POMELO MINING (PVT) LTD
versus
ANNANDALE TRUST
and
ADDINGTON BEXLEY CHIKOMBORERO CHINAKE N.O

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 3 July, 2018 and 11 July 2018

Urgent Chamber Application

Mr Nyapandi, for the applicant
Mr Madya, for the respondents

MUZOFA J: In this urgent chamber application, the applicant seeks an interim order in the following terms that,

> "1. The arbitration proceedings set down for July 3, 2018 at 9.00am be and are hereby stayed pending the finalization of the application in terms of Article 13 (3) of the Arbitration Act of Zimbabwe under HC 4914/18.
> 2. The 1st respondent be and is hereby ordered to pay the costs of this application
> And in the final order that,
> "1. At the hearing of this matter 1st respondent shows cause why this order should not be granted as the final relief.
> 2. Costs be in the cause."

The background to this matter is not in dispute. The applicant and the first respondent are embroiled in a dispute. The dispute was referred to arbitration in terms of the agreement between the parties. The second respondent was appointed by the Chairman of the Commercial Arbitration Centre as the arbitrator in the dispute. From the time the second respondent was appointed, the applicant objected to the appointment of the second respondent preferring a retired judge. On the 10th of May 2018 the applicant and the first respondent appeared before the second respondent for a pre-arbitration hearing. In the hearing the applicant raised preliminary objections as to the appointment of the second respondent and also alleged that a likelihood of bias by the second respondent. The preliminary points were dismissed. On the 29th of May 2018, the applicant filed

an application in this court in terms of Article 13 (3) of the Arbitration Act [*Chapter 7:15*] "the Act" seeking on order for the recusal of the second respondent.

Thereafter the applicant and the first respondent's legal practitioners were in communication as to the way forward in the matter. On 30 May 2018, the first respondent's legal practitioners by letter to the applicant's legal practitioners set out what transpired between the parties *inter alia* and advised that they intended to seek a date for the continuation of the matter from the second respondent.

In response to that communication, by letter dated 31 May 2018 the applicant's legal practitioners advised the first respondent's legal practitioner that, instead of the matter proceeding before the second respondent, they preferred that the application before this court be determined first. On 13 June 2018, the first respondent's legal practitioners wrote a letter to the second respondent in which among other issues requested that the matter be set down for continuation. The letter was served on the applicant's legal practitioners. On 21 June 2018 the first respondent's legal practitioners addressed a letter to the applicant's legal practitioners, responding to a request for further particulars from the applicant. In that letter the first respondent reiterated its intention to have the matter continue before the second respondent, particularly in view of applicant's conduct in dealing with the matter. It was alleged the applicant was employing delaying tactics.

On 28 June 2018, the second respondent served the applicant's legal practitioners with a notice of set down for the matter to continue on the 3rd of July 2018.The applicant then filed this application on the 29th of June for stay of the arbitration proceedings pending determination of the application made in terms of Article 13 (3) of the Act which is pending before this court.

At the hearing of the application, the applicant submitted that the matter is urgent, the applicant acted when the need to act arose and if the matter is not dealt with irreparable harm could befall the applicant. Applicant submitted that the application made in terms of Article 13 (3) of the Act gave the second respondent an option either to hold the proceedings in abeyance or to proceed. The applicant became aware of the second respondent's decision to proceed with the matter on the 28th of June when a notice of set down was served on it.

Further it was submitted that there is no remedy to protect the applicant, because if the second respondent proceeds to deal with the matter there is a likelihood that a decision prejudicial to the applicant may be made. The applicant does not have to wait until the harm manifests in the

sense of the decision, it should take pre-emptive measures. It did by filing the application pending before this court.

The application was opposed. Two points were taken at the outset that the application was defective in that it was neither on Form No 29 nor Form 29B. It did not set out the basis of the application but it set out the relief sought. Further that even if rule 299C of the High Court Civil Rules, 1971 provides that the use of one of the said forms instead of another cannot be a basis to defeat an application. In this case, the applicant did not use any of the said forms. Secondly that, the applicant has dirty hands in that at all times before the second respondent, the applicant failed to comply with the given directives.

On urgency, the respondent submitted that the matter is not urgent, the applicant did not treat it as urgent. After the decision of the second respondent dismissing the preliminary objections, the applicant was aware that the matter would proceed before the second respondent. In the decision by the second respondent, directives were given on how the matter was to proceed. At the time of filing the application in terms of Article 13 (3) of the Act, the applicant should have acted to protect its rights and applied for stay of the arbitration proceedings, it did not.

It was also submitted that on 23 May by letter from the first respondent, the applicant was asked to confirm if it was able to meet the deadlines set out by the second respondent. Applicant indicated it was unable to file on time since its Counsel was out of the country. At this point applicant was aware the matter was to proceed. The notice of set down was just the day of reckoning and that does not constitute urgency. Even after the request for set down dated 13 June, applicant did not act. It was clear the matter was to proceed. Further to that, it was submitted that no irreparable harm would befall the applicant if the matter is not dealt with. The applicant has recourse in terms of Article 34 of the Act, to have the second respondent's decision reviewed by this court.

In response, the applicant submitted that the need to act arose after the set down of the matter. What transpired before the filing of the application in terms of Article 13 (3) is irrelevant. In relation to the application it was submitted that the substance of the application is well set out and the first respondent was able to respond. There was no prejudice.

On dirty hands, it was submitted that the principle applies in circumstances where a party fails to comply with the law. The directives by the second respondent, the arbitrator were not law.

It was also stated that the Act has provisions to deal with a failure to comply with directives and that cannot be used to defeat this application.

Nothing much turns on the two issues raised at the outset for the first respondent. The application is not on either Form 29 or 29 B. Rule 241 (1) provides for modifications to suit the application.

In *casu,* the application sets out the substance of the relief sought, it sets out what the respondent should do and the *dies induciae* and attached to it are the relevant affidavits setting out the facts upon which the applicant relies. I do not find anything out of line with the essence of Form 29 to justify the dismissal of the application. The respondent was able to respond to the application, there was no prejudice to the respondents. There is no merit in the point.

The issue on dirty hands was abandoned after the court inquired whether the consequences of a default were not adequately addressed in the relevant Act.

Urgency

Where a chamber application is accompanied by certificate urgency it is for the applicant to establish that the matter is urgent deserving to be attended to ahead of other cases.

There is ample authority on what constitutes urgency. The applicant must act when the need to act arose and should have treated the matter as urgent in the sense that there must be action to avert the threat immediately and not wait for doomsday to arrive. The applicant must also show that it will suffer irreparable prejudice if the relief sought is not granted immediately. See *Madzivanzira & Others* v *Dexprint Investment (Pvt) Ltd & Another* HH 245/02, *Dexprint Investments (Pvt) Ltd* HH 120/12.

In *casu* I do not think the applicant acted when the need to act arose. It is not in dispute that the second respondent after handing down the ruling on the preliminary objections by the applicant gave directives on how the matter will proceed. This was the first indication that the matter was to proceed before the second respondent. Applicant exercised its rights and approached this court in terms of Article 13(3) of the Act. At the time of making such an application the applicant was aware of the second respondent's intention to proceed with the matter, nothing was done to stay the proceedings.

First respondent advised applicant that it will request for a set down date for continuation which was subsequently done on 13 June still applicant did not do anything to stay the proceedings.

The applicant did not even object to the request for set down by the first respondent. In my view the request for set down with no objections from the applicant addressed to the second respondent meant one thing that the matter would be set down.

The wording in Article 13 (3) does not automatically stay the arbitration proceedings, it provides

> 'If a challenge under any procedure agreed upon by the parties or under the procedure of para (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the High Court to decide on the challenge, which decision shall be subject to no appeal, while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award."

The article gives the arbitrator discretion. In this case it is my considered view that in the circumstances of the case, it was evident that the second respondent would proceed to deal with the matter. Second respondent had dismissed the preliminary objections which challenged his appointment. There was a request that the matter be set down for hearing, applicant did not object. Applicant actually also gave indicators that it would proceed with the hearing by indicating that it would be unable to meet the timelines given by the second respondent due to the absence of its counsel.

It was for the applicant to protect its interest as soon as there were indicators that there was a real risk that the matter was going to proceed and not to wait until the risk manifested by way of the date of set down.

I do not believe that applicant acted at the time the need to act arose.

Irreparable Harm

The irreparable harm contemplated is that in the event that the matter is not dealt with and the order not granted immediately the applicant will suffer permanent, irreversible harm or harm that is beyond repair.

According to the applicant, there is a likelihood of a biased decision by the second respondent. The basis of the likelihood of bias does not concern this court. Applicant submitted that it does not have to wait until the harm is manifest; it has a right to take preemptive measures to avert the harm. There is no alternative remedy except to stay the arbitration proceedings.

I do not believe that there is irreparable harm in this case. Indeed in the event that this matter is not dealt with immediately, the second respondent may proceed to deal with the matter.

Dealing with the matter *per se* is not the problem. The applicant's apprehension is the outcome of the arbitration process that it may be against the applicant. The arbitral award is not an end in itself. In terms of Article 34 the applicant can still challenge the award based on the reasons set out in the Article 13(3) application. For that reason there is no irreparable or irreversible harm that can befall the applicant. There is a clear alternative remedy available to the applicant.

I must say in passing that, *quasi-judicial* proceedings should be allowed to take their course so that a matter may reach its logical conclusion. Applications upon applications can only achieve one thing, to delay the disposal of the main matter on the merits, yet the tenets of justice require that matters be disposed on the merits.

From the foregoing I find no urgency in the matter. The following order is made.

The matter not being urgent be and is hereby struck off the roll of urgent matters.

Muza & Nyapadi, applicant's legal practitioners
Wintertons, 1st respondent's legal practitioners