REPORTABLE (42)

Judgment No. SC 51/03
Civil Appeal No. 113/03

STANMARKER MINING (PRIVATE) LIMITED

v METALLON CORPORATION LIMITED

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA JA
HARARE, NOVEMBER 25, 2003 & JANUARY 15, 2004

J C Andersen SC, with him *G Mutha-Valla*, for the appellant

E W W Morris, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's application for an order, *inter alia*, confirming the jurisdiction of the High Court in a dispute between the appellant ("Stanmarker") and the respondent ("Metallon"), and granting leave for the service of Stanmarker's summons and declaration in respect of its claim for damages against Metallon to be effected at Metallon's registered office in Johannesburg, South Africa.

The factual background is as follows. Stanmarker is a mining company registered in terms of the laws of Zimbabwe, and Metallon is a South African company with its registered office in Johannesburg.

On or about 24 June 2002, Stanmarker and Metallon concluded a written agreement in respect of their intended acquisition of the shares in

Independence Mining (Private) Limited ("Independence"), a Zimbabwean company which owns five gold mines in Zimbabwe – How Mine, Shamva Mine, Arcturus Mine, Mazowe Mine and Redwing Mine. The acquisition was to be effected through a company to be incorporated in Zimbabwe ("Newco").

At the relevant time Independence was a wholly owned subsidiary of Cableair Limited ("Cableair"), a private company limited by shares and incorporated in the United Kingdom. In turn, Cableair was a wholly owned subsidiary of Lonmin Public Limited Company ("Lonmin"), incorporated in the United Kingdom. Lonmin was, therefore, the holding company of Cableair, which was the holding company of Independence, which owned the five mines.

Lonmin intended to dispose of its shares in Cableair and, consequently, divest itself of its interests in Independence. Thus, on 28 October 2002 Lonmin wrote to the Minister of Mines and Mining Development ("the Minister") as follows:

> "May we take the opportunity first of all to explain that the sale of our Zimbabwe assets is the result of a decision taken, and made public some time ago, to concentrate on our core business only, which is the mining and refining of platinum group metals."

The agreement concluded by Stanmarker and Metallon on 24 June 2002 was in the form of written Heads of Agreement ("the Heads"). Clause 2.2 thereof provided as follows:

> "These Heads set out the main principles upon which the parties will negotiate the detailed written agreements referred to herein. These Heads (save for 2.3, 9, 10 and 11) accordingly do not constitute legally binding rights and obligations on the parties hereto. These Heads will fall away and be of no force and effect upon the signing of the detailed written agreements and them becoming unconditional in accordance with their terms."

Thus, the only legally binding rights and obligations were those set out in Clauses 2.3, 9, 10 and 11.

Clause 2.3 provided as follows:

> "The parties undertake with effect from the signature date and until the expiry of three months thereafter that they will negotiate with each other in good faith in respect of the detailed written agreements and that, subject to 3.5, they will not negotiate with Lonmin or any other person in respect of any matter relating to the acquisition of all or part of the share capital, assets or business of Independence or its immediate holding company."

Clause 3.5, referred to in Clause 2.3, provided as follows:

> "Metallon shall, on behalf of Newco, negotiate with Lonmin and make an offer to acquire Independence or its immediate holding company for the amount of approximately twelve million US Dollars or such other amount agreed upon between the Shareholders."

Finally, Clause 11.1 provided as follows:

> "From the signature date and for a period of three months thereafter, neither party shall, without the prior written consent of the other party, engage in or enter into discussions with any other party with an interest in acquiring the share capital or business of Independence or its immediate holding company and/or engage in or enter into discussions with any other party desirous of achieving similar objectives than, or competing with, Newco."

Subsequently, Metallon pursued negotiations with Lonmin which resulted in an agreement of the sale of the shares in Cableair to Pemberton International Investments (Pty) Ltd ("Pemberton"), a company incorporated in terms of the laws of the British Virgin islands with its registered office in the Virgin Islands. Regrettably, in its opposing affidavit Metallon did not indicate what its relationship was with Pemberton.

However, it is pertinent to note that whilst Metallon alleged that the shares in Cableair were acquired by Pemberton, on 5 November 2002 Mzilikazi Khumalo ("Khumalo"), the chief executive of Metallon, wrote to the Minister as follows:

> "This serves to confirm that Metallon Corporation Limited, a black-owned South African company controlled by myself, has acquired 100% of Independence Gold Mining Zimbabwe (Private) Limited from Lonmin Plc." (emphasis added)

It does appear, therefore, that either Pemberton was a wholly owned subsidiary of Metallon, or that it acquired the shares in Cableair for and on behalf of Metallon.

Whilst Metallon admitted that it pursued negotiations with Lonmin which resulted in the sale of the shares in Cableair being concluded, it denied that the negotiations were embarked upon before the restraint period of three months, specified in Clauses 2.3 and 11.1 of the Heads, expired.

In the circumstances, Stanmarker decided to institute a civil action in the High Court against Metallon claiming damages for breach of contract in the sum of US$27 315 797.00. However, as Metallon is a *peregrinus*, and the High Court did not, therefore, have the jurisdiction to entertain such an action, which sounded in money, unless the defendant was within Zimbabwe, or property belonging to the defendant was within Zimbabwe and could be attached in order to confirm the jurisdiction of the High Court, Stanmarker applied in the court *a quo* for an order confirming the jurisdiction of that court in the proposed action.

That application was subsequently dismissed with costs on the ground that the beneficial interest which Metallon had in Independence was not the kind of interest which could be attached to confirm the jurisdiction of the court. Aggrieved by that decision, Stanmarker appealed to this Court.

The common law position on the attachment of property in order to confirm jurisdiction was set out by BECK J (as he then was) in *African Distillers Ltd v Zietkiewicz and Ors* 1980 ZLR 135 (GD) at 136 F-H as follows:

> "The well settled common law, for which there is no dearth of judicial authority, is that for claims that sound in money brought by an *incola* or a *peregrinus* against a *peregrinus*, there must be an arrest of the person of the defendant *peregrinus* or an attachment of his property within the territorial jurisdiction of the Court in order to found jurisdiction, or to confirm jurisdiction in those cases where some other jurisdictional ground exists in relation to the claim – such as, for example, that it arises from a contract concluded or a delict committed within the Court's territorial limits of jurisdiction. Such arrests or attachments are necessary in order to satisfy, albeit only partially and imperfectly in some cases, the doctrine of effectiveness, for the Court will not concern itself with suits in which the resulting judgment will be no more than a *brutum fulmen*. (*Foord v Foord* 1924 WLD 81 at 87; *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (AD) at 300D and 307A-311E)."

The common law position was altered by s 15 of the High Court of Zimbabwe Act [*Chapter 7:06*] which reads as follows:

> "In any case in which the High Court may exercise jurisdiction founded on or confirmed by the arrest of any person or the attachment of any property, the High Court may permit or direct the issue of process, within such period as the court may specify, for service either in or outside Zimbabwe without ordering such arrest or attachment, if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached, and the jurisdiction of the High Court in the matter shall be founded or confirmed, as the case may be, by the issue of such process."

Thus, whereas under the common law "there must be an arrest of the person of the defendant *peregrinus* or an attachment of his property within the territorial jurisdiction of the court in order to found jurisdiction, or to confirm jurisdiction in those cases where some other jurisdictional ground exists in relation to the claim", the court now has a discretion as to whether the arrest of the defendant *peregrinus* or the attachment of his property should be ordered. However, the plaintiff still has to show that the defendant *peregrinus* is within Zimbabwe or that property belonging to the defendant *peregrinus* is within Zimbabwe and is capable of being attached.

In the present case, as the contract in question was concluded in Zimbabwe, a *causa jurisdictionis*, apart from attachment of Metallon's property, exists. Nevertheless, Stanmarker had to establish that Metallon had property in Zimbabwe which could be attached.

Having said that, I now wish to deal with Stanmarker's application to adduce further evidence on appeal. The application was made at the hearing of the appeal and was opposed by Metallon. After hearing both counsel, we reserved our decision on the matter and indicated that the decision would form part of the main judgment in this appeal.

The basic requirements which must be satisfied by the applicant in an application for leave to adduce further evidence on appeal were set out by HOLMES JA in *S v de Jager* 1965 (2) SA 612 (A). At 613 B-E the learned JUDGE OF APPEAL said:

"Accordingly, this Court has, over a series of decisions, worked out certain basic requirements. They have not always been formulated in the same words, but their tenor throughout has been to emphasise the Court's reluctance to re-open a trial. They may be summarised as follows:

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a *prima facie* likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.

See *R v de Beer* 1949 (3) SA 740 (AD) at p 748; *R v Wiemers and Ors* 1960 (3) SA 508 (AD) at pp 514-5; *R v Madikane* 1960 (4) SA 776 (AD) at p 780; *R v Nkala* 1964 (1) SA 493 (AD); …".

The above requirements were subsequently quoted with approval by this Court in *S v Mutters and Anor* 1987 (1) ZLR 202 (SC) at 204G-205A; *S v Osborne* 1989 (3) ZLR 326 (S) at 336 D-G; and *S v Kuiper* 2000 (1) ZLR 113 (S) at 116 A-C.

I now wish to examine Stanmarker's application in order to determine whether the requirements set out above have been met.

In the founding affidavit, a director of Stanmarker averred as follows:

"… at the time of the preparation, argument and determination of the case in the court *a quo*, the appellant did not have the additional information relating to the acquisition by the respondent of Independence Gold Mining Zimbabwe (Private) Limited that it seeks leave to produce. However, subsequent to the handing down of the judgment of the court *a quo* on 25 March 2003, and as a result of the conduct of the respondent in respect of the operations of Independence Gold Mining Zimbabwe (Private) Limited and its own corporate activity in Zimbabwe, the appellant has become aware of or has received from various sources, documentation which clarifies the relationship between the respondent and Independence Gold Mining Zimbabwe (Private) Limited and

> sets out in more detail the exact nature of the respondent's interest in Independence Gold Mining Zimbabwe (Private) Limited."

In determining the validity of these averments, the date when the proceedings in the court *a quo* were instituted is of crucial importance. The proceedings were instituted as an urgent *ex parte* chamber application on 30 January 2003. When it was subsequently placed before the learned judge in chambers, he directed that it be served on Metallon, and agreed to hear it later on an urgent basis. The application was later heard on 8 March 2003 and the judgment was handed down on 25 March 2003.

Some of the documents sought to be produced as additional evidence on appeal are not dated, for example, those prepared for the occasion marking the launching of Metallon in Zimbabwe. These documents show, *inter alia*, Metallon's "Family Tree", and describe Independence as a division of Metallon. The documents would not have been available to Stanmarker when the urgent chamber application was filed in January 2003 because Metallon was only launched in Zimbabwe on 3 April 2003.

However, the most important documents sought to be produced are dated, and shed a lot of light on Metallon's control over Independence and its assets.

The first of these documents is a letter bearing Metallon's letterhead and which was written to the Minister by Nonkqubela Maliza ("Maliza"), Metallon's head of corporate affairs. It is dated 12 March 2003, long after the urgent chamber application had been filed, and reads as follows:

"Dear Minister …

RE: INVITATION TO THE LAUNCH OF METALLON GOLD IN ZIMBABWE AND A TOUR OF SHAMVA MINE

The Chairman of Metallon Corporation, Mr Mzi Khumalo, would be honoured if the Minister could join him and his colleagues as they launch Metallon Gold in Zimbabwe. We would appreciate it greatly if the Minister would avail himself to deliver the keynote address at this event.

This event will be held on 03 April 2003 at 18H00 at Amanzi Restaurant, Harare, and will be followed by a visit to Shamva Mine on Friday 04 April at 10H00." (emphasis added)

The second document is another letter to the Minister, dated 28 March 2003. It was written by Maliza and, in relevant part, reads as follows:

"Honourable Minister

Further to the telephone discussion between the undersigned and Honourable Minister … we are pleased to forward:

A letter detailing our partnership with the Manyame Consortium in Independence Gold and an outline of our production and expansion plans for Independence Gold …". (emphasis added)

The third document is a letter written by Greg Hunter, a director of Metallon. It is dated 28 March 2003 and, in relevant part, reads as follows:

"Honourable Minister

CURRENT STATUS OF INDEPENDENCE GOLD MINES (PVT) LIMITED

1. SALE OF SHARES IN THE COMPANY

As mentioned in my letter dated 27th March 2003, I indicated that we had now signed Heads of Agreement with a grouping of local Zimbabweans that would allow them to purchase up to 30% of the company. The grouping have elected to call themselves the Manyame Consortium. …

> The structure of the deal will result in the formation of a private company, Newco, which will hold the 30%.
>
> We have also agreed that Cableair and Newco will procure the formation of the staff incentive trust (SIT), which will acquire up to 5% of Newco's shareholding … .

2. OPERATIONAL ISSUES

> … An initiative we have instituted to support our operations and to ensure that they are able to produce without disruption is the procurement of maize meal, rock drill spares, cement, steel balls, pump spares and even cyanide outside of Zimbabwe. To date we have outstanding orders for the above amounting to some R18.3m over the next 3-6 months.
>
> We are also actively looking at the sponsorship of the School of Mines in Bulawayo, a bursary scheme for the University and we have already injected more than Z$1m into our local school bursary fund. In addition we continue to look at the best option for upgrading the buses at our mines, a programme for the upgrading of housing … and the upgrading of clinics.
>
> All the above issues are continually examined, planned and where possible executed. …
>
> We are committed to building a substantial and profitable gold producer in Zimbabwe and we have the assets and the people to do this." (emphasis added)

The fourth and last document of relevance in the application for leave to adduce further evidence is a letter to the Minister. It is dated 2 September 2003 and was written by Collen Gura, a director of Independence. The significance of this letter is that it shows that Independence's letterhead had been altered so as to indicate that the company had become a division of Metallon. In addition, the letter shows that Independence has three directors – A J Reve ("Reve"), G Hunter ("Hunter") and C Gura ("Gura").

It is pertinent to note that Reve and Hunter, both of whom are South African, are also members of Metallon's Board of Directors in Johannesburg.

Applying the test set out in *S v de Jager supra*, I am satisfied that Stanmarker has proffered a reasonably sufficient explanation as to why the evidence sought to be adduced on appeal was not led in the court *a quo*. In addition, I am satisfied that the evidence is cogent and materially relevant to the outcome of this appeal. The application for leave to adduce further evidence is, therefore, granted. However, I make no order as to costs as neither party was at fault.

Having said that, I now revert to the main issue in this appeal.

The legal requirements for an order such as the one sought by Stanmarker in the court *a quo* were set out by OLIVIER J in *Numil Marketing C C and Anor v Sitra Wood Products PTE Ltd and Anor* 1994 (3) SA 460 (C). At 463 F-I the learned judge said:

> "It is common cause that an applicant for attachment must show that:
>
> (1) it has a *prima facie* cause of action against the defendant;
>
> (2) the defendant is a *peregrinus* of the Republic; and
>
> (3) the defendant is within the area of jurisdiction of the Court or that the property in which the defendant has a beneficial interest is within that area.
>
> … The requirement to establish a *prima facie* cause of action means, in this context, that the applicant must tender evidence which, if accepted, will establish a cause of action. The fact that such evidence is in dispute does not preclude an order for attachment being granted. (See *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A) at 914 E-F; *Inter-Science Research and*

> *Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T) at 118H-119A)."

In my view, those are the requirements which Stanmarker had to meet in the court *a quo*. The learned judge correctly fond that the first two requirements had been met.

However, with regard to the third requirement he concluded that although Metallon had a beneficial interest in Independence, that was not the kind of interest which could be attached to confirm jurisdiction. In my view, the learned judge erred in this regard.

An interest in property short of ownership nevertheless constitutes a right capable of being attached and sold in execution. Thus in *Nkwana v Hirsch* 1956 (2) SA 219 (T), a decision of the Full Bench of the Transvaal Provincial Division, DE WET J said the following at 221H:

> "It seems to me that any vested right or interest which a debtor is himself able to sell or dispose of for value is capable of attachment and capable of being sold in execution for the benefit of a judgment creditor."

Similarly, in *Soja (Pty) Ltd v Tuckers Land Development Corporation (Pty) Ltd and Anor* 1981 (2) SA 407 (W) at 409 F-H NESTADT J said:

> "The question that arises is whether what was purportedly attached was capable of attachment. A creditor, having been granted a judgment sounding in money against its debtor and not obtaining satisfaction thereof, is entitled to have issued a writ of execution which serves as a warrant to the Deputy Sheriff … to take possession, by attachment, of so much property of the debtor as will realise by public sale the amount of the judgment and costs. Such property includes the judgment debtor's incorporeal rights (Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed at 615, 635). The learned authors give a number of examples of incorporeal rights

> which may be attached in execution. One of them is the right, title and interest of a litigant in an action (*Marais v Aldridge and Ors* 1976 (1) SA 746 (T) at 750).
>
> The test or criterion would seem to be that laid down by the Transvaal Full Bench in *Nkwana v Hirsch* 1956 (2) SA 219 (T) which was approved in *Nkwana v Hirsch* 1956 (4) SA 450 (A)."

Thus, various types of interests and incorporeal rights in property are capable of being attached and sold in execution. In our jurisdiction, the procedure to be followed in attaching incorporeal property or incorporeal rights in property is set out in r 343 of the High Court Rules, 1971. Once the right or interest is identified, there should be no difficulty in attaching it.

In the present case it was common cause that Metallon had a beneficial interest in Independence. In addition, and more importantly, it is clear from the additional evidence admitted on appeal that Metallon has complete control over Independence and its assets.

In the first place, the documents produced by Stanmarker show that two of the three directors of Independence are also directors of Metallon. That means that Metallon is in effectual and constant control of Independence.

Secondly, the documents indicate that all the production and expansion plans are prepared for Independence by Metallon.

And, thirdly, Metallon is directly involved in all operational issues affecting Independence, which include the procurement, outside Zimbabwe, of maize meal, cement, rock drill spares, steel balls, pump spares and even cyanide. In

addition, Metallon takes decisions on matters such as the upgrading of buses, houses and clinics at the five mines, matters which in fact should be handled by Independence. Undoubtedly, it is Metallon which would decide whether the mines should be sold or not.

In my view, the control which Metallon has over Independence and its assets is of great commercial value. It is property which can be attached and sold in execution. I find support for that view in the House of Lords' decision in *Short and Anor v Treasury Commissioners* [1948] AC 534 (HL).

In that case, all the shares of a company called Short Brothers (Rochester and Bedford) Limited ("Short Brothers") were being acquired by the Treasury under a Defence Regulation which provided for payment of their value as between a willing buyer and a willing seller. Each share was valued on the basis of the quoted market price.

However, the shareholders argued that as all the shares were being acquired, stock exchange prices were not a true criterion, and that there were two ways of determining the real value of the shares. The first was that the whole undertaking should be valued and the global price thus determined apportioned among the shareholders; and the second was that the value of the shares should be the price which one buyer would pay for all the shares, which price should then be similarly apportioned.

Although the alternative ways of determining the value of the shares were rejected, it was conceded by the Court of Appeal and the House of Lords that had any individual shareholder held a sufficient block of shares to give him control of the company, then he might have been entitled to a higher price than the total stock exchange value of all his shares, since he would then have been selling an item of property – control – additional to his shares.

At 546 LORD UTHWATT said:

> "I desire only to add that if some one shareholder held a number of shares sufficient to carry control of the company, it might well be that the value proper to be attributed to his holding under the regulation was greater than the sum of the values that would be attributed to the shares comprised in that holding if they were split between various persons. The reason is that he has something to sell – control – which the others considered separately have not."

I respectfully agree with the learned LAW LORD.

Accordingly, the learned judge in the court *a quo* ought to have granted the order sought by Stanmarker to enable it to litigate at home.

In the circumstances, the following order is made –

1. The appeal is allowed with costs.

2. The order of the court *a quo* is set aside and the following is substituted –

   "(a) The jurisdiction of this court in the dispute between the applicant and the first respondent is hereby confirmed.

(b) The applicant is granted leave to serve the Summons and Declaration in respect of its claim for damages against the first respondent, together with a copy of this Order, upon the first respondent's legal practitioners, Messrs Gill, Godlonton & Gerrans.

(c) Service of the Summons and Declaration, together with a copy of this Order, may be made on the first respondent, or any responsible person, at 161 Rivonia Road, Sandton, Johannesburg, South Africa, by the Sheriff of Johannesburg, Gauteng Province, South Africa, or his lawful Deputy or Assistant. The said Sheriff, Deputy or Assistant shall certify service of the said documents by affidavit sworn to before a Notary Public in South Africa and filed of record with this Court.

(d) The costs of this application shall be paid by the first respondent."

CHEDA JA: I agree.

GWAUNZA JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners