

NORTHERN FARMING [PVT] LTD
versus
VEGRA MERCHANTS [PVT] LTD
t/a VEGRA COMMODITIES
and
CHENA MILLERS (PVT) LTD

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 24 July 2013 & 3 October 2013

Urgent chamber application - interdict

R. Chawatama, for applicant
O. Kadare & G. Machingura, for first respondent
B. Dhlakama, for second respondent

MAFUSIRE J: On 24 July 2013, I granted the following interim relief in favour of the applicant:

“That pending determination of the dispute between the applicant and the 1st respondent by the arbitrator, the applicant is granted the following relief:

1. The 1st respondent be and is hereby interdicted from using, selling, transferring, disposing or dealing in any other way with the 32 metric tonnes of maize held at Mash Co Premises, Mazowe Road, Centenary.
2. The Deputy Sheriff be and is hereby directed to place under attachment the said 32 metric tonnes of maize and hold the same under his custody at Mash Co Premises, Mazowe Road, Centenary pending finalization of arbitration proceedings between the parties.
3. The 2nd respondent be and is hereby interdicted from paying the sum of US\$80 810-00 to the 1st respondent but that such amount when due, shall be paid to the Sheriff of the High Court who shall hold the money in trust pending finalization of the arbitration proceedings between the applicant and the 2nd respondent.”

The above provisional order followed an urgent chamber application by the applicant. The brief facts were that the applicant had sold some 709 tonnes of maize to the first respondent on a 14 day credit term arrangement. The first respondent had failed to pay. The final balance due by the first respondent was said to be US\$179 608-35 following a payment of US\$98 100-00. The credit term facility had an arbitration clause. At the time of the hearing the arbitration proceedings had just been initiated. Applicant alleged that the first respondent was disposing of the maize to third parties and receiving payment but was refusing or failing to pay it. Second respondent was one of the third parties. It admitted owing first respondent in terms of their own contractual arrangements.

Applicant further alleged that apparently the first respondent had had no capacity to raise capital for its business in the first place; that first respondent had enticed the applicant to offer credit terms as a means of raising that capital and that it had no assets of its own other than the maize. On that basis applicant sought what it termed an anti-dissipation interdict to restrain the first respondent from disposing of the maize held for it by a company called Mash Co pending the determination of its claim by the arbitrator. Applicant said it feared that if the first respondent was not restrained as aforesaid any award in its favour by the arbitrator would be a *brutum fulmen* because there would be nothing left to levy execution on given that first respondent was undoubtedly indigent.

What is an anti-dissipation interdict? It is just an ordinary interdict to restrain the disposal of assets. In *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) both the court of first instance and the appeal court debated the propriety of the term 'anti-dissipation interdict'. None of them found the name quite suitable and none of them, for the case before them, could quite understand the content of such interdict. In the end the appeal court was content to say that the South African courts had recognised this type of interdict for many years without giving it any specific name.

The full debate over the interdict is captured in the judgment of GROSSKOPF JA at pp 731 – 372:

“The nature of the interdict sought by the petitioners is to prevent the respondents from concealing their assets. The petitioners do not claim any proprietary or quasi-proprietary right in these assets. It is conceded that the assets are the unencumbered property of the respondents. The interdict sought was therefore of an unusual nature. It is not the usual case where its purpose is to preserve an asset which is in issue between the parties. Here the petitioners lay no claim to the assets in question. They

merely allege a general right to damages. Moreover, the conduct on the part of the respondents which is sought to be interdicted is *prima facie* lawful. It is therefore not surprising that both the name of the interdict and its essential content have been the subject of some debate.

“As far as the name is concerned, the petitioners referred to it as a Mareva-type interdict after the term used in English law. The Court *a quo* did not like this name since the use of the English term might suggest that English principles are automatically applicable [see 1994 (3) SA at 705A – 706B]. I agree with this criticism. The alternatives suggested by Stegmann J were not, however, much more felicitous. Thus he referred to an interdict in *securitatem debiti* and an anti-dissipation interdict. The former expression may suggest that the purpose of the interdict is to provide security for the applicant’s claim. This is not so. The interdict prevents the respondent from dealing freely with his assets but grants the applicant no preferential rights over those assets. And ‘anti-dissipation’ suffers from the defect that in most cases and, certainly in the present case, the interdict is not sought to prevent the respondent from dissipating his assets, but rather from preserving them so well that the applicant cannot get his hands on them. Having criticised the names used for the interdict I find myself unfortunately unable to suggest a better one. I console myself with the thought that our law has recognised this type of interdict for many years without giving it any specific name.”

What the applicant sought in the present matter was simply a prohibitory interdict in the interim. The requisites for such an interdict are:

- 1 a *prima facie* right;
- 2 a well-grounded apprehension of irreparable harm if the relief is not granted;
- 3 that the balance of convenience favours the granting of an interim interdict;
- 4 that there is no other satisfactory remedy.

see *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (1) ZLR 289 (SC) @ 391; *Hix Networking Technologies v System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (A) @ 398I – 399A); *Flame Lily Investment Company (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd and Anor* 1980 ZLR 378; *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor* 2000 [1] ZLR 234 [HC] @ 238;.

The first respondent opposed the application. However, its affidavit was predominantly argumentative and wordy but too short on facts. Its point *in limine* was that the matter was not urgent. However its basis for saying so was in effect its only major point on the merits. It was argued that in the absence of an award or judgment in its favour it was premature for the applicant to seek an order that would have the effect of interfering with the respondent’s normal commercial activities. It was further argued that the relief sought by the

applicant would virtually force the first respondent to close down its operations and that the process of arbitration that the applicant had just initiated would be an adequate remedy.

I was satisfied that the matter was urgent. The applicant presented evidence that the first respondent was disposing of its maize stocks at such a rate that there would be little or nothing left by the time the arbitration process was concluded and that if the applicant succeeded it would be left with an empty judgment. In both the opposing affidavit and in its submissions during the hearing the first respondent conspicuously skirted what I considered to be applicant's major cause for alarm and apprehension. That point was that the first respondent had no other assets apart from the maize. The applicant's apprehension was grounded on the perception that in the event that the arbitrator found in its favour, the respondent would have nothing left from which to satisfy any award.

It seems that in an application for this type of interdict one of the major considerations is whether the respondent would still have sufficient property to satisfy any judgment that may eventually be given against him and whether the respondent's continued disposal of his assets is deliberately intended to frustrate any such judgment. That seems to be the rationale for the interdict. The principle was laid down in *Mcitiki and Another v Maweni* 1913 CPD 684. It was followed in *Bricktec (Pty) Ltd v Pantland* 1977 (2) SA 489 (T) and in the *Knox D'Arcy* case above. In the *Mcitiki* case HOPLEY J laid down the principle as follows, at pp 686 - 687:

“It is said if one were to interdict a man like respondent in such circumstances from parting with some of his property so as to satisfy a judgment, one would be revolutionising the practice of this Court. The practice of this Court is to do justice between people according to the circumstances that may arise. It has, of course, long been the practice of this Court that if the respondent, although an *incola*, were *in fuga*, the Court would in such circumstances restrain him from parting with certain property pending the result of an action; **and that doctrine has been extended a little further where the respondent is a prodigal wasting his money or is purposely making away with funds although remaining an incola of the country, so that eventually when his creditor gets the judgment it may be a barren one;** and to use a graphic phrase in one of our old law cases, when he went there with his writ of execution, such creditor would find he was ‘fishing behind the net’. It is to protect a *bona fide* plaintiff against a defeat of justice in such a case that such orders are given. The case cited such as *David v Reinhard* 8 E.D.C. 30; *Robinson, Miller and Co. v Lennox and Another*, 18 C.T.R. 402; *Fredericks v Gibson*, C.T.R. 445, all have their distinguishing features, **but they all proceeded upon the wish of the Court that the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that**

such debtor is wasting or getting rid of such funds to defeat his creditors, or is likely to do so” (emphasis added).

In the *Knox D’Arcy* case above it was held that the purpose of such an interdict was to prevent the respondent from freely dealing with his own property to which the applicant lays no claim because justice may require such restriction in cases where the respondent is shown to be acting *mala fide* with the intention of preventing execution in respect of the applicant’s claim even though there would not normally be any justification to compel a respondent to regulate his *bona fide* expenditure so as to retain funds in his patrimony for the payment of claims.

In the present case applicant presented evidence that in the face of a demand for payment, and in the face of its claim having been submitted for arbitration the respondent was still disposing of the maize but without remitting anything to the applicant.

That arbitration was a remedy available to the applicant was hardly a sound basis for opposing the interdict. In the *Knox D’Arcy* case that kind of argument was dismissed in the following terms, at pp 372 - 373:

“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?

“That is not the question which arises here. In the present circumstances **there is no question of a claim for damages being an alternative to an interdict.** The only claim which the petitioners have is one for damages. There is no suggestion that it could be replaced by a claim for an interdict. **The purpose of the interdict is not to be a substitute for the claim for damages but to reinforce it – to render it more effective.** And the question whether the claim is a satisfactory remedy in the absence of an interdict would normally answer itself. **Except where the respondent is a Croesus¹, a claim for damages buttressed by an interdict of this sort is always more satisfactory for the plaintiff/applicant than one standing on its own feet.** The question of an alternative remedy accordingly does not arise in this sort of case.

¹ Croesus was an ancient king of ancient Lydia who was famed for his wealth and whose name is said to be synonymous with terms like ‘capitalist’, ‘deep pocket’, ‘fat cat’, ‘moneybags’, etc. Of Croesus, and dealing with an apparent non-disclosure of an essential asset by the director of an insolvent company in a liquidation matter, BERMAN J in *Absa Bank Ltd v Rhebokskloof [Pty] Ltd and Others* 1993 [4] SA 436 [C], said:

“There is in any event good cause for suspecting that the truth concerning this alleged asset has not been forthcoming. In setting out his financial position in his original opposing or answering affidavit, Key states that it ‘frankly escaped his mind to deal with it’. I venture to suggest that no man of wealth, ***from Croesus to Rockefeller***, when in a tight financial situation could conceivably have simply forgotten the existence of an asset so substantial.”

The interdict with which we are dealing is *sui generis*. It is either available or it is not. No other remedy can really take its place (except, possibly, in certain circumstances [of] attachments or arrests)” (emphasis added).

On the facts before me, I was satisfied that not only was arbitration not a remedy to what the applicant feared, but also that there existed no other satisfactory remedy. First respondent did not seem to have any source other than the maize from which to satisfy its contractual obligations to the applicant.

The applicant’s claim was predicated on Article 9 of the Model Law on International Commercial Arbitration which is a Schedule to the Arbitration Act, [*Cap 7:15*]. But in its notice of opposition the respondent argued as follows:

“...Article 9 of the Arbitration Act, certainly does not confer jurisdiction on the Court to make an ordinary debt matter urgent, or to interfere with normal commercial activity between corporates or of the First Respondent or to make another contract for the parties specifically on how the disputes were to be resolved, how one party is to recover on the contract and also the method of recovery such as barring receipt of payment, barring trade, attachment of stocks in trade in the absence of any court order and in my view, supplementing the arbitration procedure that was agreed to by the parties to be final.”

I found the first respondent’s meandering averment above to be plainly without merit and quite absurd. Article 9 of the Arbitration Act reads as follows:

“ARTICLE 9

“Arbitration agreement and interim measures by court

- [1] **It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from the High Court an interim measure of protection** and subject to paragraphs (2) and (3) of this article, **for the High Court to grant such measure.**
- [2] Upon a request in terms of paragraph (1) of this article, the *High Court* may grant –
- [a] **an order for the preservation, interim custody** or sale of **any goods which are the subject-matter of the dispute;**
- [b] an order securing the amount in dispute or the costs of the arbitral proceedings; or
- [c] **an interdict or other interim remedy;** or

- [d] **any other order to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual.**
- [3] The *High Court* shall not grant an order or interdict in terms of paragraph (1) of this article **unless** –
- [a] **the arbitral tribunal has not yet been appointed and the matter is urgent;**
or [emphasis added]
- [b] the arbitral tribunal is not competent to grant the order or interdict; or
- [c] the urgency of the matter makes it impracticable to seek such order or interdict from the arbitral tribunal;
and the *High Court* shall not grant any such order or interdict where the arbitral tribunal, being competent to grant the order or interdict, has determined the application therefore.
- [4] The decision of the *High Court* upon any request made in terms of paragraph (1) of this article shall not be subject to appeal”

It is plain that in terms of both the common law and the Arbitration Act this court can grant such an interdict. Article 9 could not have been clearer. I was satisfied that the applicant had fulfilled the conditions under which the interdict could be granted. Among other things, and as I have already pointed out, the applicant argued strongly that the first respondent had no other assets apart from the maize. During argument I expressly invited counsel for the first respondent to address the point. He said nothing of substance.

It was first respondent’s argument that the relief sought by the applicant would cripple its operations and put it out of business. However, I was not persuaded by that argument. The first respondent was a grain merchant. It sourced maize from disparate suppliers. The applicant was just one of them. The first respondent would then on-sell the maize to its own customers. It boasted of an ability to source the maize at so competitive prices as to enable it to on-sell to its own customers at considerable discounts, even coming down to as much as less than the price at which it would have bought the maize from the applicant. So what puzzled me was how an embargo on a paltry 32 tonnes could cripple and put first respondent out of business. For the relief sought the applicant had identified and targeted a particular item – maize, and a particular quantity – 32 tonnes. First respondent was free to trade in any excess of that commodity. I thought that the first respondent was concealing more than it was revealing.

In the final result I found the respondent's opposition to be without merit and I granted the order sought.

Mawere & Sibanda, legal practitioners for applicant

G. Machingambi Legal Practitioners, legal practitioners for first respondent

Dhlakama B. Attorneys, legal practitioners for the second respondent