**HWANGE COAL GASIFICATION COMPANY (PVT) LTD**

**Versus**

**HWANGE COLLIERY CO. LTD**

**And**

**ZHONG JIAN INVESTMENTS (PVT) LTD**

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 14 NOVEMBER 2022 AND 31 AUGUST 2023

**Opposed Application**

*Advocate S. Banda,* for the applicant
*V. Majoko,* for the 1st respondent
*T. G Kuchenga,* for the 2nd respondent

**TAKUVA J**: On 29 October 2020, MABHIKWA J issued a Provisional Order in the following terms;

> "Pending the final determination of this present case, it is hereby ordered;
>
> 1. That the first respondent is hereby interdicted and restrained from interfering with applicant's coal supplies from second respondent or any other coal supplier.
>
> 2. That the second respondent be and is hereby compelled to proceed with supplying applicant with coal in terms of the agreement between applicant and second respondent.
>
> 3. First respondent shall pay costs of suit on an attorney and client scale.
>
> Terms of the final order sought as follows;
>
> "That you should show cause to this Honourable Court why a final order should not be made in the following terms;

1. That the first respondent be and is hereby interdicted and restrained from interfering with applicant's coal supplies from second respondent or any other coal supplier.

2. That the second respondent be and is hereby compelled to proceed with supplying applicant with coal in terms of the agreement between applicant and second respondent.

3. The first respondent shall pay costs of suit on an attorney and client scale."

In this application applicant seeks confirmation of the Provisional Order.

**THE FACTS**

The applicant processes coking coal to coke. To do that applicant requires at least 500 tonnes of coal supply for the continuous running of its battery plant. Any stoppage in the running of the battery plant results in extensive damage to the battery plant and will require US$40 million dollars to repair. Under no circumstances is the battery plant supposed to stop running.

It is common cause that there is a business relationship between applicant and 2nd respondent. Applicant and 1st respondent have a contract for the supply of coal to applicant. On the other hand applicant has a similar contract with 2nd respondent. First respondent has a contract with 2nd respondent for the mining of coal destined for the foreign market. There is a clause in this contract which bars the 2nd respondent from unconditionally selling coal to the applicant.

Applicant used to receive coal from 1st respondent in terms of their supply contract. However when supplies stopped, applicant engaged 2nd respondent to supply it with coal upon payment to keep its battery plant running. Applicant has been receiving coal supplies from 2nd respondent since January 2020. The 2nd respondent owed more than 10 000 -00 tonnes of coal to the applicant. This consignment has already been paid for by the applicant.

On 11th June 2020, applicant wrote to 2nd respondent requesting the delivery of coal it had already paid for. It was 2nd respondent's response that it had received an order from 1st respondent prohibiting it from supplying applicant with any coal because applicant was owing 1st respondent some money. Applicant sought clarification from 1st respondent on the alleged debt. In response, 1st respondent confirmed that it had barred 2nd respondent from supplying applicant with coal because of non-payment of the purchase price.

Applicant maintained that 1st respondent has no lawful right to order another miner and supplier of coal to stop supplying coal to applicant. It was also contented that applicant has a well grounded apprehension of irreparable harm in the event that 1st respondent is not prohibited from its unlawful actions in that its battery will extensively damaged. The balance of convenience so it was submitted favours the granting of the interdict since it is applicant only who stands to suffer irreparable prejudice due to 1st respondent's unlawful actions. Finally applicant argued that it is unable to get enough coal supply from anywhere else except from 2nd respondent.

The application was opposed by the 1st respondent which raised a couple of points *in limine* and on the merits. It was argued that the 2nd respondent is contracted by the 1st respondent to mine coal for and on behalf of the 1st respondent. This is so because 2nd respondent does not own any mining rights and in terms of the contract between 1st respondent and 2nd respondent, 2nd respondent can only sell or market coal to the domestic market upon approval in writing by 1st respondent or supply under 1st respondent's name. Reliance was also placed on the fact that applicant owes 1st respondent ZWL$14 975 426-09. The 1st respondent submitted that reminding a party to a contract of the terms of the contract can never be said to be unlawful or a threat or manipulation of the so reminded party.

It was 1st respondent's argument that 2nd respondent continued selling coal to the applicant illegally after it had written to the former to desist from its illegal conduct. Applicant's relief seeks to perpetuate an illegality by encouraging a party to breach a valid contract.

As regards the web of intricate relationships amongst the parties, it has been revealed by the 1st respondent that it is a minority shareholder in the applicant and this is why applicant has always been getting coal from 1st respondent. Therefore 1st respondent would not unnecessarily starve applicant of coal. However, because of its legal problems with the 1st respondent some of which are before the courts, applicant has instead of setting its account with the 1st respondent resorted to getting coal from the 2nd respondent who for reasons best known to it has been breaching its contract with 1st respondent by supplying coal to applicant without written approval from 1st respondent.

Despite the opposition, this court per MABHIKWA J granted the Provisional Order shown above. It is this provisional order which comes for confirmation or discharge. Both

parties filed heads of argument. Applicant persisted with its argument that leave from the Administrator was not necessary because the conduct complained about in the application was directed by the 1st respondent's Acting Managing Director representing 1st respondent. The Administrator was at no stage involved in the decision to bar 2nd respondent from supplying applicant with coal. Further, applicant argued that 1st respondent is therefore estopped from seeking to involve the Administrator where it suits it to do so.

Alternatively, applicant submitted that the application was an extra-ordinary relief. Any effort to try to seek permission of the alleged Administrator would have defeated the whole purpose of urgency. The need to act on an urgent basis arose on a Saturday when the application was promptly put together and subsequently filed on a Sunday. It is under these circumstances that the applicant could not have been reasonably expected to run around approaching a closed office to seek permission to protect an impending irreparable harm. Each case should be dealt with on its own circumstances and merits.

Finally, applicant contended that the 1st respondent's reliance on *Mzwimbi & others* v *Reserve Bank of Zimbabwe & Ors* 2005 (2) ZLR 132 (S) is misplaced in that it is clearly distinguishable from the present case for the following reaons;

1. In the Mzvimbi case, it is the applicants' rights and powers as shareholders that had been suspended by virtue of section 53 of the Banking Act.

2. Applicants in the Mzvimbi case had alternative remedy of filing an appeal to the Reserve Bank in terms of section 55 (4) of the Banking Act whereas in the present case there is no alternative remedy.

3. The conduct complained of in the Mzvimbi case was directly attributed to the curator whereas in the present case the conduct under scrutiny was directly attributed to the Acting Managing Director representing 1st respondent.

The issue of not obtaining leave first was dealt with by MABHIKWA J in his judgment granting the provisional order. After hearing argument the Learned Judge condoned applicant's failure to seek leave under rule 7 of this court's rules. In doing so the Judge used his discretion.

However 1st respondent argued that the court erroneously granted condonation *mero motu* since the applicant did not move the court to condone its failure to seek leave. The 1st respondent is inviting me to decide whether or not MABHIKWA J's use of discretion was proper. I doubt that this would be a proper procedure to follow.

On the merits the 1st respondent's argument is that its conduct is lawful and an interdict is not a proper remedy. The basis of this submission is that the contract between 1st and 2nd respondent contains a restraint of trade clause which is binding and enforceable in our law.

See *Book* v *Davidson* 1988 (1) ZLR 365,

*Mangwana* v *Mparadzi* 1989 (1) ZLR 79

*National Foods Ltd* v *Mitchell (Pvt) Ltd t/s Makhell's Bakery* 1997 (2) ZLR 14

The 1st respondent insisted that all it did was to direct 2nd respondent not to sell coal to applicant in breach of its contract. Such conduct is lawful as it is meant to protect 1st respondent from ordinary trade competition by 2nd respondent. Conduct which is lawful cannot be interdicted. *Airfield Investments (Pvt) Ltd* v *Minister of Lands, Agriculture & Rural Resettlement and Ors* 2004 (1) ZLR.

**THE LAW**

The broad issue is whether or not the applicant has established the requirements of a final interdict. A final interdict is in the court's discretion. Unlike an interim interdict, which does not involve a final determination of rights of the parties, a final interdict effects such a final determination of rights. It is granted in order to secure a permanent cessation of an unlawful course of conduct or state of affairs. There are three requisites, all of which must be present, namely;

1. Clear right
2. An act of interference
3. No other remedy

**CLEAR RIGHT**

The word clear relates to the degree of proof required to establish the right and should strictly not be used to qualify right at all. The existence of a right is a matter of substantive evidence. In order to establish a clear right the applicant has to prove on a balance of probability the right which he seeks to protect. See C.B Prest, *The Law of Interdicts Juta & Co* 1993 at page 43.

**AN ACT OF INTERFERENCE**

What is meant here is an act which constitutes an invasion of another's right. This was described by KOTZE CJ as 'an act actually done by the Company (resp) showing an interference with the exercise of any alleged rights possessed by the Government (applicant); nor does it appear that there exists any well-grounded apprehension that acts of the kind will be committed by the respondent." *B & K* v *The Transvaal Gold Exploration & Land Co* 1883 ISAR 75 at 76.

The test for apprehension is an objective one. Applicant must show objectively that his apprehensions are well grounded in that the facts grounding his apprehension must be set out in the application to enable the court to judge for itself whether the fears are indeed well grounded. In other words, the apprehension must be induced by some action performed by the respondent.

**NO OTHER REMEDY**

There should be no other satisfactory remedy available to the applicant. Where there is an existing remedy with the same result, for the protection of the applicant an interdict will not be granted.

**APPLICATION OF THE LAW TO THE FACTS**

Applicant has established a clear right arising from contracts it has with 1st and 2nd respondents for the supply of coal for its use. This is common cause. Applicant has also proved that it operates a delicate plant that requires constant and uninterrupted supply of coal. Applicant, 1st and 2nd respondent's business operations are interwoven by virtue of the triple contracts entered into by the parties. The 1st respondent as a coal miner contracted 2nd respondent to mine coal for it. The 2nd respondent is remunerated in coal by 1st respondent.

The 2nd respondent does not have coal mines of its own and the only coal it has is that paid to it by the 1st respondent in terms of the mining contract. The 2nd respondent has a contract to supply coal to the applicant. This can only be done with 1st respondent's consent.

From the above condition, it is apparent that 1st respondent wields a lot of power over the ownership of coal and its supply to the applicant. It is for this reason that I do not agree with *Mr Majoko* that "as against the 1st respondent applicant has no colour of right." Applicant has proved on a balance of probabilities that it has a clear right to be supplied with coal by both 1st and 2nd respondents.

**NO OTHER REMEDY**

On the facts of this case, the applicant does not have another satisfactory remedy with the same result. Either the applicant secures sufficient volumes of coal timeously or its plant collapses. The 1st respondent has admitted that there are no other sources of coal open to the applicant other than those it controls. It seems applicant's operations can be crippled instantly without the cooperation of the 1st respondent. Perhaps this is why its shareholding is so structured.

The objective is to keep the 1st respondent financially attracted to applicant's existence. As long as the triple entente remains in place, applicant will remain ensnared.

**AN ACT OF INTERFERENCE**

It is 1st respondent's argument that it did nothing illegal as all that it did was to enforce its contractual rights against the 2nd respondent upon the latter's breach of the contract. *Prima facie*, this argument is tenable. However if one scratches the surface further, one discovers that the 1st respondent's conduct is not lawful in that it did not only "orally issue a bar" but also assigned its personnel to the weighbridge to prevent any trucks destined to the applicant's plant from loading. See Annexure D on page 13 of the record of proceedings. It is common cause that 1st respondent did this without a court order. Sight must not be lost of the fact that 2nd respondent mines at 1st respondent's sites. As a result 1st respondent wields tremendous authority over 2nd respondent's operational capacity.

In my view this is the act of interference complained of. I agree with *Mr Majoko* that no one can expect 1st respondent to stand and watch while its contractual rights are being

trumpled upon. The point of the departure is that in my view, the 1st respondent should have sued the 2nd respondent for breach of contract seeking its cancellation and damages instead of resorting to self-help by physically preventing the supply of coal to the applicant.

More importantly, it is not up to 1st respondent to unilaterally declare that there has been a breach by 2nd respondent and then take drastic measures without a court order confirming such breach.

**DISPOSITION**

The applicant has made a proper case for the confirmation of the Provisional Order.

In the result the Provisional Order be and is hereby confirmed with costs.

*Zinyengere Rupapa, c/o Joel Pincus, Konson & Wolhuter*, applicant's legal practitioners
*Majoko & Majoko*, 1st respondent's legal practitioners
*Makururu & Partners*, 2nd respondent's legal practitioners