APPROUC CONSORTIUM

Versus

BIG VALLEY MASTERS (PRIVATE) LIMITED

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 26 MAY AND 23 JUNE 2022

Opposed Application

A. Mutatu, for the applicant
Ms C Dube, for the respondent

MAKONESE J: The applicant in this matter initially filed an urgent application under case number HC 1787/21. The urgent application was opposed. Under HB 272-21, DUBE-BANDA J held that the matter was not urgent as contemplated in Rule 60 of the High Court Rules 2021. The application was struck off the roll of urgent matters with no order as to costs.

The applicant has pursued its application on the opposed roll. The respondent has opposed the relief sought and prayed for dismissal of the plaintiff's claims. The relief sought by the applicant is in the following terms:

"**IT IS ORDERED THAT**:

1. The agreement between the applicant and the respondent dated 21st May 2021 be and is hereby terminated.

2. The respondent be and is hereby interdicted from interfering with the removal of the applicant of its equipment listed in paragraph 17 of the founding affidavit from the Carbon in Pulp at Skyrocket 1 Registration Number 16485 and Dunvegan Registration Number 15188, Shurugwi.
3. The respondent pays costs of suit on an attorney and client scale."

BACKGROUND FACTS

On the 21st May 2021 the parties signed a joint venture agreement for the purposes of processing of gold ore at Skyrocket registration number 16485, and Dunvegan registration number 15188, Shurugwi. It was a term of the agreement that the mining venture would remain in operation for a year. The parties agreed to carry out the business of tailings processing, consisting of regrinding and mechanically assisted agitated leaching of gold (Carbon in Pulp) from the tailing dumps situate on the mining claims. It was agreed that respondent would contribute, among other things immovable and moveable assets at the claims in Shurugwi, including existing plant and equipment. Applicant would take responsibility for the financial expenses towards the completion and commissioning of the existing (CIP) plant at the claims. It was further agreed that all equipment installed at the claims by applicant would remain its property until the expiration of the agreement. The parties would share profits and losses at the ratio of respondent 70% and applicant 30%. The agreement did not go according to plan. The applicants contend that they were not receiving due profits from the transaction.

On 12th November 2021, the parties agreed to terminate the agreement by mutual consent. A dispute arose when applicant sought to remove its equipment from the plant as provided for in the written agreement. Applicant avers that on 15th November 2021, it received a letter from the respondent communicating a different narrative. Applicant avers

that respondent intends to retain the installed equipment and pay a sum of USD 200 000 upon production of the value of the equipment. It is contended by the applicant that respondent wants to keep the plant running whilst using the equipment belonging to the applicant. It is argued by the applicants that the position taken by the respondent is in clear violation of clause 3 (ii) (e) of the agreement.

Respondent takes a different stance to the dispute. Respondent concedes that the agreement was terminated by mutual agreement, however it denies that the parties agreed to the removal of the equipment installed by the applicant. Respondent contends that it offered to pay the sum of USD $200 000 for the equipment. Respondent avers that the agreement between the parties was that the applicant would be paid for the value of the equipment. It is against this background that the applicant has filed this application and sought the relief sought in the Draft Order.

The facts of the matter and the background to this dispute appears clear and straightforward.

SUBMISSIONS BY THE APPLICANT

It is not in dispute that the parties entered into a written joint venture agreement on 21st May 2021 for the processing of gold ore. In terms of the agreement the applicant was to supply plant and equipment which was to be installed at Skyrocket 1 registration number 16485 and Dunvegan registration number 15188. These mining claims belong to the respondent. In terms of the agreement, ownership of the equipment was to remain with the applicant's until expiry of the agreement by virtue of the provisions of the agreement.

Applicant submits that pursuant to the agreement, the applicant installed various moveable properties to the CIP plant. This equipment includes the following:

1. 25 ton Bin Complete with 60 mm aperture screen

2. 12m inlet conveyor complete with conveyer belt, idlers, drive and tail pulleys, inlet and outlet chute, drive motor and gearbox and steel frame.

3. Ball Mill Complete with various components.

4. Electrical equipment.

5. CIP feed trash screen complete with motor, gearbox, trammel screen, bearings and collector bin.

6. Tailings carbon safety screen complete with motor, gear box, trammel screen bearing and collector bin and switch gear.

7. Carbon cleaning trammel screen with complete motor, gear box, trammel screen, bearing and collector bin and switch gear.

8. Dosing pump for coagulant complete with papers.

9. 63 and 53 mm poly pipe from plant to tailings dam.

10. Tailings return pump switch gear.

11. Tailings dam lights.

12. 1 x 3 kw tailings return pump.

13. 1 x 5.5 kw tailing return pump.

14. 1 ton activated carbon

15. Mat Weld invetor welding machine

16. Bosch 125 mm angle grinder.

17. Metabo drilling machine.

18. Bosch 250 mm angle grinder.

19. Gedore socket set.

20. 36 mm spanner.

Applicant contends that the equipment installed on the plant is in excess of USD 300 000 in terms of value. It is not disputed that the reason for the parties entering into a joint venture was the inability of the respondent to activate the plant on its own. Applicant avers that the respondent continues to run the plant without remitting any profits to it.

Applicant contends that it has established a clear right to the equipment in that the written agreement of sale clearly spells out the rights and obligations of the parties. The signed agreement was valid for a period of 12 months. Any termination of the agreement before the effluxion of time entitles the applicant to recover the equipment it installed on the plant.

In terms of clause 3 (ii) (e) of the agreement entitles the applicant to retain its equipment. The agreement was terminated before the effluxion of time and hence the ownership of the equipment remains with the applicant. The right to the equipment is a clear right established by the clear terms of the written agreement.

Applicant avers that there is reasonable apprehension of injury in that the equipment is being used by the respondent since November 2021. The equipment is subjected to wear and tear and there are no safety measures to ensure that the equipment is not damaged, stolen or destroyed. Applicant's employees have been chased from the plant and this exposes the applicant to further potential harm or damage to the equipment.

Applicant argues that there is no other remedy. The only available remedy that is efficient and effective is the restoration of the property to the applicant. The respondent has no capacity to pay reasonable compensation for the equipment. At the hearing of the matter, the respondent proposed to pay for the equipment for a very low value. Even then, it would take the respondent over 2 years to pay for the equipment. Respondent admitted at the hearing of the matter that the respondent has no capacity to pay for a fair value of the equipment in a lump sum. Applicant avers that what led to the cancellation of the agreement were misrepresentations made by the respondent prior to the signing of the agreement. The plant was producing low grade ores which resulted in the operations sliding into the negative financially, making the whole venture a futile exercise. Applicant contends that the only available, efficient and effective remedy is the removal of the equipment in terms of the contract. Any other remedy will expose the applicant to serious loses.

As regards the balance of convenience, the applicant argues that the agreement between the parties gave the applicant the mandate to run the plant. The respondent has however, sought to prevent the applicant from accessing the plant. Upon termination of the agreement, the applicant had the clear right to remove its equipment in terms of the agreement. Notwithstanding the clear provisions of the agreement, the respondent refuses to act in accordance with contract. The balance of convenience clearly favours the applicant in that applicant is bound to suffer prejudice if the equipment is not removed by the applicant. Applicant avers that the respondent has shown that it has no capacity to restitute the applicant for the equipment installed on the plant.

SUBMISSIONS BY THE RESPONDENT

The respondent admits that the joint-venture agreement was terminated by mutual consent on 12th November 2021. The agreement was terminated prior to the expiry of the

duration of the contract. Respondent avers that instead of removing the equipment installed by the applicant it was willing to compensate the applicant the sum of USD$200 000. Respondent avers that the applicant agreed to receive compensation for the equipment. This position is denied by the applicant who rejected the offer for compensation. Respondent contends that for reasons best known to it, the applicant shifted goal posts regarding the issue of compensation. On the 15th of November 2021 applicant through its legal practitioners wrote a letter to the respondents indicating that it did not need compensation and that it intended to remove its equipment.

Respondent avers that following the termination of the agreement it has always acted in good faith in making all efforts to protect both parties' interests. Respondent contends that following the termination of the agreement, its personnel discovered that some of the property had been vandalized. The matter was reported to the police at Shurugwi.

The respondent opposes the application on the grounds that upon termination of the agreement, the parties discussed the matter and agreed that instead of removing the equipment from the plant, the applicant should receive compensation. As stated earlier in this judgment, the allegations of any agreement on compensation are denied by the applicant.

Respondent avers that the applicant's case is based on speculation that its equipment might be damaged by the respondent without demonstrating any reasonable apprehension of harm or damage to the equipment.

WHETHER APPLICANT HAS SATISFIED THE REQUIREMENTS FOR A FINAL INTERDICT

The requirements for a final interdict are now well settled in our law. C.B Prest: *The Law and Practice of Interdicts (SA: Juta Law: 2014)* pp 34-80 the learned author discusses

the requirements of the Law of Interdicts in detail. Specific reference is made to the leading case of *Setlogo* v *Setlogo* 1914 AD 221. The case has been cited with approval in *Econet Wireless Holdings* v *Minister of Information* 2001 (1) ZLR 373 at 374 B; *Airfield Investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004 (1) ZLR p 511; *Zesa Staff Pension Fund* v *Mushambadzi* SC 57/02.

From these cases the requirements for a final interdict may be summarised as follows:

1. a clear right which must be established on a balance of probabilities.

2. irreparable injury actually committed or reasonably apprehended; and

3. the absence of a similar protection by any other remedy.

I shall discuss each these requirements in turn.

CLEAR RIGHT

The written agreement between the parties provides as follows in paragraph 3 (ii) (e):

"All equipment installed at the claims by the consortium shall remain the property of the 2nd party until expiration of this agreement whereupon it will revert to the 1st party."

This clause does not need any further interpretation. The agreement between the parties was terminated by mutual consent prior to the expiration of the agreement. The property in dispute therefore remained the property of the applicant. The clause admits of no other interpretation.

The doctrine of the sanctity of contract binds the respondent to respect the agreement it willfully entered into. In *Magodora & Ors* v *Care International Zimbabwe* 2014 (1) ZLR 397 (S) at page 403 the Supreme Court held that:

"In principle, it is not open to the courts to re-write the contract entered into between the parties or excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. See: Walls v South African Alumenite Company 1927 AD 69 at 73; Christie: The Law of Contract in South Africa 3rd ed at pp 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See: South African Mutual Aid Society v Cape Town Chamber of Commerce 1962 (1) SA 598 (A) at 615; First National Bank of SA Ltd v Transvaal Rubgy Union & Anor 1997 (3) SA 851 (W) at 864 E-H."

In Printing Registering Co v Sampson 19 Eq 462 at 465 it was stated thus:

"If there is one thing that more than any other, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be enforced by courts of justice. Therefore you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract."

It is clear that the respondent is attempting to craft a new contract for itself. The respondent cannot do so because a contract already exists between the parties entitling the applicant to retake the equipment. See: *Agribank* v *Machingaifa & Anor* 2008 (1) ZLR 244 (S) where the learned Judge of Appeal held in a slightly different context that:

"*Such an entitlement could not be changed, altered or amended at whim on the basis that the appellant was entitled to change its policies and procedures from time to*

time. A party to a contract cannot unilaterally alter the terms and conditions of the contract in these circumstances."

There can be no doubt that when the agreement was cancelled, the respondent's right to use the equipment was automatically extinguished. The applicant established a clear right. This much cannot be contested.

IRREPERABLE INJURY ACTUALLY COMMITTED OR REASONABLY APPREHENDED

For an application of this nature to succeed the applicant must establish that there is an actual injury committed by the respondent or reasonably apprehended injury. Reasonable apprehension or irreparable harm implies that the court must exercise its discretion as to whether an applicant could or could not be placed in the same position in which he was before the infringement or threatened infringement of his rights. In this case, if applicant is not allowed to remove its equipment, it will be placed in the same position in which it was before the infringement of its right by the respondent.

In this matter there is actual injury that has been committed by the respondent. By its own admission, the respondent confirms that some of the applicant's property has already been stolen or vandalized. In addition the respondent continues to use the equipment and the equipment is exposed to deterioration due to wear and tear. Applicant has demonstrated that actual injury has been committed against it.

See: *Setlogo* v *Setlogo* (supra)

ABSENCE OF ANOTHER REMEDY

It is trite that an alternative remedy must be (a) adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; and (d) grant similar protection.

See: *Triback (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 52 (S).

At the hearing of this matter, the parties disclosed that various attempts to resolve the matter had failed. On the one hand, the respondent argued that the removal of the equipment would cause damage to the plant. The applicant tendered into the record various annexures showing that the major components such as Ball mill, 25 ton Bin, and electrical installations can be easily removed without damage to the plant. It became apparent that the respondent is not willing to make fair and reasonable compensation. In any event it would take the respondent more than two years to pay the amount of compensation they had originally offered to the applicant. The remedy which is generally available under contract law is not available in this case. It is common cause that when the agreement was terminated the respondent has been using the equipment. The property continues to lose value as it is being used by the respondent exclusively. If the property vandalized, damaged or stolen, the applicant would have suffered immeasurable loss. It does not make sense for the applicant to wait for the property to be destroyed and then seek to have the injury inflicted upon it quantified and paid as damages. In *Heilbron* v *Blignant* 1932 WLD 167 at 169, the court held that;

> *'If an injury which could give rise to a claim is apprehended then I think it is clear law that the person against whom injury is about to be committed is not compelled to wait for the damage and sue afterwards for compensation, but can move the court to prevent any damage being done to him."*

CONCLUSION

I am satisfied that the applicant has satisfied all the requirements for the grant of a final interdict. This application ought to succeed.

In the result, and accordingly, the following order is made:

1. The application be and is hereby granted.

2. The respondent is ordered to bear the costs of suit.

Mutatu & Partners c/o Mutatu, Masamvu & Da Silva Gustavo Law Chambers, applicant's legal practitioners
Chitere Chidawanyika & Partners c/o Dube-Tachiona & Tsvangirai, respondent's legal practitioners