DALIAN TIANCHENG MINERAL RESOURCES (PRIVATE) LIMITED
and
ZHIQIANG GAO
versus
BAOQUAN HUANG

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 13 June, 25 July 2023 and 23 October 2024

Opposed Application

T Rusinahama, for the applicants.
G Dzitiro with E Ndlovu, for the respondent.

DEME J: On 25 July 2023, I made an order for the removal of the matter from the roll pending the finalisation of the matters under case numbers HC 4083/23, HC 2480/20, and HC 2942/20 coupled with an order that there shall be no order as to costs.

The applicants approached this court seeking an order for interim interdict under the following terms:

> "1. The Respondent, personally or through his agents, or anyone claiming rights or title through them are interdicted and restrained from preventing the applicants and /or their duly appointed employee, contractors and/or agents, from accessing 1st Applicant's Gudubu Mines at Mhangura, Chinhoi for purposes of conducting and maintenance work on the shaft and machinery. Failing which, the Sheriff of the High Court, with the assistance of the Zimbabwe Republic Police shall take all necessary steps to grant access to the applicants, and herein their duly appointed employee, contractor and /or agents.
> 2. The 2nd Applicant shall be responsible for the cost and expenses incurred by the maintenance work."

This court dismissed the urgent chamber application for interim interdict. Dissatisfied by the dismissal the applicants successfully appealed against the decision of this court. The Supreme Court in its judgment ruled that:

> "1. The appeal is allowed with costs.
> 2. The judgment of the court *a quo* is set aside and substituted with the following:
> "the application is granted in terms of the amended draft order."

The applicants approached this court seeking the confirmation of the provisional order. In particular, the applicants sought the confirmation of the provisional order under the following terms:

> "1. Pending the determination of HC2480/20 and 2942/20, the Respondent be and is hereby ordered not to prevent the Applicants and its authorised employees, contractors and agents from conducting mining or other business operations at the 1st Applicant's mining location known as Gudubu 1-3 registered as 40850BM, 40855BM and 40856BM.
> 2. The Respondent be and is hereby to pay costs of suit on a client-attorney scale (sic)."

The respondent also filed a counter-application against the present application. In the counter application, the respondent is the first applicant while the first applicant in the main application is cited as the second applicant. The second applicant in the main application is cited as the respondent in the counter application. The applicants to the counter application pray for an order for interdict. More particularly, they prayed for the following relief:

> "1. The application for an Interdict against Respondent be and is hereby granted.
> 2. Respondent and all persons acting on his behalf be and are hereby interdicted from visiting 2nd Applicant's Mining premises Gudubu 1 to 3 in Mhangura, Chinhoyi.
> 3. The 2nd Applicant acting through the 1st Applicant be and is hereby granted leave to proceed to appoint a Mine Manager for the Mine Gudubu 1 to 3 in Mhangura, Chinhoyi.
> 4. Pending the determination of HC2480/20 and HC2942/20 the 2nd Applicant acting through 1st Applicant or Baoming Huang shall file biannual mine maintenance reports with the Minister of Mines and Mining Developments.
> 5. Respondent shall pay Applicants' costs of suit."

The counsel for the applicants made an oral application for the removal of the matters from the roll pending the finalisation of the matters under case numbers HC 2480/20 and HC 2942/20. The two matters which were, at the material time, pending at the Commercial Division of this court, were consolidated by Judgment No. HH 495/22. The application was opposed by the respondent's counsel on the basis that the applicants wish to eternally cling to the provisional order to the prejudice of the respondent. The counsel for the respondent made an application for the removal of the matter from the roll or postponement of the matter *sine die* pending the finalisation of the application for consolidation of this matter and HC 4303/21. The application for consolidation was filed under HC 4083/23.

Under case number 4083/23, the respondent in this application is the first applicant while the first applicant in this matter is the second applicant. The applicants under HC 4083/23 pray for an order that:

> "1. The application for consolidation of the hearing of matters HC4303/21 and HC3429/22 be and is hereby granted.
> 2.The matters HC4303/21 and HC3429/22 shall be set down for hearing as one matter.
> 3. Each party shall bear its own costs."

The matter under HC 4303/21 was instituted by the applicants in this matter by way of urgent chamber application. In the matter under case number HC 4303/21, the respondent in this matter is also the respondent. Under HC 4303/21 the applicants successfully obtained the interim relief under the following terms:

> "1. Respondent be and is hereby ordered not to dissipate the 1st Applicant's assets namely transformer, mining equipment and trucks.
> 2. Leave be and is hereby granted to 2nd Applicant to enlist the services of guards and to install them at the mine generally known as Gudubu 1, 2 and 3 with registration numbers 40855BM and 40856BM to ensure the safety of the assets of 1st Applicant pending the determination of this matter.
> 3. Respondent be and is hereby ordered not to prevent 2nd Applicant from accessing 1st Applicant's mine for purposes of enforcing this order."

The provisional order was still pending at the time of hearing this application. The Applicants under HC4303/21 are seeking the confirmation of the provisional order under the following terms:

> "1. The Provisional Order be and is hereby confirmed.
> 2. The Respondent be and is hereby ordered permanently not to transfer any of the 1st Applicant's assets, equipment and not to interfere in any manner whatsoever with any of 1st Applicant's property.
> 3. Respondent pays costs of suit on an attorney-client scale."

The matters under case numbers HC 2480/20 and HC 2942/20 were consolidated by consent, under judgment number HH 495/22. The second applicant in HC 2480/20 is seeking an order that he be declared 66% shareholder in the first applicant. In HC 2942/20 BAOQUAN HUANG (Respondent herein) and BAOMING HUANG are seeking a cancelation of an amendment of the applicant's CR14 by ZHIQIANG GAO (2nd Applicant herein) and GUIBIAO ZHANG.

It is visible that the cases instituted by the parties reflect that the natural persons, the second applicant and the respondent, are embroiled in a dispute of shareholdership in the first applicant. In this regard, I saw it prudent to suspend the hearing of this matter until substantive disputes of shares in the first applicant have been fully ventilated and finalised. Without the resolution of this dispute of shares, parties would continue to be in and out of the courts.

It is apparent that parties to the present application are alive to the fact that there is a need to finalise the matters under HC 2480/20 and HC 2942/20. Paragraph 1 of the terms of the final order sought by the applicants in the present application is dependent upon the finalisation of the matters under HC 2480/20 and HC 2942/20. The relief prayed for by the applicants to the counter application in para 4 of their draft order is also made reliant upon the finalisation of the two matters. Thus, determining the confirmation or discharge of provisional order before the finalisation of these two matters will be premature. In light of this, I was driven by para 1 of the terms of final interdict sought by the applicants in the main application to remove the present application from the roll paving the way for the finalisation of the two matters. After these two matters have been definitively finalised, this court can properly determine whether to confirm or discharge the provisional order. Suppose the provisional order is to be confirmed as prayed for, the parties may be forced to approach the court to ensure that they comply with the outcome of the two matters if the provisional order is no longer compatible with the consequence arising from the determination of the two matters. Since these two matters were consolidated under Judgment No. HH 495/22, their finalisation may be expedited.

Further, the matter under HC 4083/23 seeks to consolidate this matter and the matter under HC 4303/21. Under the two matters, the applicants do have extant provisional orders against the respondent. The applicants under the two matters are seeking the confirmation of provisional orders. There is an advantage in allowing the finalisation of such an application, in my view. If the application is successful, this will go a long way in promoting finality to litigation and upholding uniform decisions from the same court. Consolidation of the matters also avoids the potential of having the same court contradicting itself.

This court does have the discretion to stay proceedings pending the finalisation of certain matters which are before it or before any other court. This discretion must be judiciously exercised with a view of bringing finality to litigation. The issue before me would raise the question of whether the requirements of *lis pendens* have been met. In my earlier judgment of *Bariade Investments (Private) Limited* v *Tendai Mashamhanda*[1], in discussing the basic requirements of lis pendens, I remarked as follows:

> "The jurisprudential undertone of our jurisdiction has established the basic requirements for *lis pendens*. These include:
>
> (a) The matters under consideration must involve the same parties.
> (b) The things being contested in the two separate cases must be identical.
> (c) The two separate matters must involve the same cause of action."

In *casu,* the parties under HC 2480/20, 2942/20 and 4083/23 are the same parties who are fighting for the control of the first applicant. Commenting on the nature of the dispute for the litigants under these two cases, NDLOVU J, in Judgment No. HH495/22, superbly observed as follows:

> "The first 2 matters (HC 2480/20 and HC 2942/20) which have since been consolidated are seeking declarations by this court as to who are the legitimate shareholders and directors of the company and their respective shareholding. On the other hand HC 4303/21 is waiting at the bus stop of finalisation either by the discharging of the provisional order or confirmation of the same. The common denominator in all this is the company and its assets. HC 4303/21 is an anti-dissipation interdict."

Additionally, in the case of *Chigami 2 Syndicate and 2 Ors* v *Cleo Brand Investments (Pvt) Ltd*[2], the court made the following germane remarks:

> "*Lis pendens* refers to a special plea raised by the defendant that the matter is being determined by another court of competent jurisdiction on the same action and between the same parties. For a plea of *Lis pendens* to succeed it must be demonstrated that the two matters are between the same parties or their successors in title concerning the same subject matter and founded upon the same cause of complaint (see Diocesan Trustees for Diocese of Harare v Church of the Province of Central Africa 2009 (2) ZLR 57(H); Nestle (SA) Pvt Ltd v Mars incorporated (2001) 4 A SA 315 (SCA), Geldenhys v Kotz 1964(2) SA 167".

[1] HH815/22

[2] HMA14/20.

To this end, an order confirming the provisional order or granting the counter application as prayed for would not be in the interest of justice in light of the live dispute of shareholdership between the second applicant and the respondent. Once the shareholding dispute has been definitively resolved, this case will be affected. The outcome may dictate the proper course to be taken in order to finalise the main application and the counter application. The main application and the counter application confirm that there is a serious fight between the second applicant and the respondent, for control of the first applicant. The same battle is also evident in HC 4303/21. Erasmus[3], in relation to the requirements of *lis pendens*, postulated the following pertinent observations:

> "The requirement that the parties be the same does not entail that the same plaintiff should have sued the same defendant in both proceedings. The plaintiff in the first proceeding could, as a defendant in the second, raise the plea of his *Lis pendens*".

It is apparent that stay of proceedings under such circumstances cannot be claimed as a right by any litigant appearing before the court but this remains within the discretion of the court which must be conscientiously employed to ensure that justice and fairness are at the centre of such consideration. The learned author, Erasmus propounded the following comments:

> "The court may stay an action on the ground that there is already an action pending between the same parties or their successors in title, based or the same cause of action, and in respect of the same subject matter. The defendant is not entitled as of right to a stay in such circumstances the court has a discretion whether to order a stay or not, and may decide to allow the action to proceed if it deems it just and equitable to do so or where the balance of convenience favours it. As the later proceedings are presumed to be vexations, the party who instituted those proceedings bears the onus of establishing that they are not, in fact vexations. This must be done by satisfying the court that despite all the elements of Lis *pendens* being present, justice and equity and the balance of convenience are in favour of those proceedings being dealt with".

Further, Herbstein and van Winsen[4], the learned authors, in relation to the defence of *lis alibi pendens* remarked as follows:

> "If an action is already pending between the parties and the plaintiff therein brings another action against the same defendant on the same cause of action and in respect of the same

[3] *Superior court Practice*, (2nd edition) at D 1-280

[4] *The Civil Practice of the Superior Courts in South Africa* 3rd ed at pp 269-270.

> subject matter, whether in the same or a different court, it is open to such defendant to take the objection of *lis pendens*, i.e. another action respecting the identical subject matter has already been instituted, whereupon the court, in its discretion, may stay the second action pending the decision in the first action."

One of the major reasons why the court may stay proceedings pending the finalisation of the matter before the court is to avoid replication of matters before the same court or any other court of competent jurisdiction. ZISENGWE J, in the case of *Chigami 2 Syndicate and 2 Ors* (*supra)* made the following significant comments:

> "The courts are loath to encourage the unnecessary duplication of cases for to do so amounts to encouraging a proliferation of cases across the country which cases emanate from the same cause of action between the same parties. It is untenable to support the proposition that where a party perceives a particular seat of the current seats of the High Court to be supposedly congested then he will be justified to take flight midstream to some perceived less congested seat. To accept that argument would by necessary implication mean a party would be justified (for instance) in mounting four simultaneous or successive applications and/or actions in each of the four geographical seats of the High Court and await which of them handles the same most expeditiously. If applicants' position were pursued to its logical conclusion, what would stop the respondent, for instance, from rushing off to (say) Mutare to launch its own similar (albeit reverse) application there ostensibly premised on its perception that the wheels of justice turn faster there."

In light of these authorities, I was motivated to remove the matter from the roll pending the finalisation of the matters under case numbers HC 4083/23, HC 2480/20, and HC 2942/20. In my view, this decision is in the interest of justice and brings finality to real and substantial disputes between and among the shareholders. The shareholdership dispute, in my opinion is the elephant in the room. Logic and common-sense demand that the elephant in the room must be eliminated before dealing with other issues which are related to the main dispute.

DEME J:……

Rusinahama Rabvukwa Attorneys, applicants' legal practitioners.
G Dzitiro, respondent's legal practitioners.