ANGEL HILL MINING COMPANY
versus
RUMGOLD TRADING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 30 November 2022 and 1 February 2023

Urgent Chamber Application

Mr *R Zimudzi*, for the applicant
Adv *R Goba* with Mr *S Murondoti*, for the respondent

CHINAMORA J:

Introduction

This is an urgent chamber application for an interdict which came before me on 30 November 2022. The matter is strenuously opposed. The order sought by the applicant is couched in the following terms:

"**INTERIM RELIEF SOUGHT**

1. The respondents, its agents, employees, proxies or anyone claiming rights through it be and is hereby interdicted from mining on mining claims and mineral rights in Mashonaland West Province along Angwa River known as the "10 kilometer Bridge Mining Claim" belonging to the applicant, pending the determination of summons for eviction with co-ordinates in HC 8022/22 by this Honourable Court.
2. To the extent that it becomes necessary or expedient, the Sheriff of the High Court or his lawful deputy be and is hereby authorized and empowered to attend to remove the respondent, its agents or employees as well as equipment, tools and machinery from the applicant's claims stated above.
3. Respondent shall pay costs of suit on an attorney and client scale.
4. The notice of appeal against this order shall not suspend the operation of this order.

TERMS OF FINAL ORDER SOUGHT

That you show cause why a final order should not be made in the following terms that:

1. The respondent's operations be and are hereby … to be unlawful and the respondent shall stop the operations forthwith.

2. The respondent be and is hereby interdicted from mining on the applicant's claims.
3. Respondent to bear costs of suit on a higher scale.

The applicant's case

It is not disputed that the applicant holds mining claims known as the "10 Kilometer Bridge Mining Claim" along Angwa River in Mashonaland West. On 18 December 2021, the applicant and the respondent entered into a Joint Venture Agreement ("JVA"), which was amended by an addendum on 9 April 2022. The parties disagree on the import of the extension. The JVA appears on pp 18-23 of the record marked Annexure "B" and the addendum is on pp24-26 of the record marked Annexure "C". The applicant contends that the JVA expired, and the respondent no longer has rights to continue mining on its claims. It further averred that the respondent has mined on wrong co-ordinates, which has brought the applicant into conflict with regulatory authorities. In this respect, the applicant alleges that on 1 September 2022, the Angwa-Rukomichi Sub-Catchment Council (hereinafter called "the Sub-Catchment Council) all operations on its claims to cease. The stop order, which is marked Annexure "D1, is part of the record on pp 27-28.

The applicant wrote a letter dated 2 September 2022, which appears on p 29 marked Annexure "D2". In addition, the applicant provided the letter on page 30 marked Annexure "D3" letter from one Muchineripi, a farm owner and headman in the area where the mining claims are located, complaining about the respondent's mining activities. According to the applicant, despite the stop order and the complaint, the respondent refused to cease mining operations. On 13 October 2022, a police report was made against the respondent and the matter is pending. The applicant stated that the respondent opened water for three (3) days from Piringani and Two Three dams in breach of the Sub-Catchment Council and Environmental Management Agency (EMA) Regulations. Additionally, it is alleged that the respondent installed a wash plant 200 metres away from the Angwa River, and the applicant was issued with a warnings by the relevant authorities. In this regard, the letter from the Sub-Catchment Council dated 20 October 2022, which is on p 31 of the record and is marked Annexure "E", reads:

> "**WARNING TO STOP RELEASING WATER FROM PIRINGANI AND TWO THREE DAMS**
>
> We notice with great concern that your partner, Rumgold Trading, has illegally opened water from the said dams, thereby contravening the Water Act, s 118 (1)(dii) (e) …

> Please be advised that by law, we are supposed to penalize your company. You have our de-siltation permit and we expect you to abide by your permit terms. Please take this as a warning".

A second warning letter from the Sub-Catchment Council was issued on 24 October 2022, and is on p 32 marked Annexure "F", which, *inter alia*, reads:

> "**ILLEGAL WATER RLEASE FROM PIRINGANI DAM AND TWO THREE DAM**
> We noticed that you have failed to take heed to our warning issued on 20 October 2022. Thereby you forcefully released water on the said dam illegally. You have contravened section 118 of the Water Act, which states that:
>
> "Any person who, without lawful excuse, the onus of proof of which lies on him –
> (1) (ii) waste or does not take due precaution to prevent the waste of water from the water works;
> (e) waste the water of a public stream shall be guilty of an offence.
>
> We had to go and close the taps at night so that we prevent water from being wasted. On the third time, we closed the tap on Sunday. We appeal to you to inform your contractor Rumgold to stop releasing water from dams without our permission, as this will bring harm to your de-siltation permit. Consider this as your last warning".

Subsequently, on 26 October 2022, the Sub-Catchment Council invoiced the applicant a fine of US$9,000-00 arising from the respondent's conduct. The invoice, which appears as Annexure "H" on p 34 of the record states that it is in respect of a penalty for illegal release of water for three (3) days at Piringani and Two Three dams. The applicant further averred that the respondent was unlawfully mining its claims despite the stop order issued by the Sub-Catchment Council and the expiry of the JVA and, as a result, wrote a letter on 2 November 2022 giving the respondent 48 hours to vacate the mining claims. The letter is marked Annexure "J" and appears on p 36 of the record. The respondent's reply, which is on p 38 of the record marked Annexure "K", denies the allegations as malicious falsehoods and asserts that the JVA was still valid. On 16 November 2022, by letter marked Annexure "L" on p 39 maintains that the respondent must immediately vacate the mining claim and remove its equipment. The applicant submits that its claims are at risk of cancellation owing to the respondent's conduct, and that the JVA has expired. Consequently, the applicant seeks the urgent relief of an interdict, by lodging this application on 25 November 2022.

When the parties appeared before me on 30 November 2022, the matter was postponed to 2 December 2022, and I granted an interim preservation order in the following terms:

> "1. The hearing of this urgent chamber application be and is hereby postponed to 2 December 2022 at 1.00 pm subject to the following directions:

(a) The applicant and the respondent and their agents, employees or anyone claiming authority through them shall not carry out any mining or extraction of bullion along Angwa River known as the "10 kilometer Bridge Mining Claim" pending the hearing and determination of this urgent chamber application (i.e HC 8031/22).

(b) The respondent shall file and serve its opposing papers/affidavit no later than close of business on 30 November 2022.

(c) The applicant shall (if need be) file and serve its answering affidavit no later than close of business on 1 December 2022.

(d) The Registrar shall place the record in HC 38/22 before Hon CHINAMORA not later than close of business on 1 December 2022".

The respondent's case

The respondent opposed the application and in its opposing affidavits raised certain preliminary points. The first point was that the application should have been filed in the Commercial Division of the High Court. Reliance was placed on the definition of "commercial dispute" in Statutory Instrument 123 of 2020. Secondly, the respondent submitted that the matter was not urgent, in so far, as the applicant's case is that the JVA expired in July 2022, and the application was only lodged after four (4) months. Thirdly, the respondent avers that there is an extant order of this court under HCHC 38/22 which, so the contention goes, effectively allows the respondent to carry out mining activities on the applicant's claim. The said order, which is on p 33 of the record marked Annexure "G", says:

"IT IS ORDERD BY CONSENT THAT:

1. The respondents be and are hereby ordered to honour, abide by, and comply with the full terms of the agreement between the applicant and the first respondent dated 18 December 2021and its addendum dated 9 April 2022, and to allow the applicant and its agents to irrevocably continue mining at the agreed sites in the aforementioned agreement and addendum.
2. There shall be no order as to costs".

The application under HCHC 38/22 was brought by *Rumgold Trading (Pvt) Ltd* v *Angel Hill Mining (Pvt) Ltd and two Others*. The respondent contended that, if the relief sought in *casu* was granted that would contradict the order granted by the Commercial Division. The fourth objection was that the relief the applicant was asking for was incompetent as final relief which could not be granted on an interim basis. It was argued that the removal of the respondent and its equipment from the mining site amounted to an eviction, which was final in nature. Finally, at the

hearing of this matter, the respondent raised the objection that this court lacked jurisdiction since the JVA had an arbitration clause. It argued that the remedy of arbitration should be pursued first.

On the merits, the respondent argued that the agreement between the parties was still in force and denied that it had expired. It asserts that it paid the applicant a mining rights fee of US$120,000-00, and that the JVA had no specific timelines. In fact, the respondent's understanding of the contract was that it was allowed 21 days to carry out due diligence and exploration works and, if satisfied with the exploration results, it would waive the option to opt out of the JVA. In this respect, the respondent submits that clause 2 of the JVA only limited the exploration period. The further argument was that the addendum extended the exploration period to 90 days. Thus, the respondent maintains that it is entitled by the JVA to continue mining on the claim. It appears to me that the respondent's interpretation is wrong, since clause 1 of the addendum says that the parties "agree to an extension of 90 days to the terms of the agreement" with effect from the date the addendum is signed. Nothing in the addendum confines the extension to the exploration period. It would have said so if that was the intention of the parties. I note that the addendum states its purpose as being to amend clause 1 of the JVA, which outlines the obligations of the parties.

The allegations of mining on wrong co-ordinates; of releasing water from the dams as alleged; and installing a wash plant 200 metres from Angwa River are denied. Instead, the respondent alleges connivance between the applicant and the Sub-Catchment Council. The respondent challenges the legality of the stop order. An addition submission was that the applicant could not advance a grievance on behalf of the Sub-Catchment Council, and concludes that the applicant has corrupted the Council.

The respondent averred that it has invested in excess of US$2,000,000-00 in the mining venture, and that the applicant would unjustly benefit if the relief sought was granted. The submission was also made that the applicant had an alternative remedy of referring the dispute to the Mining Commissioner for the relevant district. After hearing argument from the parties I reserved judgment, which I now deliver giving reasons for my conclusions. Let me deal with the points in *limine* first, but not necessarily in the order listed above.

Points in *limine*

Whether the matter is urgent

The applicant's case in this regard was, firstly, that the JVA between the parties had expired and, secondly, that the respondent was extracting bullion disregarding an extant stop order issued by the Sub-Catchment Council. Thirdly, the applicant argued that violations of the law by the respondent risked cancellation of its mining permit. Once the relevant authorities raised the issue, the applicant submits that he wasted no time in coming to court. The denial of urgency by the respondent does not seem to have a basis, as the allegation of corruption and connivance between the applicant and the Sub-Catchment Council has not been backed by any evidence. It is inconceivable that the Sub-Catchment Council would generate the warning letters if the conduct complained of did not happen. The papers before me do no show anything cogent to back up the suggestion that the Sub-Catchment Council's letters were motivated by corruption. It is settled law that he who alleges must prove and, in this regard, in *Astra Industries Limited* v *Chamburuka* SC 258-11 OMERJEE AJA stated that:

> 'The position is now settled in our law that in civil proceedings a party who make a positive allegation bears the burden to prove such allegation'. The applicant did not prove the grounds or advance any evidence to prove its case".

The applicant acted on time to protect their interests perceiving that their mining registration was in jeopardy, and that the respondent no longer had a right to continue mining on its claim. In my view, the urgency contemplated by the rules and case law was established by applicant. (See *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (HC). The urgency was established in the certificate of urgency and founding affidavit. I dismiss the preliminary point for lack of merit.

That the Civil Division of the High Court lacks jurisdiction

This line of objection need not detain the court, since both the Commercial Division and Civil Division are part of the High Court, and judges can hear any matter allocated to them. Counsel for the respondent could not point to any provision of the law which precludes the Civil Division from hearing this application. As far as I can see, there is nothing in the definition of "commercial dispute" that can remotely create a ground for excluding the jurisdiction of this court. Obviously, the point in *limine* was ill conceived and is dismissed.

Whether the arbitral clause excludes jurisdiction of the High Court

It is common cause that the JVA contains an arbitral clause, but the question to be asked is: does this oust the jurisdiction of this court? Adv *Goba* for the respondent, referred me to clause 5 of the JVA which provides that:

> "Any dispute arising from any matters relating to this agreement or the validity or meaning or execution thereof, must be resolved by means of arbitration in accordance with the following procedure".

While clause 5 allows the parties to have their dispute resolved through litigation, it also specifies the procedure that must be followed to arrive at arbitration. At this juncture, I wish to highlight that ordinarily where there is an arbitration clause in an agreement this court will decline jurisdiction over a matter. To decide whether the laid down procedure was followed, let me start with what the JVA says in clause 5.1:

> "Any of the parties shall be entitled to demand in writing that the dispute be referred for arbitration within ten (10) days after the agreement could not be reached".

I observe that the respondent did not demand in writing that the dispute should go for arbitration as required by clause 5.1 of the JVA, as the objection to this court's jurisdiction was raised for the first time in argument before me. The Model Law which is incorporated in the Arbitration Act [*Chapter 7:15*] is also relevant. In this respect, Article 8 of the Model Law is clear on how referral should be instigated by the parties. It reads:

> "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed".
>
> **[My own emphasis]**

In fairness to the respondent, it did not claim that it had submitted its first statement on the substance of the dispute to the arbitrator. My reading of Article 8 of the Model Law is that, before arbitration proceedings have been initiated, a party cannot seek a stay of proceedings premised on a referral to arbitration. Accordingly, I find this point in *limine* without merit and dismiss it.

Whether relief is incompetent

The competency of the relief has been attacked by the respondent. In this regard, I take counsel in that KWENDA J in *Chiswa v Maxess Marketing and Ors* HH 116-20, relied on rule 240 of the High Court Rules, 1971 (then applicable) and said that this court has the power to amend a draft provisional order where it does not properly capture the appropriate remedy merited and articulated in the founding affidavit. In particular, he made the following pertinent remarks:

> "I have already alluded to rule 240 of the High Court of Zimbabwe rules, 1971 which empowers the court to grant any order it deems fit in any application, including a provisional order, whether or not other relief has been asked for. My understanding is that the final wording of any court order (whether final or provisional) is the prerogative of the court as long as the order resolves the dispute(s) before the court. The draft provisional order submitted by the applicant with the application remains a proposal".

On the authority of *Chiswa* v *Maxess Marketing (Pvt) Ltd supra*, this court can amend the draft order to capture the relief which is apparent from the pleadings.

Whether the relief sought defeats the order of the Commercial Division

I do not see anything that undermines that order from the way the applicant has couched its relief. The order of the Commercial Court does not determine the tenure of the JVA. It merely obliges the applicant to allow the respondent to carry out mining activities on its claim in terms of the agreement between the parties. If it shown that the agreement has terminated, I do not read anything in that order that says that the mining activities should carry on post termination or expiration of the contract. Similarly, this point in *limine* has no merit and is dismissed. I now turn to consider the merits of the case.

Merits of the application

The requirements for the grant of an interdict are settled in this jurisdiction, and are:

(a) a right which though *prima facie* established is open to some doubt.

(b) a well-grounded apprehension of irreparable harm.

(c) the absence of any other remedy.

(d) the balance of convenience favours the applicant

See: *Zesa Staff Pension Fund* v *Mushambadzi* SC 57-02.

Having examined the respective positions placed before the court by the parties, my view is that the applicant has established not only a *prima facie* right, but a clear right in order to be afforded the relief that it seeks. In this context, there is nothing in the jurisprudence of this court which militates against the grant of final relief if the evidence establishes a clear right. It is the registered owner of the mining claim known as the "10 kilometer Bridge Mining Claim", and that fact is not disputed. In that respect, the applicant has an obvious interest in protecting that claim and ensuring that it is not cancelled as a result of the conduct of the respondent. As I have already said, the conduct complained of has been established on a balance of probabilities. The allegation of corruption and connivance between the applicant and the Sub-Catchment Council, despite being made was not substantiated. The applicant has also shown that the JVA expired and the respondent has no basis to continue mining on the claim.

On the second hurdle, I am satisfied that the applicant has demonstrated a well-rounded apprehension of irreparable harm based on the warnings given by the Sub-Catchment Council. The danger of irreparable harm to the applicant was therefore established. There is no other effective remedy available to the applicant if the relief sought is not granted. The balance of convenience favours the applicant since it may lose its mining claim if the respondent continues mining activities in contravention of the law, more so, in circumstances where the JVA has expired. I believe that the applicant has satisfied all the requirements for the grant of an interdict. See the cases of: *Criksen Motors (Welcom) Ltd* v *Protea Motors & Anor* 1973 (3) SA 685 (A); *Flame Lily Investment Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378 and *Durma (Pvt) Ltd* v *Siziba* 1996 (2) ZLR 636 (S). I have no reason to depart from the general that costs follow the result. However, in the exercise of my discretion, I will not award costs on the higher scale as I do not believe that the respondent prosecuted its case in bad faith. I agree with the position taken by CHITAPI J in *Netone Cellular (Pvt) Ltd* v *Reward Kangai* HH 441-19, that a party should not be penalized with punitive costs for holding a contrary legal position, since opposing arguments on the law enhance our jurisprudence.

Disposition

In the result, the following order is made:

1. The respondents, its agents, employees, proxies or anyone claiming rights through it be and is hereby, forthwith, interdicted from mining on the claims and mineral rights in Mashonaland West Province along Angwa River known as the "10 kilometer Bridge Mining Claim" belonging to the applicant, pending the determination of HC 8022/22.

2. To the extent that it becomes necessary or expedient, the Sheriff of the High Court or his lawful deputy be and is hereby authorized and empowered to attend to remove the respondent, its agents or employees as well as equipment, tools and machinery from the "10 kilometer Bridge Mining Claim".

3. Respondent shall pay costs of suit.

Zimudzi & Partners, applicant's legal practitioners
Absolom Attorneys, respondent's legal practitioners