

MINEXUS MINERAL RESOURCES (PVT) LTD
and
EDGETOP MINING (PRIVATE) LIMITED
and
FADI ALI KHATOUN
versus
ADVOCATES AMIT PINES N.O
and
URI GIL N.O
(in their capacities as joint foreign interim liquidators of)
FUSS DIAMOND LTD
and
ZIMBABWE CONSOLIDATED DIAMOND COMPANY (ZCDC)
(incorporating former Marange Resources (PVT) Ltd)
and
MINISTER OF MINES & MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 1 August & 20 September 2017

Opposed Application

T Mpofu, for applicants
T Zhuwarara, for 1st, 2nd and 3rd respondents
T Marume, for 4th respondent
T Shumba, for 5th respondent

TAGU J: This is a Court Application for a Declaratory Order in terms of section 14 of the High Court Act [*Chapter 7:06*] as read together with Order 32 r 226 (1) (a) of the High Court of Zimbabwe Rules, 1971. In this application the applicants have to satisfy the court that they are interested parties, that there is a right or obligation which becomes the object of the inquiry, they are not approaching the court for what amounts to a legal opinion upon abstract or academic matters and that consideration of public policy favours issuance of the declaratory.

INTRODUCTORY NOTE

The first and second applicants are legal personas duly registered in terms of the laws of Zimbabwe. The third applicant is the director of the first and second applicants who are the local agents of the fourth respondent. First and second respondents are joint provisional

liquidators of the third respondent. The fourth respondent is a consolidation of former local diamond mining companies (now incorporating formerly Marange Resources (Pvt) Ltd) in the Republic of Zimbabwe duly registered and trading as such in diamond mining. It is now liable on the latter's debts on the ground of the legal principle of succession, takeover and consolidation of companies reference to Company laws of the Republic of Zimbabwe. The fifth respondent is the overseer of the third respondent and its various consolidated or incorporated subsidiaries. The liability of the first and second respondent arises out of the fact that they are the appointed provisional liquidators of the second respondent in Israel. The liability of the second respondent arises in contract and statutory obligations enforceable against it in terms of the laws of Zimbabwe.

BACKGROUND FACTS

Sometime in 2013 the third respondent FUSS DIAMONDS (PVT) LTD who is a diamond dealer based in Israel and wanting to deal in diamonds in Zimbabwe appointed the third applicant FADI ALI KHATOUN as its local representative for purposes of negotiating, execution of a diamond purchase and sale contract, receipt of diamonds and monies in connection therewith which were the fundamental terms. On or around 4th of July 2013 the second respondent URI GIL N.O through the third applicant executed a memorandum of agreement with the third respondent through which as a fundamental term thereof fourth respondent ZIMBABWE CONSOLIDATED DIAMOND COMPANY (ZCDC) would and actually deposited US\$5 000 000.00 (Five million United States Dollars) with the fourth respondent then MARANGE RESOURCES (PVT) LTD for purposes of diamonds. On various dates and in terms of said agreement between July 2013 to around April 2016, the third respondent released diamond gems and money to the third applicant worth about US\$3 774 000.00 (Three million seven hundred and seventy four thousand United States Dollars) leaving a balance of US\$1 1226 000.00 (One million one hundred and twenty six thousand dollars) due and payable to the fourth respondent through third applicant. On various dates between 2011 and 2014 the third applicant had a mammoth task in having the amounts of money due, owing and payable by the fourth respondent released.

Meanwhile the third respondent also appointed the first applicant MINEXUS MINERAL RESOURCES (PVT) LTD as its agent in various mining concessions and interest which it entered into and was involved in Kadoma-Zimbabwe and incurred various contractual and statutory debts and liabilities amounting to US\$1 689 800.00.

The amount of US\$850 000.00 owed to first applicant as fourth respondent's local mining agent was expressly acknowledged on 28th July by third respondent's director YOSSI FUSS. The amount of US\$284 800.00 has already been granted in a judgment against first applicant in respect of contractual relations duly authorised by third respondent which first applicant is to suffer on behalf of third respondent's debts. The amount of US\$555 000.00 was incurred and acknowledged by third respondent and have been awarded in a judgment in case HC 1529/15.

The applicants are now alleging that the third respondent has now appointed the first and second respondents as its provisional liquidators for purposes of seeking repatriation of the amounts in issue to the Republic of Israel against the laws of Zimbabwe. They suspect that the provisional liquidation of third respondent in Israel is a fraud well –calculated to evade debts there and internationally and is meant to hoodwink international creditors into believing that any monies owed by fourth respondent in any country cannot be received by anyone other than the appointed provisional liquidators. The applicants approached this Honourable Court seeking the following relief:

“IT IS ORDERED THAT:

1. The 1st, 2nd and 3rd applicants are hereby declared to be the lawfully authorised and recognized agents and representatives of Fuss Diamonds Ltd in the Republic of Zimbabwe for purposes of all diamond transactions, receipt and payment of monies from the 3rd Respondent in connection with their dealings with the 3rd Respondent formerly Marange Resources (Pvt) Ltd.
2. It is hereby declared that, all outstanding monies in the sum of US\$1 226 000.00) ONE MILLION TWO HUNDRED AND TWENTY SIX THOUSAND UNITED STATES DOLLARS) currently held by the 4th Respondent and due to Fuss Diamonds Ltd with respect to the Diamond dealership agreement dated the 04th of July 2013 shall immediately within seven (7) days of this order be payable by the 04th Respondent to the 1st, 2nd and 3rd Applicants or anyone of them.
3. All the debts arising out of statutory and contractual obligations of Fuss Diamond Ltd with the 1st, 2nd and 3rd Applicants shall be payable thereto in Zimbabwe in terms of the laws of the Republic of Zimbabwe out of any monies stated in paragraph 2 herein above.
4. It is hereby declared that, the 04th Respondent, its employees, agents or anyone acting through them or demanding payment from them shall not make any payment of money referred to in paragraph 2 hereinabove to any other person residing or living outside the jurisdiction of the courts of Zimbabwe other than the 1st, 2nd and 3rd Applicants or, anyone with a valid judgment of the courts of the Republic of Zimbabwe.
5. Costs of this suit on a legal Practitioner and Client -Scale shall be paid by the 3rd Respondent Fuss Diamonds Ltd.

THE SUBMISSIONS

The applicants in their founding affidavit, answering affidavit, heads of argument and oral submissions through their defence counsel have managed to show that the third applicant is the representative agent of the third respondent in Zimbabwe. This from the third respondent's opposing affidavit is now common cause and it is not disputed. They further submitted and managed to show that there are valid judgments by the courts of the Republic of Zimbabwe against the third respondent and its deponent Yossi Fuss and that such judgments sound in money and have not yet been satisfied. This again is common cause. It is common cause from the parties' papers that there is no dispute that the third respondent is owed some well-ascertained amounts of money by the fourth respondent which monies are locked by the fourth respondent on the grounds that there has been competing claims and it now does not know who to pay. What is clear is that the third respondent has an interest in the money and applicants also have an interest in the said money and the later are alleging that the former has an obligation in terms of the laws of Zimbabwe to have judgments debts in Zimbabwe satisfied from such monies which it intends to export to Israel.

The applicants contrary to what respondents said claimed that the liquidation of the third respondent in Israel was done fraudulently to try to evade satisfaction of foreign judgment creditors including those in Zimbabwe. The first, second and third applicants as interested parties were not advised and such liquidation is vitiated and is contrary to principles of natural justice. See Van Winsen, Cilliers and loots: *The Civil Practice of the Supreme Court of South Africa* (4th Edition. 1997) at page 999, *Corona v Zimbabwe Iron and Steel Company Ltd* 1985 (2) SA 423 (TKA) at 425-426.

From the submissions by the respondents it is not in dispute that there is evidence of an Interim judgment for voluntary liquidation of the third respondent in Israel. The issue to be decided is whether or not the Interim judgment for voluntary liquidation of the third respondent in Israel has legal force and effect in terms of the laws of Zimbabwe. While the respondents submitted that such a judgment has legal force and effect in Zimbabwe and that such judgment need not be formerly registered in Zimbabwe first to have effect, the applicants argued otherwise. The respondents on this point cited the case of *Intro-Wise Catering (Pvt) v Cosira Communications Global & Others* HB 10/15 at p 2 para 3 where it was held as follows:

“There is no legal basis for that order of liquidation to be recognised in this court, to give recognition to such an order. There is no merit in the argument in that the order of liquidation granted by the court of in South Africa, must be recognised in this jurisdiction first before the Republic can be heard...In, the circumstances therefore, and exercising my judicial discretion I do not consider it necessary for the liquidation order relating to the 2nd Respondent to be recognized first in this court formerly. I am satisfied that the order is valid and that the issues for determination can be disposed of without consideration of cross-border insolvency and the recognition of foreign liquidators. I would accordingly dismiss the point *in limine*.”

On the other hand the applicants submitted that the purported evidence of an interim judgment for voluntary liquidation of the third respondent in Israel has no legal force and effect in terms of the laws of Zimbabwe on the grounds that it is an interim and not a final judgment of a foreign court with the effect of *res judicata*. The applicant’s contention is based on the case of *Tiiso Holdings (Pty) Limited v Zimbabwe Iron Steel Company* HH-95-2010 where PATEL J (as he then was) dealing with a case where a foreign judgment was in issue as evidenced of that fact among others remarked after quoting Forrsyth’s Private International Law (4th, at page 427-428) remarked that:-

“A provisional judgment of an internationally competent foreign court will not be enforced and recognised. After all, it will be very undesirable if the foreign judgment was set aside or altered by the court which made it in the first place. Consequently, any foreign judgment must be final and conclusive before it will be recognized or enforced...”

In casu, it has not been said by the respondents that the third respondent has been finally placed under liquidation in Israel. What we have been told is that there is a provision order for liquidation. Whether the third respondent will ultimately be liquidated or not is a story to be told on another day. For this reason it would be undesirable, illegal and an affront to public policy of Zimbabwe to recognize and enforce a provisional judgment of an internationally competent court whose finality is not yet known. Had it been said that the third respondent had been finally liquidated in Israel and there was a final judgment to that effect, my position would have been a different one. The case cited by the respondents would have been binding on me. Now that it is just a provisional judgment, I am persuaded to follow the case cited by the applicants. I therefore find merit in the submissions by the counsel for the applicants that such provisional judgments are not enforceable in the Republic of Zimbabwe persuasive as they may be.

Other points such as lack of jurisdiction, defective cause, and material disputes of facts were raised by the respondents. I found no merit in them in view of the acknowledgments of debts, that the defendants have money and property in Zimbabwe. In particular counsel for the fourth respondent submitted that the fourth respondent is not privy to the agreement between first, second and third respondent hence the claim against fourth respondent infringes upon the doctrine of privity of contract. He disputed that proof of payment cannot be used as basis for liability since the fourth respondent did not assume debts of Marange. I found the submission by the applicants to be credible in that liability of the fourth respondent is on the grounds of the legal principle of succession, takeover and consolidation of companies, reference to the Company laws of the Republic of Zimbabwe. The fifth respondent was barred from making submissions in view of him having failed to file heads of argument. However, his counsel submitted that they would abide by the decision of the court.

CONCLUSION

In my view the applicants have managed to satisfy all the principles required in an application of this nature. I agree that the attempt to place the third respondent under liquidation is made solely as a way to avoid payment of debts owed to the applicants in Zimbabwe and others internationally. It is a gimmick designed to take the money out of the Republic of Zimbabwe to Israel without paying local debts and other beneficiaries. The application will succeed and I make the following orders.

IT IS ORDERD THAT

1. The 1st, 2nd and 3rd Applicants are hereby declared to be the lawfully authorised and recognized agents and representatives of Fuss Diamond Ltd in the Republic of Zimbabwe for purposes of all diamond transactions, receipt and payment of monies from the 3rd respondent in connection with their dealings with the 3rd Respondent formerly Marange Resources (Pvt) Ltd.
2. It is hereby declared that, all outstanding monies in the sum of US\$ 1 226 000.00 (ONE MILLION TWO HUNDRED AND TWENTY SIX THOUSAND UNITED STATES DOLLARS) currently held by the 4th Respondent and due to Fuss Diamonds Ltd with respect to the Diamond dealership agreement dated the 04th of July 2013

shall immediately within seven (7) days of this order be payable by the 04th Respondent to the 1st, 2nd and 3rd Applicants or anyone of them.

3. All the debts arising out of statutory and contractual obligations of Fuss Diamonds Ltd with the 1st, 2nd and 3rd Applicants shall be payable thereto in Zimbabwe in terms of the laws of the Republic of Zimbabwe out of any monies stated in paragraph 2 herein above.
4. It is hereby declared that, the 4th Respondent, its employees, agents or anyone acting through them or demanding payment from them shall not make any payment of monies referred to in paragraph 2 hereinabove to any other person residing or living outside the jurisdiction of the courts of Zimbabwe other than the 1st, 2nd and 3rd Applicants or, anyone with a valid judgment of the courts of the Republic of Zimbabwe.
5. Costs of this suit on a legal Practitioner- Client Scale shall be paid by the 3rd Respondent.

Mawadze and Mujaya, 1st, 2nd and 3rd applicants' legal practitioners
Thompson Stevenson & Associates, 1st, 2nd and 3rd respondent's legal practitioners
Matsikidze and Mucheche, 4th respondent' legal practitioners
Civil Division of the Attorney General's Office, 5th respondent's legal practitioners