PROBADEK INVESTMENTS (PVT) LTD
versus
REDWING MINING COMPANY (PVT) LTD
and
BETTER BRANDS MINING (PVT) LTD
and
PRIME ROYAL (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE 15 February and 24 February 2021.

Urgent Chamber Application for leave to sue a company under corporate rescue in terms of section 126 (1) (h) of the Insolvency Act [*Chapter 6:07*] and for an Interdict in terms of Article 9 of the Arbitration Act [*Chapter 7:15*]

B Makururu, for the Applicant
R Mukavhi, for the 1st respondent
A Masiya, for the 2nd respondent
S Mpofu, for 3rd respondent

CHITAPI J: The parties in this application as cited above are all duly incorporated and registered companies in terms of the laws of Zimbabwe. They carry out their business in Zimbabwe. From the nature of the dispute as revealed on the papers, the parties are running entities or have an interest in mining. The first respondent is however under a legal handicap in that it was placed under corporate rescue in terms of s 121 as read with ss 124 and 131 of the Insolvency Act, [*Chapter 6:07*] by the High Court at Mutare on 13 July, 2020. In consequence of the placement of the first respondent under corporate rescue as aforesaid, one Cecil Madondo was appointed the corporate rescue practitioner in the interim. As with the usual duties of a corporate rescue practitioner, Cecil Madondo in his capacity as such took over the administration of the first respondent. This would include, the preparation and consummation of a business plan to rescue the first respondent from going under and restore it to a healthy state businesswise.

At the route of the application is the allegation by the applicant company that it entered into a joint venture agreement with the first respondent on 15 October, 2020 in terms of which the applicant would invest in the first respondent for mutual benefit. The applicant and the first

respondent followed up on the joint venture agreement by executing a tribute agreement on 30 November 2020, in terms of which the applicant was granted exclusive rights to mine certain listed claims of the first respondent. The applicant alleged that it then had a notarial tribute agreement prepared and registered with the Ministry of Mines and Mining Development. The respondent in their opposing papers took issue with the authenticity of the registration. I will not make a finding on this point of disagreement either way because of the manner that I have resolved to dispose of the application.

The applicant alleged in the founding affidavit that the first respondent reneged on the agreements aforesaid and concluded other agreements with the second and third respondents thus breaching the agreements which the first respondent had executed with the applicant. In paras 17 to 22 of the founding affidavit, the applicant averred that on an undisclosed date its director became aware that the corporate rescue practitioner Cecil Madondo had entered negotiations with the second and third respondents to have them also invest in the first respondent and was further trying to prevail upon one of the applicant's directors Grant Chitate to amend the joint venture agreement with the first respondent in order to give room for the involvement of the second and third respondents as co-investors in the first respondent.

Consequent on the outlined developments, the applicant alleges that on 1 December, 2020, the applicant's directors Grant Chitate held a meeting with Cecil Madondo where Cecil Madondo was alleged to have denied executing any agreements with the second and third respondents. It is alleged that on the following day, 2 December, 2020, the first respondent (sic) sent a text message on Grant Chitate's phone confirming that "He indeed had signed a mining tribute agreement with the second and third respondents." The applicant alleged that,

> "This was done without the applicant's consent or knowledge and despite the exclusive rights to mine conferred on the applicant by the notarial tribute agreement."

The applicant averred that it then contacted the legal practitioner for the first respondent's workers and together with a workers representative they went to the offices of the first respondent. They obtained therefrom a copy of the tribute agreement between the first and second respondents in terms of which the latter was granted by the former mining rights to 45 gold claims already covered or included in the prior agreements between the applicant and the first respondent. The averment herein is made in para 19 of the founding affidavit. The applicant did not provide the

date of this alleged meeting and its discovery of the tribute agreement annexure "E" to its papers. This annexure was however signed by both the first respondent represented by Cecil Madondo and the second respondent on 1 December, 2020.

The next development in the trail of events going by the applicant's founding affidavit was the discovery by the applicant that the first respondent had executed another tribute agreement in respect to other claims already subject of the agreements between the applicant and the first respondent. The applicant once again did not state the exact date of the discovery, choosing to use the words "sometime in December, 2020". The applicant however attached a copy of the tribute agreement between the first and the third respondent as annexure "F". The copy of the attached agreement is not signed by the first respondent nor is it dated. I refrain from commenting on the agreement contents and its validity as this is unnecessary for purposes of my determination.

The next event was an alleged engagement between the applicant and the first respondent. The applicant deposed in para 21 of the founding affidavit the engagement (s) was "….for purposes of ensuring that the two tribute agreements entered with second and third respondents are rescinded.." The applicant in usual fashion did not give a date (s) of the meetings. The applicant alleged in the same paragraph 21 aforesaid that the first respondent wrote to the applicant, a letter dated 15 December 2020 wherein the first respondent gave the applicant notice to terminate the agreements between them. The applicant did not attach a copy of the letter of intention to terminate the agreement nor did the applicant set out details of its terms. The applicant did not explain what it did about the letter.

The next event according to the founding affidavit was that on 30 December, 2020 the corporate rescue practitioner Cecil Madondo invited the applicants representatives to a meeting to discuss the agreements executed between the first, second and third respondents including the notice of termination of agreements between the applicant and the first respondent. The applicant averred that a resolution was reached at the meeting that the subsequent agreements between the first, second and third respondents

> "…had not been signed properly and that the applicant had not breached the J V agreement as it had purchased machinery worth US$345 000 as appears from the invoice attached hereto as G and had also paid creditors of the first respondent."

It does not appear that there were any minutes of the meeting which were recorded as nothing was stated about them in the founding affidavit. Such minutes if available would have assisted the judge to appreciate the nature and content of the deliberations.

Lastly and in regard to the trail of events, the applicant averred in para 24 of the founding affidavit that after the applicant had noted that the first respondent had not advised what steps it had taken to cancel the agreements executed between the applicant and second and third respondents, the applicant instituted court proceedings by way of application under case number "HH (sic) 7276/20 but withdrew it due to technical issues." In typical fashion of not being specific when alleging events and being coy with facts, the applicant did not give details of what the application was about nor who the parties were. The applicant did not incorporate the said application by reference nor ask the court to refer to it. It is not the duty of the court to dig out material to assist a party to prove its claim or defence as the case maybe. It is the duty of the litigant to place before the court all necessary evidence available to the litigant to advance its cause or defence.

In regard to the institution of this application, the applicant averred that it learnt through "rumours" "sometime in January 2021" that the second and the third respondents were carrying out mining activities despite the assurance by the first respondent that it would cancel agreements between it and second and third respondents. The applicant averred that on 12 January, 2021, it wrote a letter to the first respondent requesting the first respondent's consent that their dispute be referred for arbitration as provided for in their agreement (s). A follow up letter was written on 18 January, 2021 following a lack of response to the letter of 12 January, 2021. The first respondent then responded on 19 January, 2021 wherein it refused to consent to arbitration. The applicant then deposed as follows in para 25 of the founding affidavit.

> "….1st respondent only responded on the 19th of January, 2021 and refused to grant consent. He resurrected the issue of breach of the J.V agreement. I then decided that the court has to be approached on an urgent basis as people were conducting mining activities and 1st respondent was not willing to grant consent in terms of the Insolvency Act and to make matters worse, it had resuscitated the issue of notice of termination, which had been discussed and agreed at the meeting…."

After receiving the first response dated 19 January, 2021 the applicant decided to approach the court on an urgent basis as now done by this application. The applicant's deponent to the founding affidavit averred that the applicant could not file the proposed urgent application because

her co-director/partner was away in Dubai and she did not have his contact details. She deposed that upon the co-director's return, he went into COVID 19 induced quarantine. A copy of the co-director's passport annexed to the founding affidavit shows that the co-director Grant Chitate existed Zimbabwe on 23 December, 2020 and arrived in Dubai on 24 December, 2020. He exited Dubai on a date not clearly shown on the copies of the passport but entered Zimbabwe on 17 January, 2021. It was averred that a meeting could only be held between the applicant's directors on 3 February, 2021. The meeting culminated in the filing of this application, eight days post the meeting. A resolution to sue the respondents had however been prepared on the day of the meeting on 3 February, 2021.

The applicant further averred that the urgency of filing this application had been informed by the arrest of the Cecil Madondo, the corporate rescue practitioner on 2 February, 2021 for "fraudulently giving second and third respondent mining claims which belong to applicant." It is of course false to state that the claims belonged to the applicant. The claims belong to the first respondent with the second and third respondents and applicant being granted rights to mine on the claims. The applicant averred that there was a risk or chances that the second and third respondents would continue to mine the claims without checks and the mined gold would not be accounted for to the prejudice of the applicant should the proposed arbitration be in its favour.

The applicant averred further that the filing of this urgent application was motivated by the fact that on 3 February, 2021, it discovered that the tribute agreement between the first and second respondents had been approved by the Mining Affairs Board making it a legally binding document. Although the applicant did not state whether or not its own tribute agreement was approved to legalise its operation, it was accepted during the hearing that the applicant's tribute agreement was yet to be approved by the Mining Affairs Board.

Against the above background facts, the applicant filed this urgent application claiming the following relief:

> "TERMS OF THE FINAL ORDER SOUGHT
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
> 1. The Provisional Order is hereby confirmed.
> 2. Pending the determination of the dispute between the parties by the process of arbitration in terms of the provisions of the Arbitration Act, 1st Respondent shall not take any steps neither shall it act in any such manner as is inconsistent with the rights of the Applicant

arising from the Joint Venture Agreement between the parties and shall not act in such a way unless entitled to so act in terms of any Arbitral award that may be handed down.

3. 2nd and 3rd respondents are hereby ordered not to exercise any rights flowing from their tribute agreements signed with 1st respondent unless entitled to so act in terms of any Arbitral award that may be handed down.

INTERIM RELIEF GRANTED

Pending determination of this matter, the Applicant is hereby granted the following relief:

1. Leave to sue the 1st Respondent be and is hereby granted
2. 2nd and 3rd Respondents or any other person be and are hereby interdicted from conducting any exploration, mining or milling of any mineral from the registered mining claims belonging to Redwing Mining Company (Pvt) Ltd (under corporate rescue)
3. The 1st respondent be and is hereby interdicted from cancelling the Joint Venture agreement entered into by and between Applicant and itself on the 15th of October 2020

SERVICE OF PROVISIONAL ORDER

That a copy of this Provisional Order shall be served on the Respondents by the Applicant's legal practitioners of record."

The three respondents filed opposing affidavits and documents challenging the applicant's application. They all took issue that the application was not urgent. The first respondent averred that the need to act arose on 15 December, 2020 when the first respondent wrote and directed a letter to the applicant wherein it gave the applicant a "notice to Remedy Breach and intention to terminate." The notice was said to have placed the applicant on terms to remedy identified breaches of failing to provide proof of funding within fifteen days of signature of the joint venture agreement or provision of $USD 1 647 000.00 to provide for the joint venture budget. It was alleged that the breach had not been remedied despite the 30 days' notice period given. The first respondent further alleged that the applicant on 4 January, 2021 responded to the first respondents letter of intention to terminate the agreement. On 12 January, 2021 the applicant wrote another letter to the first respondent and the first respondent replied that letter on 19 January, 2021. In the letter, the first respondents' legal practitioners stated that-

> "We advise that our client is still intent on terminating the joint venture agreement should the breach complained about in the notice aforementioned remain as such by lapse of the notice period."

The first respondent averred that the need to act on the part of the applicant arose on 2 December, 2020 which is the date that it alleges as the first time that the applicant came to know that the second and third respondents had executed tribute agreements with the first respondent. The first respondent averred that the applicant being fully aware that a notice to terminate the agreement was in place and had not been rescinded did not do anything about securing its rights and in fact waited for 58 days post 2 December, 2020 to file this application. The date of filing the

application was also about two weeks after the expiry date of the notice to terminate the agreement which the applicant had been granted as the final date by which the applicant should have remedied its alleged breach failing which the agreement would be terminated. The first respondent averred that there was no impediment to the applicant filing an urgent application at that time and that the applicant abstained from asserting its rights early by choice.

In regard to the absence of a co-director of the applicant being out of the country and such absence being the cause of the applicant's delayed filing of this application for want of a board resolution, the first respondent averred that the directors of the applicant being two could have held a virtual meeting but did not do so because they did not treat the matter as urgent. The first respondent averred that the applicant did not have to hope that the notice could be cancelled because the operation of the notice was repeated in the letter dated 4 January, 2021 from the first respondents legal practitioners to the applicants legal practitioners. Further, subsequent letters dated 19 and 26 January reiterated the operation of the notice to remedy being still in force.

In relation to the urgency of the matter being based upon the realization by the applicant that the second and third respondents were now mining on the claims in dispute, the first respondent averred that no urgency arises from that realization because as far back as 2 December, 2020, the applicant was aware of the tribute agreements executed between the first, second and third respondents. The first respondent averred that the applicant should have taken action immediately upon its becoming aware of the tribute agreements. The first respondent averred further that it took the applicant two months from 2 December, 2021 to take action against the second and third respondents. Additionally, the first respondent averred that the applicant filed an application against the second and third respondents which application was withdrawn on 11 December, 2020. The first respondent averred that there was no new development post the withdrawal of that application which made the matter urgent.

The first respondent also raised preliminary issues on firstly the non-joinder of the corporate rescue practitioner and submitted that the failure to cite the corporate rescue practitioner rendered the application invalid. Secondly the first respondent averred that it was improper for the applicant to seek an interdict in the same application for leave to sue the first respondent.

The above points *in limine* require determination only after the application has been determined to be urgent. I therefore refrain from determining these points until I decide other preliminary issue of the urgency of the application.

The second respondent similarly raised the issue of the application not being urgent. It made the same point made by the first respondent that the need for the applicant to act arose on 2 December, 2020 after the applicant as alleged by it, became aware that the first respondent had executed tribute agreements with the second and third respondents in breach of the applicant's prior agreements with the first response. The second respondent also referred to a withdrawn application case No HC 7274/20. The second respondent referred further to a letter which it wrote to the applicants legal practitioners pointing out to irregularities in the citation of parties in addition to other areas of criticism like the want of leave to sue. The letter was dated 10 December, 2020. The withdrawal of application case No HC 7274/20 was not followed up by another application. The second respondent averred that there was no explanation for the non filing of the application from 3 February, 2021 when the applicants' co-director arrived back in the country and the filing of this application on 11 February, 2020. The first respondent also took issue with the hybrid application wherein the applicant has filed an application for leave to sue whilst suing for substantive relief for an interdict before the grant of leave. I will again not delve into that because of the decision I have taken to dispose of the application.

The third respondent also raised objection that the application is not urgent. By and large the third respondent raised the same points as raised by the first and second respondents on when the need to act arose. The third respondent submitted that the need to act arose on 2 December, 2020 when the applicant got knowledge of the tribute agreements between the first, second and third respondents. It was submitted that the applicant was in possession of the notice to terminate but waited for the notice to terminate to lapse without seeking to assert its rights. The applicant also filed a defective application which it withdrew. The third respondent also submitted that the physical absence of a co-director of the applicant was not required for purposes of preparing a resolution to sue the respondent. There was a further submission made by the third respondent that the applicant upon the return of the absent co-director did not file the application for nine days post the director's meeting and did not in that respect treat the matter as urgent.

The subject of whether an application is urgent or not is a well travelled road for judicial officers and legal practitioners. There is so much case law on the subject that one would be excused to think that the law is not settled on the subject. I think the law is settled and the case of *Kuvarega* v *Registrar General and Anor* 1998 (1) R188 (H) is instructive. It has withstood the test of time and has been consistently followed in this jurisdiction and outside it. The learned CHATIKOBO J stated as follows;

> "What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is urgent if at the time the need to act arise, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

Having considered the parties submissions on urgency and considered the affidavits and document filed of record to the extent that they are relevant to the question of urgency, I have come to the conclusion that whilst there may have been engagements between the first respondent and the applicant concerning the agreements executed by the first and, second and third respondents there was no engagement between the applicant and second and third respondents. The need to act in relation to the second and third respondents would have been 2 December, 2020 when the applicant became aware that the first respondent had concluded tribute agreements with the second and the third respondents. The tribute agreements clearly interfered with the claims which were already allocated to the applicant. There is no reasonable explanation offered as to why the applicant did not sue the respondents immediately after it discovered, the existence of the agreement, copies of which were obtained from the offices of the corporate rescue practitioner.

It was not disputed that the applicant filed a defective application before the court which it withdrew. After withdrawing it, a properly prepared application was not immediately filed. No explanation was given for leaving the withdrawn application to die a natural death without properly resuscitating. When an application is withdrawn because of irregularity of procedure but it was dealing with an urgent matter, a failure to then immediately pursue the same matter is a sign that the matter is no longer urgent from the applicant's perspective.

The applicant's explanation that it could not file an application in the absence of a Board resolution is unreasonable. The meeting could have been virtually held or even discussions held over the phone. And at best the issue could have been discussed immediately upon the arrival of

the co-director. The applicant averred that the co-director had to be quarantined upon his return and that the meeting could not be held before the co-director's quarantine period was completed. Again this explanation is not reasonable. The quarantine status of the co-director would not have been a bar to holding a telephone or virtual meeting.

The fact of this case clearly shows that there was no hurry or urgency of action taken by the applicant. If the applicant did not jump when the need to act arose, it cannot call upon the court to jump for it. An urgent matter is more like an emergency matter. One must act there and then to deal with the emergency. An urgent matter is one where had it to wait, there would be irreparable harm occasioned to the applicant. *In casu*, the applicant did not deal with the issue of irreparable harm in any detail save to State that without the corporate rescue practitioner being present to administer the first respondent since he had been arrested by police, there would be no accounting of mining proceeds from second and third respondents operations and that the first respondent would be prejudiced of the mining proceeds. It is unlikely that there would be no mining records produced and kept by the second and third respondents. Without more the argument is not persuasive.

Resultantly, I am not persuaded that this application is urgent. The order I make is follows:

(i) Application is not urgent
(ii) Application is struck off the roll with the applicant to pay the wasted costs of each respondent.

Makururu and Partners, applicant's legal practitioners
Rubaya-Chinuwo Law Chambers, 1st respondent's legal practitioners
Masiya-Sheshe and Associates, 2nd respondent's legal practitioners
Munangati and Associates, 3rd respondent's legal practitioners