

DRILPOW INVESTMENTS
versus
LONE KOP SYNDICATE
and
CRAIG HOLLINSHEAD

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 25 August, 01 September and 02 October 2015

Urgent Application

J. Chikomwe, for the applicant
O. Matizanadzo, for the respondents

MAWADZE J: This is an urgent chamber application for on an anti-dissipation interdict in which the applicant seeks interim relief in the following terms;

“INTERIM RELIEF GRANTED

Pending the determination of this matter the applicant is granted the following relief;

1. The first and second respondents be and are hereby interdicted from alienating, encumbering dissipating, or dealing in any manner whatsoever that will bring about reduction in the value of any of the immovable assets at Norman 22 and 23 whether specified in the order or not including mining dumps, pending the determination of this matter on the return day.
2. The Sheriff or the Provisional Judicial Manager of Krol Mining (Pvt) Limited be and is hereby instructed to put under care and maintenance all immovable assets at Norma 22 and 23.
3. The officer commanding the Zimbabwe Republic Police in Mashonaland West be and is hereby instructed to assist in the enforcement of the order should need arise.

SERVICE OF PROVISIONAL ORDER

This Provisional Order be served on the respondents by a clerk on the respondents by a clerk in the employ of the applicant’s legal practitioners”

The terms of the final order sought are in the following terms;

TERMS OF THE FINAL ORDER SOUGHT

1. Pending the outcome for leave to sue Krol Mining (Pvt) Limited first and second respondents are hereby interdicted from dissipating in any manner the security that was tendered to the applicant in form of the agreement dated 12 April 2012 that was signed between the applicant and Krol Mining (Pvt) Ltd.

2. Pending the outcome of the applicant's claim against Krol Mining (Pvt) Ltd the first and second respondents are hereby further interdicted pending the applicant's claim against Krol Mining (Private) Limited which should be filed within seven(7) days of granting of leave to same be granted.
3. First and second respondents to bear costs of this application jointly and the one paying the other being absolved."

The applicant is a duly registered company in terms of the laws of Zimbabwe.

The first respondent, a syndicate is alleged to be strongly linked to a company called Krol Mining (Pvt) Ltd as the Directors of the latter are said to be the only members of the first respondent.

The second respondent is an individual partnering the first respondent in conducting mining activities at gold claims known as Norman 22 and 23, Sadoma Farm Extension, Chinhoyi (Norman 22 and 23).

The background facts of the matter are as follows;

According to the applicant the first and second respondents are carrying out mining activities at Norman 22 and 23 and the gold claims and the infrastructure around the claims were provided as surety for a debt owed to the applicant by the first respondent. It is the applicant's case that on 12 April 2012 the applicant entered into an agreement with the first respondent which presented itself as per "annexure B" to applicant's founding affidavit as "Krol Mining (Pvt) Ltd Trading as Lone Kop Syndicate represented by the Director, Steven Ross Deller he being duly authorised to do so."

It is the applicant's contention therefore that Krol Mining (Pvt) Ltd and Lone Kop Syndicate (the first respondent) are one and the same entity. This assertion is strenuously disputed by the respondents'.

In terms of clauses 15 to 17 of the said agreement the following are the salient features of that agreement;

- i) that the applicant is the sole and preferential creditor of the first respondent in the event of the voluntary or involuntary liquidation of the first respondent.
- ii) that the applicant has as its exclusive security all of the first respondent's immovable assets and claims at Norman 22 and 23 for the express, sole and exclusive securitisation of the liabilities arising to applicant for the duration of that agreement.
- iii) that the applicant's claims are deemed senior and preferential and would be addressed in full prior to the redress of any other creditor.

- iv) that all the plant equipment, smalls and consumables brought to Norman 22 and 23 site by the applicant should remain as the sole and exclusive property of the applicant.

According to the applicant it later became apparent that the first respondent was running down the business of Norman 22 and 23 which adversely affected the applicant's interests. This prompted the applicant to demand from the first respondent payment of US\$10 million as per the agreement. The first respondent however failed to pay the amount. This prompted the applicant to apply for the first respondent to be placed under provisional Judicial Management.

On 28 May 2015 my sister Makoni J in HC 8569/14 placed Krol Mining (Pvt) Ltd (which applicant claims to be the same as the first respondent) under provisional judicial management. The judicial manager one Shepherd Chimutanda then moved in to exercise his powers.

The first and second respondents after the judicial manager had moved in at Norman 22 and 23 mounted an urgent chamber application against the judicial manager in HC 6484/15 alleging that the judicial manager had overstepped his mandate by taking control of the first respondent (Lone Kop Syndicate) which the respondents allege is a different entity from Krol Mining (Pvt) Ltd placed under provisional judicial management and therefore not within the scope of the provisional order for judicial management granted in HC 5691/14 by Makoni J on 28 May 2015. It is important to note however that the applicants were not cited or joined in this urgent chamber application for a spoliation order and an interdict. On 16 July 2015 my sister Makoni J granted a provisional spoliation order and interdict in favour of the respondents. As a result of this provisional order the first and second respondents resumed mining operations at Norman 22 and 23, the very site which constitutes the applicant's security and apparently using the very same infrastructure and equipment pledged as security to the applicant in the agreement referred to earlier on.

According to the applicant this development prejudices the applicant's interests which had been protected through the provisional order for judicial management granted on 28 May 2015. It is for this reason that the applicant, in order to protect its interests has filed an application to sue Krol Mining (Pvt) Ltd together with the first respondent. However before that application for leave to sue has been determined the applicant deemed it prudent to approach the court on an urgent certificate seeking a provisional order for an interdict to stop the first and second respondents from dissipating the property that was pledged as the sole

and exclusive security for the applicant. The applicant believes the resources at Norman 22 and 23 are being exploited at the rate of between US\$20 000.00 to \$30 000.00 per month and that by the time the matter is concluded nothing will be available to satisfy the judgment. The applicant also believes that the poor management of the resources which the applicant had sought to protect through the provisional order for judicial management is being defeated. As already said the applicant believes that the first respondent Lone Kop Syndicate is the same entity as Krol Mining (Pvt) Ltd despite the averments to the contrary made by the first and the second respondents. The applicant contends that it has no other remedy other than to seek an anti-dissipation interdict against the first and second respondents.

In response to this application Mr *Matizanzozo* for the first and second respondents has taken basically two points *in limine*, which are that the matter is not urgent and also raised the plea of *res judicata*.

The respondents in their opposing affidavit also sought to put into issue the factual basis of this application and submitted that the applicant has not only failed to be candid with the court but has sought to mislead this court. Further, certain aspersions have been cast against the applicant's legal practitioners and that their conduct has been improper and unprofessional. I am however not persuaded that I should be dragged into such side shows but I would rather keep the eye on the ball and deal with the material issues. I now deal first with the points *in limine*.

URGENCY

The contention by the respondents is that the matter is not urgent at all as the applicant was aware of the its purported cause of action as way back as in September 2014 when the applicant opted to apply for judicial management against Krol Mining (Pvt) Ltd. It was further submitted that the applicant has been aware since February 2015 of the hire contract between the first and second respondents but took no action. According to the first and second respondents the applicant is merely seeking through the urgent chamber application to circumvent the provisional order granted by Makoni J under HC 6484/15. The first and second respondents argued that it is therefore improper for the applicant to allude urgency on the basis of the order granted by Makoni J.

The question of what constitutes urgency is settled in our law see *Kuwarega v Registrar General and Anor* 1998 (1) ZLR 188 (H) at 193 F; *Gifford v Mazarire & Ors* 2007 (2) ZLR 131 (H) at 134H-135A.

In general terms the matter is deemed to be urgent if;

- (i) It cannot wait the observance of the normal procedures and time limits prescribed by the rules of this court in ordinary applications as to do so would render nugatory the relief sought.
- (ii) 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.
- (iii) The applicant has no other alternative remedy.
- (iv) The relief sought is both interim in nature and proper at law.

See also *Chitungwiza Central Hospital v Motor Fix (Pvt) Ltd & Ors* HH 230/15.

The nature of the relief sought by the applicants is both interim in nature and proper at law. The applicant seeks a provisional order for an anti dissipation interdict. It has not been disputed that the applicant has no other alternative remedy. I understand the argument by the respondents to be that the applicant has not treated the matter as urgent as the applicant failed to act as far back as in September 2014. I am not persuaded by this argument.

It is common cause that when the applicant realised that its rights were being infringed upon, the applicant sought and was granted an order for provisional judicial management. After the granting of such an order the applicant believed that it had protected its interests. The urgency in this matter therefore arose when the first and second respondents obtained provisional order for spoliation and interdict under HC 6484/15 on 16 July 2015. The provisional order for judicial management which the applicant had obtained under HC 8569/14 on 28 May 2015 in essence was rendered nugatory as this judicial manager was now not able to exercise his powers at Norman 22 and 23 and therefore protect the interests of the applicant. The mining operations at Norman 22 and 23 had resumed without the involvement of the judicial manager which was at the very site which constituted applicant's security and using the same equipment pledged to the applicant. I am inclined to dismiss this point *in limine* as I am satisfied that the matter is urgent.

RES JUDICATA

The point taken by the first and second respondents is that the plea of *res judicata* is available to the respondents as Makoni J under HC 6484/15 dealt with the same issues which the applicant seeks to raise and made a finding in favour of the first and the second respondents.

The requirements for a plea of *res judicata* can be summarised as follows;

- a) the action in respect of which judgment has been given must concern the same party or parties.
- b) the action or judgment must involve the same subject matter and
- c) the action in which judgment is given must be founded on the same cause of action or complaint.

See *Wolfenden v Jackson* 1985 (2) ZLR (S); *Tobacco Sales (Pvt) Ltd v Eternity Star Investments* 2006 (2) ZLR 293 (H) at 300 B-G; *Flowerdale Investments (Pvt) Ltd Anor v Bernard Construction (Pvt) Ltd & Ors* 2009 (1) ZLR 110 (S)

I am not satisfied that the plea of *res judicata* is available to the first and second respondents. It is not in dispute that the applicant was not a party in the matter dealt by Makoni J under HC 6484/15. In fact the first and second respondents in their wisdom or lack thereof chose not to join the applicant but simply cited the provisional judicial manager. It is also not correct that the matter before Makoni J in HC 6484/15 was founded on the same cause of action or complaint with the current urgent chamber application. While the dispute involves the mining claims at Norman 22 and 23 and relates to the same infrastructure and equipment the cause of action is entirely different. In HC 6484/15 the first and second respondents applied for and were granted a spoliation order and an interdict after they had stated that they had been despoiled of Norman 22 and 23 by the provisional judicial manager. In *casu* the applicant seeks an anti-dissipation interdict of mining resources or reserves and mining equipment at Norman 22 and 23 tendered as security. It is therefore clear to my mind that the cause of action is different. It is for that reason that will dismiss the point in *limine* in respect of the plea of *res judicata*.

I now turn to the merits of the case.

The requirements for a provisional anti despoliation interdict which is also a prohibitory interdict are;

- i) a *prima facie* right
- ii) a well- grounded apprehension of irreparable harm if the relief is not granted.
- iii) that the balance of convenience favours the granting of an interim interdict.
- iv) that there is no other satisfactory remedy.

See *Tobacco Marketing Board* 1996 (1) ZLR 289 (S) at 391; *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (H) at 238;

Novithem Farming (Pvt) Ltd v Vegra Merchants (Pvt) Ltd t/a Vegra Commodities and Chena Millers (Pvt) Ltd HH 328-13.

The applicant contends that the *prima facie* right arises from the agreement the applicant entered with the first respondent in which it supplied and fitted the mining equipment and that this *prima facie* right was recognised when Makoni J under HC 8569/14 granted a provisional order for judicial management.

The respondents on other hand submitted that the applicant has not been able to establish a *prima facie* right. According to the first and second respondents the agreement relied upon by the applicant involves the applicant and Krol Mining Pvt Ltd and not the respondents. I understand the argument by the respondents to be that Krol Mining (Pvt) Ltd is a separate entity from the first respondent Lone Kop Syndicate which is a separate legal entity. A number of questions arises from this argument.

The respondents have not provided any proof that Lone Kop Syndicate is a legal *persona* either by way of a constitution or a certificate of incorporation as a company. There is no evidence to suggest at this stage that Lone Kop Syndicate is a juristic person. The *Encarta English Dictionary* defines a Syndicate among other things as “a group of people who combine to carry out a business enterprise or some other common purpose”.

I am not persuaded that the respondent Lone Kop Syndicate is a separate legal entity from Krol Mining Pvt Ltd. While a Syndicate can sue and be sued in its own right in terms of the Rules of this court I share that view that a syndicate is not a body corporate. *See* r 7 of the High Court Rules 1971.

It is not in issue that Steve Deller who deposed to the opposing affidavit on behalf of the first respondent is the one who represented Krol Mining (Pvt) Ltd in the agreement which the applicant relies upon. In that agreement it is clearly stated that Krol Mining (Pvt) Ltd trades as Lone Kop Syndicate. It is therefore disingenuous for the same Steve Deller to try and deny that Lone Kop Syndicate trades as Krol Mining (Pvt) Ltd when he made that representation to the applicant and he is a co-Director of Krol Mining (Pvt) Ltd and also a member of Lone Kop Syndicate. There is therefore clearly an inextricable link between Krol Mining (Pvt) Ltd and Lone Kop Syndicate. It may not be far-fetched that the difference between the two is simply to confound creditors.

The second leg of the first and the second respondent’s argument is that the agreement between this application and Krol Mining Pvt Ltd is invalid for basically two reasons. Firstly that it does not comply with the requirements of s 282 of the Mines and Minerals Act

[*Chapter 21:04*] and that it was not finalized as the schedule referred to in clauses 2 and 3 of that agreement was never complied with.

The reference to s 282 of the Mines and Minerals Act [*Chapter 21:04*] in my view is misplaced. Section 282 (1) of the said Act provides as follows:

“282 No tribute, sale or alienation of precious stones location without the approval of Minister

- (1) Notwithstanding anything contained in this Act or any other enactment, no holder of a mining location registered for precious stones or a mining lease on which the principal mineral being mined is precious stones shall tribute, cede, assign sell or otherwise alienate in any manner whatsoever that mining lease or any interest therein without the permission of the minister.” (emphasis is my own)

In terms of s 5 of the Mines and Mineral Act [*Chapter 21:04*] precious stones means “rough or uncut diamonds or emeralds or any substances which may, in terms of subsection 2 be declared as to be precious stones for the purposes of this Act”. It clearly excludes gold which is the subject matter in this case. It follows therefore that s 282 of the Mines and Minerals Act [*Chapter 21:04*] is irrelevant in this case. There is therefore no basis to allege that the agreement relied upon by the applicant is invalid or illegal for want of compliance with s 282 of the Mines and Minerals Act [*Chapter 21:04*].

It is my view that the agreement relied upon by the applicant is valid as the applicant supplied the mining equipment to Krol Mining Pvt Ltd. The applicant has therefore established a *prima facie* right.

It is not in dispute that mining is going on at Norman 22 and 23. I am not persuaded that the mining dump is not being dissipated as submitted by the respondents. The applicant may not therefore be able to recover the US\$1.1 million it claims to have incurred as a result of the contract with the first respondent. The applicant has rights to protect as per the agreement and the assets tendered as security are being dissipated. To my mind it is clear that the applicant has no other satisfactory remedy as the provisional judicial management order granted by Makoni J has been rendered nugatory. The balance of convenience clearly favours the granting of the provisional order.

In relation to the second respondent a concession was made that there is no valid customer Milling Permit for Norman 22 and 23 and that if the first and second respondents are engaged in custom milling they are doing so illegally. They are violating the law as the alleged tribute agreement between the first respondent and the second respondent is patently unlawful.

This is confirmed by letter from the secretary for Mines and Mining Development dated 31 August 2015.

In the final result I find that the first and the second respondents' opposition is clearly without merit and I am inclined to grant the provisional order sought.

Thompson Stevenson & Associates, applicants' legal practitioners
Matizanadzo & Warhurst, respondents' legal practitioners