said battery plant. The 2nd respondent is also alleged to have been going behind 1st respondent’s back to supply coal to applicant although they argue that they did so in respect of the “M Block” contract which allowed for such Sub contracting.

Thirdly, the parties themselves in this court on 18 June 2020 agreed, realising the urgency and undesirability of letting the battery plant sieze, that 1st respondent be directed not to bar 2nd respondent from supplying the coal.

When the above interventions are considered, it cannot be a genuine submission therefore that “The fact that the battery has not seized running can only mean that the matter has never been urgent or at least is no longer urgent” (the underlining is mine). The reverse appears to be true. What runs clear is that the urgency is acknowledged. This court is thus satisfied that applicant has shown a *prima facie* right, a well grounded apprehension of an irreparable harm, that there is no other remedy than approach this court and that the balance of probabilities in this matter favour the granting of the Interim relief sought. It is for the court on the return date to confirm or discharge the relief.

1st respondent has argued vigorously on the point that applicant is getting coal from 2nd respondent when 2nd respondent does not own any mineral rights, but only mines for and on behalf of the 1st respondent. 1st respondent has gone on to argue at length on the contract between it and 2nd respondent which allegedly prohibits subcontracting without written approval from 1st respondent. In my view, this is not the matter before the court. Plausible and concerning as it may seem, it is a matter for a different forum and for a different day.

The voluminous “M-Block” and “Chaba Block” contracts sadly had nothing much to do with the current application. They may be used in argument in a different forum. 1st respondent cannot take advantage of this application to bring in its issues with 2nd respondent. The argument of who owes what between the three (3) parties as well as the argument of who is breaching what contract are again matters of a different platform. It has been argued that if an order is granted in this matter then it would be creating a contract for the parties and sanctioning the perpetuation of an illegality. Regrettably, that would not be the position. This court has nothing to do with the usual contractual liabilities between the parties. It is not the mandate of this court to decide those issues.

For the foregoing reasons, I accordingly grant the order as prayed for in the application.

Zinyengere Rupapa Legal Practitioners, c/o Joel Pincus, Konson & Wolhuter, applicant’s legal practitioners

Majoko & Majoko, 1st respondent’s legal practitioners

Makururu & Partners, 2nd respondent’s legal practitioners