

TANZANIA / JUDGMENT

MWACOTRA LTD VS MGS MINING SERVICE LTD MISC

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
PAR ES SALAAM MISC. COMMERCIAL APPLICATION NO. 19970 OF 2024 MWACOTRA
LIMITED.....APPLICANT VERSUS MGS MINING SERVICES
LIMITED.....1st RESPONDENT JIUDING MINING INVESTMENT LIMITED.....
2nd RESPONDENT

RULING

Date of last order: 30/08/2024 Date of ruling: 06/09/2024 AGATHO, J.: The applicant armed with certificate of urgency and chamber summons support with an affidavit knocked at the door of this court accusing the respondents of disobeying the temporary injunction order given on 5th July 2024 and seeking an order restraining them from continuing with mining activities at the mining site in dispute. The supporting affidavit was deposed by Farid Mohamed Sherali, the Director of the applicant. Upon receiving a copy of the application, the respondents denounced the applicant's allegations through the counter affidavits of Medard Daudi Mwijage and Jun Li. It suffices to state here that the chamber summons contained ex parte and inter parte orders sought. But on the date when the matter came for hearing both sides were present. The applicant could not therefore be heard ex parte. The court ordered the hearing to be inter partes. In the chamber summons, the applicant sought the following inter parte

orders:

1. That the honourable Court be pleased to make a finding that there exists sufficient cause to the respondent liable for breach of lawful court order issued on 5th July 2024 by this Court.
2. That the honourable Court be pleased to summon and arrest the principal officers of the respondents, one, Medard Daudi Mwijage, and Jun Li to show cause why they should not be committed to prison or order to pay fine for intentional disobedience of the lawful order of this Court.

3. The honourable court be pleased to order on the request the immediate assignment of a court broker with the police assistance for closure of the mine to ensure the cease of mining activities pending the final determination of the main suit. This assignment is the only way to verify and ensure the pure enactment of the judgment in the court order removing the burden of proof from either party, as it is envisaged that the defendants will likely claim to have stopped the activities, while the applicant claims otherwise as deponed herein.
4. That, this honourable court be pleased to order restoration of the status quo before the breach of the court order and the respondents and or their agents to stop operating mining activities pending determination of the main suit. 2
5. That, court be pleased to maintain the status quo pending hearing and the final determination of commercial case No. 4459 of 2024 before this honourable Court.
6. Costs of this application to abide by the results; and
7. any other orders this honourable court may deem fit to grant As for legal representation both sided were represented by the learned counsel. Whereas Mr Abubakar Salim represented the applicant, Mr. Meswin Masinga and Geofrey Kalaka appeared for the 1st and 2nd respondent respectively. The hearing of the application was conducted orally on 30/08/2024. The thrust of the application at hand is whether there is evidence to prove allegation of contempt to persuade the court grant the inter parte orders sought in the chamber summons. In fact-finding mission, the court will thus travel through the contents of the affidavit and counter affidavits filed in Court. An eye will also be thrown on the submissions of the learned counsel. And due consideration will be given to the law on contempt. Before analysing the evidence, submissions of the parties and the law, it is worth briefly depict their persuasions of the parties as captured in the submissions. I am grateful to the learned counsel for the submissions made. Mr. Salim for the applicant began his submission by withdrawing the applicant's reply to respondents' counter affidavits because it was filed out of time and without seeking extension of time or leave of the court. Thereafter, the learned counsel recalled that the Court issued temporary injunction, and the respondents were ordered to maintain status quo on 5th July 2024 and the said order was given in the presence of Meswin Masinga for the 1st respondent and Mr Masinga was holding brief of Mr Kalaka for the 2nd 3 respondent. Mr. Salim lamented that as of to date, the respondents have not complied with the court order. And the mining activities are ongoing until now. He then turned to the contents of counter affidavits by both respondents, and they have averred that no mining activities that are ongoing except people who are living at the site. Mr Salim made a contrasting submission that the respondents are taking advantage of residing in the same area and they are freely conducting mining activity contrary to the injunction order given by the court. He submitted that looking at the applicant's prayers particularly prayer number 3, this Court be pleased to assign a court broker who will enforce the court order for temporary injunction by closing the mining area not where the workers are residing pending determination of the suit. It was his view that this will clear the doubt between the applicant saying there are mining activities going on at

the site while the respondents denying it. Mr Salim made it clear that if the respondents will still persist then the other prayers for arrest and commit them to prison be also taken on board. Mr. Masinga for 1st respondent outrightly submitted that the application is devoid of merit. He reminded the Court that the application was brought under Order XXXVII Rule 2(2), Sections 68(c), (e) and 95 of the Civil Procedure Code [Cap 33 R.E. 2002]. He asked the court to note that the current CPC is the R.E. 2019. While referring to prayers in the chamber summons specifically prayer number 2 that the principal officers of the first and second respondent Medard Daudi Mwijage and Jun Li to show cause why they should not be committed to prison or order to pay fine for intentional disobedience of the lawful court order. The 1st respondent counsel was wary of the allegation of disobedience of court orders as being a serious allegation and since by its nature it involves if it is actually found that the respondents 4 have disobeyed the court order they may be imprisoned because that is what is indicated under Order XXXVII Rule 2(2) of the Civil Procedure Code [Cap 33 R.E. 2019]. He read the provision stating that the court granting injunction in case of disobedience by a party may order attachment of his property or may commit him into civil prison. In that regard it was Mr. Masinga submission that the standard of proof that the respondents have committed contemptuous acts are high on the part of the applicant. The standard of proof is not on balance of probabilities as it is in normal civil cases. He then narrated the requirements in establishing contempt of court order: first, the applicant must show that there was a court order dated 5th July 2024. Second the applicant must prove that the respondent has gone against the court order. And lastly, the punishment to a person who has disobeyed the court order. Mr. Masinga agreed that the applicant has shown there is court order. But it was his view that the affidavit of Farid Mohamed Sherally in support of the application and even the submission by the counsel provided no evidence showing that the respondents have disobeyed the court order. He then referred to paragraph 4, 7, 8 and 9 of the first respondent's counter affidavit that according to him states clearly that they have abided with the court order dated 5th July 2024. The counsel for the first respondent contended that the applicant is trying to make some prediction of what is transpiring at the mining site. And on this Mr Masinga cited paragraph 3 of the inter partes orders sought in chamber summons from third line the applicant is exonerating herself from the burden of proof that there has been disobedience to the court order. It states that this assignment is the only way to verify and ensure the pure enactment of the judgment and court order, removing the burden of proof from either party. To Mr. Masinga this is an attempt of the applicant to avoid duty to prove. The counsel further cement that the burden of proof lies on the applicant. And the proof must be beyond reasonable doubt as stated in the case of Exim Bank Tanzania Limited v Rafiki Halai, Misc. Commercial Application No. 105 of 2021 HCCD at DSM at page 10. He submitted that the proof in civil contempt is similar to that in criminal cases that is beyond reasonable doubt. The applicant should not exonerate herself to prove that the respondents have disobeyed this court's order. In furtherance of his submission, Mr. Masinga supplied the court with Mulla the Civil Procedure, 18th ed. Volume 3 at page 3364 where Rule 2A of Order XXXIX of India CPC is in pari materia with our Order XXXVII Rule 2(2) of the CPC specifically on standard of proof in application of this nature. The burden of

proof is on the person alleging contempt to prove the ingredients of the offence beyond reasonable doubt. To that end the 1st respondent's counsel submitted that the applicant is short of the standard of proof stated. Even the prayer to appoint a court broker and other prayers cannot hold water because the applicant has failed to prove the allegation. Mr Masing eventually prayed for the dismissal of the application with costs for want of merit. Flanking Mr. Masinga for the 1st respondent was Mr. Kalaka for the 2nd respondent. In his reply submission the 2nd respondent's counsel submitted that they oppose the application filed by the applicant in this Court. He made it clear that he subscribes to the submissions made by the counsel for first respondent in view of serving time. And he submitted briefly that on 5th July 2024 when then court issued injunctive order in respect of conducting mining activities in relation to the mining licences stated in the order, it was on the 6 same date he informed the second respondent to immediately comply with that court order. And it is from that time until to date that the second respondent has never conducted any mining activity as ordered by this court. Rather the second respondent is using the residence available at the mining site as their residential home together with his employees. It was Mr Kalaka's submission that apart from using the residence which is backed with annexure JLC-1 in the counter affidavit of the second respondent, he does not do any mining activity as alleged by the applicant. Mr. Kalaka attacked the applicant's bare allegation that the respondents are conducting mining activities in the area subject to court order for injunction. In his view the application and its affidavit contain a sequence of the story without any proof. As regarding the prayer number 2 in the application, that is summoning the Medard Daudi Mwijage and Jun Li, Mr Kalaka reiterated Mr Masinga's submission and the position in the case of Exim Bank Tanzania Limited (supra). And he stressed that the burden of proof in civil contempt is beyond reasonable doubt and that the applicant had the duty to prove that standard so as to enable this court to grant the prayer sought. He in the end prayed that the application be dismissed for want of merit with costs. In his rejoinder Mr. Salim for applicant opposed Mr. Masinga's claims that the application is without merit. He added that the application aims at ensuring the court order is observed. It was the counsel for the applicant's observation that the submission by the respondents' counsel is not evidence. Mr Salim reiterated the applicant's prayer that the court appoint a court broker to see to it that its order is complied with. 7 The applicant's counsel rejoined further that the respondents' counsel admitted that the respondents are residing in the very same mining area. The applicant's counsel repeated his submission in chief that the respondents are using the umbrella of residing at the mining site to continue with mining activities. He went on submitting that there is no counter argument to what he submitted. And he wondered if the respondents have complied with court order why are they afraid to appointment of court broker to see that the injunctive order is complied with. On the burden of proof Mr. Salim responded that the appointment of court broker is vital. And if the respondents continue conducting mining activities then the court be pleased to issue an order for arrest and committing them to civil prison. The learned counsel was loud that he has no quarrels with the decision of Exim Bank (supra) and commentaries by Mulla. He emphasized that they pray that their application for issuance of an order appointing the

court broker with assistance of the police to safeguard the court order pending determination of the main suit. He also prayed the costs be in due course. Now, the issue to be determined in this application is whether the respondents have committed contemptuous acts by disobeying court order for temporary injunction issued on 5th July 2024 restraining from continuing with mining activities at the mining site subject of the suit pending in this Court. The answer to this question will surely depend on evidence presented by the parties in the affidavit and counter affidavits. I thus ask, is there evidence adduced in the affidavit of Farid Mohamed Sherally to prove that the respondents have disobeyed the court order? I took liberty of reading the affidavit and counter affidavits filed in Court in respect 8 of the application at hand. My keen reading of the affidavit in support yielded nothing credible to support the allegation of contemptuous acts. Taking paragraph 5 of the affidavit as an example, the deponent avers that: " after realizing that the respondents had not ceased mining, the applicant himself went to the mining area to serve the respondents the order, in an attempt to remove possibility of advocates present during the ruling not having conveyed the order to their clients. The order was received on site by the Manager. The applicant witnessed the ongoing mining operation still being conducted by the respondents..." The above averments were disputed by the respondents vide paragraph 4 of the counter affidavit of Medard Daudi Mwijage, principal officer of the first respondent and in paragraph 6 of the counter affidavit of Jun Li, principal officer of the 2nd respondent. I have given thought to the content of paragraph 5 of the affidavit in support. Indeed, there is no evidence therein to prove that there are ongoing mining activities at the site. It is unclear as to why Mr. Farid Mohamed Sherally, the deponent of the affidavit in support of the application would go to the mining site, witnessed the respondents' disobedience to court order dated 5th July 2024 with their continuing mining activities and he, Mr. Sherally would not take a picture or video clip of these unlawful acts. His affidavit does not tell if at all the atmosphere at the mining site was terrifying that he feared his safety or he was anyhow prevented from taking picture of what was happening there. I am therefore far from being convinced with the averments that there is disobedience of the injunction order. 9 Besides that, I ask myself, can this Court issue an order for appointment of court broker and police assistance without evidence showing that the respondents have disobeyed the Court order? Since there is no evidence of disobedience to court order, to issue an order for appointment of the court broker will be taking this Court into the realm of speculation. Another question is, can the powers granted to this court under the provisions of Order XXXVII Rule 2(2), Sections 68(c), (e) and 95 of the CPC [Cap 33 R.E. 2002] be exercised without any sufficient cause or evidence of some sort? While I understand that there is possibility that the respondents are taking advantage of staying in the mining site to sneak into the mines and continue with mining activities. But this is nothing than speculation if not suspicion. In that respect the court draws an inspiration from the criminal case of Nathaniel Alphonse Mapunda and Benjamin Alphonse Mapunda v. R [2006] TLR 395), it was held that suspicion however strong it may be, it cannot ground conviction. Hence suspicion can not in the context of the case at hand be a ground for this court to hold that there was contempt committed by the respondents against the injunctive order. There ought to be evidence to

prove beyond reasonable doubt the commission of such unlawful act. In pondering further this application, I proceed to wonder, whether the applicant discharged the burden of proof. The order sought in item 3 of inter partes application orders is clear that the applicant is asking the court to dispense with requirement of burden of proof. That will be without sugarcoating against the law and established principles. The standard of proof in cases of civil contempt is beyond reasonable doubt. And the rationale for the same is clear for it is an offence to disobey court order in particular injunctive order. If it is proved and a party is found guilty his property may be io attached or he himself be thrown into civil prison. Such serious penalty of curtailment of an individual's liberty cannot be taken lightly or by basing on speculation. That would be a mockery of justice. Looking at the affidavit in support of application there is no evidence therein to prove that the respondents are continuing with mining activities even after the court issued injunctive order on 5th July 2024. That said and done the application at hand is dismissed for lack of merit. Costs will be in the main suit. Order accordingly. DATED at DAR ES SALAAM this 6th Day of September 2024. Date: 06/09/2024 Coram: Hon. U. J. Agatho J. For the Applicant: Tesieli Kikoti, Advocate h/b Abubakary Salim, Advocate For the First Respondent: Jeddines Jasson, Advocate For the Second Respondent: Geoffrey Kalaka, Advocate C/Clerk: E. Mkwizu li Court: Ruling delivered today this 6th September 2024 in the presence of Tesieli Kikoti, Advocate, h/b of Abubakary Salim, counsel for the applicant, and Jeddines Jasson, counsel for the first respondent and Geoffrey Kalaka, counsel for the second the respondent. AGATHO JUDGE 06/09/2024 12

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