

**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE KITWE DISTRICT REGISTRY**  
**(Civil Jurisdiction)**

**2006/HK/ARB/1**

**IN THE MATTER OF:        THE ARBITRATION ACT CHAPTER 40 OF THE LAWS OF  
   ZAMBIA ACT 19 OF 2000**

**AND**

**IN THE MATTER OF:        ARBITRATION**

**BETWEEN:**

**E & M STORTI MINING LIMITED**

**PLAINTIFF**

**AND**

**TWAMPANE MINING CO-OPERATIVE SOCIETY LIMITED**

**DEFENDANT**

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court on this 22<sup>nd</sup> day of March, 2013

For the Plaintiff        :        Mr. S.A.G. Twumasi - Kitwe Chambers

For the Defendant     :        Mr. F. Chalenga - Freddie & Company

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**R U L I N G**

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**Authorities referred to:**

1. Rules of the Supreme Court 1999, Order 29 rule 1A (24,) Order 30 rule 1(7) Order 30, rules 2 to 6, Order 51 (3)(1)
2. Enforcement of Money Judgments, Gray Evans, Butterworths, London 1995 at pages 121 and 122, pages 123-125

This is an application by the plaintiff for an order of appointment of a receiver by way of equitable execution and an order of injunction restraining the defendant, its servants and/or agents or whosoever from dealing with or transacting with its assets as to dissipate the same.

The application is brought pursuant to Orders 29 and 30 RSC 1999. There is an affidavit in support dated 6<sup>th</sup> September, 2012 and a further affidavit in support dated 7<sup>th</sup> September, 2012 sworn by Enrico Storti, the plaintiff's Managing Director. A number of documents are exhibited to the affidavits. On 7<sup>th</sup> September, 2012, the plaintiff also filed heads of argument and list of authorities. There is no affidavit in opposition or heads of argument filed by the defendant company.

Before me, Mr. Twumasi, counsel for the plaintiff relied on the affidavit in support and submitted that following the award ("ES1") by the arbitrator which was registered in this court on 24<sup>th</sup> April, 2009, and the refusal to set aside the award by this court and the Supreme Court ("ES2"), the plaintiff proceeded to attempt execution by writ of fi.fa, but the same failed. The report filed by the Sherriff is exhibited ("ES3"). Counsel submitted that equitable execution is necessary because of the nature of the business the defendants are engaged in, that of mining emeralds; and that the only asset which is available from which the plaintiff can recover is the mining licence and the mine itself, as the defendants have no property on the premises, but are carrying on a successful business as deposed in para 14 of the first affidavit, from which they are able to raise funds, but they have made no attempt to settle the amounts owing to the plaintiff.

Counsel further submitted that the fact that the defendants are operating a successful business is evident from the fact that as of March, 2012, they offered to pay the award in the sums of US\$100,000 and K100,000,000.00 by 21<sup>st</sup> July, 2012 ("ES8"), but they have neglected to do so, and are willfully refusing to settle the award. He contended that the defendants get third parties to mine and whatever product is mined is moved immediately from the mine and that an equitable execution by appointment of a receiver is necessary. Counsel referred to my ruling of 14<sup>th</sup> July, 2010, ("ES1" on further affidavit), and urged that this court had directed, when the stay of execution of the arbitral award was granted pending determination of the appeal against the order refusing leave to appeal out of time, that the plaintiff be paid the full arbitral award without delay, if the appeal failed.

He stated that the appeal failed on 24<sup>th</sup> November, 2011, but the defendants have not complied with this court's order although they are running a successful business. Counsel referred me also to a book by Gray Evans titled *Enforcement of Money Judgments*, Butterworths, London 1995 at pages 121 and 122, where he says it is indicated that the court may appoint a receiver in equitable execution where (a) the common and usual procedure of execution such as a writ of fi.fa has failed; and (b) in the instance where the defendant is running a successful business.

He also submitted that in terms of Order 30 rule 1(1) RSC, the power of the court to appoint a receiver are very wide and that the court will do so where it is just and convenient for purposes of ensuring that the orders of the court are enforced. Counsel submitted that the plaintiff has proposed the appointment of Mr. Elijah C. Banda, SC as receiver as he meets the criteria of a fit and proper person as required under the said order and that if he is so appointed, he would comply with any orders that this court will grant relating to his appointment as receiver; and that the court can regulate a receiver appointed in equitable execution and can give direction to him on how he can proceed to recover the amounts which the plaintiff claims.

With regard to the second leg of the application, counsel urged that in my judgment of 14<sup>th</sup> June, 2010, I directed the defendants to refrain from wasting or depleting the mine and that this is a form of injunction which the plaintiff applies that it be enforced. Counsel argued that a mine is a wasting asset and that if the defendants continue to allow third parties to mine as stated in paras 20 to 22 of the first affidavit, it would be to the detriment and prejudice of the plaintiff.

Mr. Chalenga, who has since taken over conduct of the matter on behalf of the defendants, submitted on what he terms the law, first that this application is anchored on Order 30 Rule 1, RSC and that the application for injunction is ancillary to the appointment of a receiver to manage the property of the defendant. Counsel contended that it is a requirement under that order for the plaintiff to distinctly disclose to the court the property over which the receiver is to be appointed.

Counsel submitted that it is also a requirement under Order 30 rule 1(7) for the plaintiff to file an affidavit of fitness for the person named or sought to be appointed as receiver and that this provision makes it mandatory that the affidavit must not be made by the applicant or his solicitor.

He contended that the plaintiff's affidavits do not disclose the property for which the receiver is sought to be appointed and that reference to an emerald mine or a licence is not sufficient or adequate description of the property and that the application will leave the court wondering as to what property the receiver will manage. He contended that the rationale of Order 30 rule 1(7) is not only to allow the Court to know the person it is appointing as receiver, but also to allow the parties to know whether the receiver to be appointed complies with the provisions of section 7(2) (a) of the Mines and Minerals Development Act 2008. He argued that the further affidavit in which Mr. Storti proposes the appointment of Mr. Banda, SC as receiver falls short of the requirement of Order 30 rule 1(7) as it is sworn by the Managing Director and that in the absence of an affidavit of fitness the application must fail.

On the second leg of the application, counsel submitted that the plaintiff has failed to meet the standards and requirements set out under Order 29 RSC, in that the affidavits in support do not contain a full and frank disclosure of the facts. He stated that the allegations in paras 20 to 22 of the first affidavit are not supported by any documentary proof to show that the defendants have been conducting a successful business or mining to enable them to pay the arbitral award and that the only evidence available is the Debit and Advice note by the Sheriff, "EN7" which shows that the defendants have no goods worth seizing. Counsel further argued that there is no evidence to show that the defendants are wasting or depleting the mineral wealth of the mine or that they are failing to comply with the ruling of 14<sup>th</sup> June, 2010. He argued also that Order 29 rule 1A (24) requires the applicant to make a full and frank disclosure in order to be entitled to an injunction; that with the defendants' submission that the plaintiff has failed to show proof that the defendants are running a successful business, the plaintiff is not entitled to an injunction.

Counsel urged that the proposal by the defendants to pay US\$100,000 and K100,000,000, is not a basis on which the court can rule that the defendants are running a successful business, more so that the proposal was not even met. He urged that the application be dismissed with costs.

Mr. Twumasi replied first that the matters deposed to by Mr. Storti in the two affidavits have in no way been contested by the defendants as there is no affidavit in opposition and that the defendants cannot be heard to say that there is no evidence showing that they have for example not obeyed the orders of this Court. Counsel also stated that the facts deposed to by the plaintiff clearly show that the defendants are running a successful business and that the letter from the defendant's own counsel marked "ES8" on the first affidavit clearly shows that there can be no other interpretation that they could raise such sums of money to pay towards the debt and that the input of that letter is clear evidence that the defendants are running a successful business. He said that paras 20 to 21 of the first affidavit state that third parties are mining and a name is mentioned which facts have not been opposed.

He further urged that the affidavit of fitness of the person to be appointed in terms of Order 30 rule 1(7) can be dispensed with which is made clear in paras 5 and 6 of the first affidavit where a senior lawyer is proposed; that the further affidavit is not that of the fitness of the person to be appointed, but a further affidavit to the earlier one; and that the deponent was entitled to swear that affidavit. He stated that the absence of the affidavit of fitness does not prejudice the plaintiff's application as the fact that the proposed person is a fit and proper person has not been objected to in an affidavit. Counsel urged that the affidavit of fitness should be dispensed with.

Counsel also argued that the requirement of Order 30 rule 1(7) is to give a general nature of the property over which the receiver is to be appointed and that by Order 30 rule 9 it is in the order appointing the receiver where the property should be distinctly described. He urged that the plaintiff complied in giving a description of the general nature of the property in para 14 of the first affidavit.

Finally he urged that the order of 14<sup>th</sup> June, 2010 was an injunction to prevent the defendants from wasting and depleting the assets which order must be enforced. He stated that the circumstances under which the order was made showed full disclosure of the facts and that the two affidavits have also given a full and frank disclosure of the facts. He urged me to grant the applications.

I have considered the affidavit evidence and the submissions. It is a fact that the plaintiff has an arbitral award in its favour made by Mrs. Abha Patel on 28<sup>th</sup> August, 2008 in the sums of US\$310,000 with interest at 2% above LIBOR from 30<sup>th</sup> June, 2006 the date of the appointment of the arbitrator to the date of payment and the sum of K292,657,390 with interest at the rate specified in the Judgments Act also from 30<sup>th</sup> June 2006 to the date of payment.

It is not in dispute that the final arbitral award has not been met by the defendants. I refused their attempt to set aside the arbitral award on 16<sup>th</sup> April, 2009. On 16<sup>th</sup> July, 2009 I rejected an ex parte order for stay of execution, but I granted an interim order for stay on 4<sup>th</sup> August, 2009 after the parties indicated that they were trying to settle the matter ex curial. On 15<sup>th</sup> March, 2010, I refused an application by the defendant for extension of time to appeal to the Supreme Court for reasons clearly stated in the ruling delivered on that date. However I granted the defendants leave to appeal against the dismissal of the application. The appeal was filed on 22<sup>nd</sup> March, 2010. On the same date a writ of fi.fa was filed into court by the plaintiff while the defendants filed an ex parte summons for stay of execution. Another summons was filed on 15<sup>th</sup> April, 2010.

On 14<sup>th</sup> June, 2010 I granted a stay of execution of the arbitral award pending the determination of the appeal to the Supreme Court, on condition that the plaintiff be paid the full arbitral award without delay if the appeal failed. I also directed the defendants not to waste or deplete their assets except for legitimate and necessary expenditure. The Supreme Court dismissed the defendants' appeal in the judgment exhibited as "ES2". It is quite clear that after the dismissal of the appeal the defendants did not endeavour to settle the arbitral award as I directed in the ruling of 14<sup>th</sup> June, 2010.

There is no dispute that on 23<sup>rd</sup> April, 2012 the plaintiff was granted leave by the learned Deputy Registrar to reissue the writ of fi.fa (“ES3”). The fi.fa was reissued for the total sum of US\$399,124.99 and K780,663.587.82 inclusive of interest (“ES4”). So far these amounts are not disputed by the defendants. The writ of fi.fa was executed on 24<sup>th</sup> May, 2012 and CAT excavator LC 925 was seized. On 30<sup>th</sup> May, 2012 Copper fields Mining Services Limited issued a notice of claim to the goods taken in execution (“ES5”). On 5<sup>th</sup> June, 2012, the Assistant Sheriff issued interpleader summons. On 10<sup>th</sup> August, 2012 the learned Deputy Registrar ruled in favour of the claimant and found that the equipment seized belonged to the claimant (“ES6”).

It is quite clear to me that further execution to recover the arbitral award has failed. The Debit and Advice Note by the Sherriff and his officer exhibited as “ES7” indicates that execution failed on 30<sup>th</sup> August, 2012 because the defendant has no goods worth seizing. This state of affairs has prompted the plaintiff to apply for equitable execution by way of appointment of an equitable receiver.

Under Order 51 (3)(1) RSC, an application for the appointment of a receiver by way of equitable execution may be made in accordance with Order 30, rule 1. Rules 2 to 6 of that Order apply in relation to a receiver appointed by way of equitable execution as they apply in relation to a receiver appointed for any other purpose. It is clear that under Order 30 (1)(2), an application for an injunction ancillary or incidental to an order appointing a receiver may be joined with the application for a receiver. It must be noted from the start that once judgment has been obtained against a debtor there are a number of enforcement options available to a judgment creditor including an execution by writ of fi.fa. But there are also a number of flexible options for enforcement of court orders against complex intangible assets. These flexible methods are known as “equitable enforcement”. Equitable enforcement methods unlike other types of enforcement are not granted automatically as a right. It is a matter for the discretion of the court whether or not to grant equitable enforcement. The court will look at the entire circumstances in order to do what fairness and justice requires.

Equitable execution is usually granted only if the other conventional means of enforcement are ineffective or have failed. The court will, in exercising its discretion consider the conduct of the part that has made the application. The most common type of equitable enforcement involves the appointment of a "receiver by equitable execution". This type of receiver bears similarities to a court appointed receiver by way of enforcement of security and many of the same considerations apply and the receiver's status and duties to the court are similar. This is also a similar process to garnishee, except that the ultimate objective is for the creditor to receive the net sale proceeds of an asset belonging to the debtor. The receiver must be appointed over specific property belonging to the judgment debtor and not over his property generally.

The court may also give the receiver liberty to take such proceedings as might be necessary to force a sale of the property; whether under section 30 of the Law Property Act, 1925, or otherwise, in order to realise funds to pay the creditor. The court in determining whether it is just and convenient that the appointment should be made must have regard to the amount claimed by the judgment creditor, to the amount likely to be obtained by the receiver and, to the probable cost of his appointment. The court can make an inquiry over these matters. As submitted by Mr. Chalenga, in addition to the affidavit supporting the application for the appointment of the receiver, there should be a second affidavit which states that in the deponent's judgment the named receiver is a fit and proper person to be appointed receiver. If the affidavit supporting the application shows sufficient grounds, an injunction may be granted restraining the debtor from assigning, charging or otherwise dealing with the property in issue until after the hearing of the inter partes application (See Enforcing Money Judgment at pages 123-125).

In this case, Mr. Chalenga urged that the plaintiff's affidavits do not disclose the property for which the receiver is to be appointed or that reference to an emerald mine or a license is not adequate description. He further urged that the further affidavit in which Mr. Storti proposed the appointment of Mr. Banda, SC as receiver falls short of the requirement of Order 30 rule 1 (7) as it is sworn by the Managing Director and that in the absence of an affidavit of fitness of the receiver the application should fail.



It is plain from Order 30/1/7 RSC 1999 that the evidence should state generally the nature of the property and should include an affidavit of fitness where the appointment of a named person is sought. However, this paragraph clearly states that this is often dispersed with. The paragraph also states that the deponent should speak to at least five year's knowledge of the proposed receiver and that the affidavit must not be made by the applicant or his solicitor. In this case, both affidavits by the applicant are sworn by Enrico Stroti, the plaintiff's Managing Director.

In relation to the description of the property, paragraph 14 of the first affidavit states that the only valuable asset is the mine itself and the licence thereof and that the defendants are still operating a successful business. The property referred to in this paragraph is the mine and the licence relating to the said mine. The mine is clearly identified in the Joint Venture Agreement that was signed by the parties and is referred to in paragraph 5 at page 9 of the Final Arbitral Award as Plot 7 Twampane in the Pirala Area. The Joint Venture Agreement was annexed to the plaintiff's affidavit in support of ex parte originating summons to register an award dated 24<sup>th</sup> April, 2009 as "ES4". At page 2 of that document, the parties had agreed that the partnership would be carried on under the name of Twampane Mining and that the licence holder would provide licence No. 89 (Annexure A) in respect of Plot 7 Pirala in the Ndola Rural and the said licence would be used in the joint venture for the duration of the joint venture.

In my view the mine in issue is known by the parties and the general description given in paragraph 14 of the plaintiff's first affidavit is sufficient and identified the specific property for which the receiver is sought to be appointed. I agree with Mr. Twumasi that under Order 31/1/9 RSC 1999, it is in the order appointing the receiver where the property over which the receiver is appointed should be stated distinctly.

With regard to the affidavit of fitness, I agree with the argument by Mr. Chalenga that the affidavit must not be made by the applicant or his counsel and that the further affidavit in support of summons for appointment of receiver and order of injunction is sworn by the applicant's Managing Director.

In the said affidavit at paragraphs 5 and 6, the deponent proposed Mr. Elijah C. Banda, SC to be appointed receiver. The deponent further stated that the proposed receiver is a lawyer of good standing and a State Counsel and therefore shall not only comply with the law, but with all the orders of this court. According to Mr. Twumasi, this affidavit is not an affidavit of fitness of the person to be appointed, but it is merely a further affidavit to the first one. In my view, the further affidavit appears to be an affidavit of fitness. It not only proposes the appointment of Mr. Banda, SC as receiver, but goes further to indicate that he is a lawyer of good standing and a State Counsel and able to comply with the law and orders of this court.

In so far as the affidavit is made by the applicant, it offends Order 30/1/7 RSC, 1999. Therefore, I take it as urged by Mr. Chalenga that there is no affidavit of fitness. However, the absence of an affidavit of fitness cannot defeat the plaintiff's application. I have already said that under Order 30/1/7 RSC, an affidavit of fitness is often dispensed with. As urged by Mr. Twumasi I dispense with the affidavit of fitness as the proposed receiver is well known to both counsel and his credentials are not in dispute.

I have already made the point that in determining whether it is just and convenient that the appointment of a receiver by way of equitable execution should be made, I must have regard to the amount claimed by the plaintiff, to the amount likely to be obtained by the receiver and to the probable cost of his appointment. I directed an inquiry on these matters to be made, after which I received three affidavits, the first from the proposed receiver, the second from Mr. Peter Kang'ombe a Certified Chartered Accountant, and the third from Mr. Robert Kabwe also a Certified Chartered Accountant. I have perused the affidavits and the documents exhibited thereto. I observe that the affidavit of the proposed receiver has in paragraph 7 referred to the amounts claimed by the plaintiff as K837,244,016.50, US\$ 409,458.33 and advocates' costs of K400,000,00.00 (US\$ 100,000.00). The other two affidavits do not refer to the amounts to be recovered. Since the figures given in the proposed receiver's affidavit are not challenged, I accept that these are the amounts claimed as at this date.

Unfortunately none of the affidavits have addressed the question of the amount likely to be obtained by the receiver. However, paragraph 8 of the proposed receiver's affidavit states that the claimant's only realisable asset is the mineral right over Plot 7 Pirala in the Ndola Rural Emerald restricted area. In paragraphs 9 and 10, he has indicated how the receivership could proceed. No counter suggestions are made in the other two affidavits. From the tone of Mr. Banda, SC's affidavit, I believe that the total amounts claimed are likely to be obtained by the proposed receiver. I have also considered the proposed cost of the appointment of the receiver. In paragraph 11 of his affidavit, Mr. Banda, SC has proposed remuneration in either two ways: (a) as a percentage not exceeding 10% of the sale value excluding VAT and other disbursements or; (b) an agreed sale ball park figure of at least US\$ 120,000.00 or the Kwacha equivalent.

Mr Kang'ombe has proposed a rate of K200,000.00 per hour and a commission of 8% on the gross realised/disposal value/turnover with overheads/expenses to the account of the receivership. Mr. Kabwe has proposed an average charge out rate of K250,000.00 per man hours or 10% of the amounts recoverable which would be US\$ 39,912.50 and K78,066,358.70.

Having taken into consideration the suitability of the proposed receiver and that of the other two named persons as well as the amounts claimed, the amount likely to be recovered by the receiver and the cost of appointment, I am satisfied that the appointment of a receiver will be of practical value and that Mr. Elijah C. Banda, SC is a proper and fit person to be appointed as receiver in equitable execution. Accordingly, I grant the order sought by the plaintiff and appoint Mr. Banda, SC as receiver over the defendant's property and mineral right known as Plot 7 Pirala in the Ndola Rural Emerald Restricted area, which is also specifically described at paragraph 5.1 of the Joint Venture Agreement that was signed by the parties. However, the appointment is subject to the receiver giving security. Therefore, in accordance with Order 30/1/10 RSC 1999, I direct that summons should be issued forthwith before the learned Deputy Registrar, for directions as to security, the receiver's remuneration and accounts.

I turn now to the second leg of the plaintiff's application, that is, for an injunction to restrain the defendants, their servants and or agents from engaging third parties in the mining of the minerals and emeralds at the mine in question. As rightly submitted by Mr. Twumasi, on 14<sup>th</sup> June, 2010, I directed the defendants to refrain from wasting or depleting its assets pending the determination of the appeal to the Supreme Court, except for any legitimate and necessary expenditure. In the affidavit in support, in particular in paragraph 17, the plaintiff disclosed that the defendants are still working on the mines and that they make a lot of monies from the sale of the emeralds, but they have refused to make payments for the judgment debt. In paragraph 18, it is stated that about 14<sup>th</sup> March, 2012, the defendants proposed to the plaintiff to make payments of US\$ 100,000.00 and K100,000,000.00 which they have since failed to pay, but by their letter it was clear that they are running a successful business. In paragraph 19, it is stated that in the meantime, the defendants are engaging other persons and companies to enter into the mine to mine minerals and emeralds to the disadvantage of the plaintiffs who have a judgment in their favour. In paragraph 21 one of the persons who have been mining is named as Hadjigui Doucoure. In paragraph 22, it is stated that the conduct of the defendants shall result in the wasting of all the mineral wealth and is intended to frustrate the judgment of this court.

It is the contention of Mr. Chalenga that the allegations in paragraphs 20 to 22 of the plaintiff's first affidavit are not supported by any documentary proof to show that the defendants have been conducting a successful business or mining to enable them to pay the arbitral award or that the defendants are wasting or depleting the mineral wealth of the mine or that the defendants have not complied with the ruling of 14<sup>th</sup> June, 2010.

I am inclined to agree with the argument of Mr. Twumasi that the matters deposed to in the two affidavits are not contested as there is no affidavit in opposition. Therefore, Mr. Chalenga cannot be heard to argue that there is no documentary proof that the defendants are carrying on a successful business to enable them to pay the arbitral award or that the defendants are depleting the mineral wealth of the mine or that they have not complied with the order of 14<sup>th</sup> June, 2010.

I am persuaded that the defendants are carrying on a successful business, but for reasons only known to them they have failed to settle the arbitral award as proposed in their letter of 14<sup>th</sup> March, 2012. They have allowed third parties such as Hadjugui Doucoure to remove minerals and emeralds without any payments to the plaintiff that has been denied the fruits of the arbitral award since 28<sup>th</sup> August, 2008. I do not agree with the argument by Mr. Chalenga that there is lack of full and frank disclosure of facts.

However, I ought to add that an order appointing a receiver by way of equitable execution operates in a similar manner as an injunction. Of course as urged by Mr. Chalenga, under Order 30 rule 1(2) RSC 1999, the application for injunction is ancillary to the appointment of a receiver to manage the property of the defendant. The court may grant an injunction restraining the party beneficiary entitled to any interest in the property of which the receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of the application for the appointment of the receiver. In this case, since the order appointing the receiver by way of equitable execution operates in a similar way as an injunction, there is no justification for making an order of injunction after the appointment of the receiver as the defendants are automatically restrained under the order of appointment of receiver. In conclusion I award the costs of this application to the plaintiff to be taxed if not agreed. Leave to appeal is not granted.

Delivered in Chambers at Kitwe this **22<sup>nd</sup>** day of **March**, 2013

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**R.M.C. Kaoma**  
**JUDGE**