

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING

Case No: HC-MD-CIV-MOT-GEN-2024/00005

In the matter between:

**LEWCOR HOLDINGS (PTY) LTD** **1<sup>ST</sup> APPLICANT**  
**LEWCORE PLANT HIRE ORANJEMUND (PTY) LTD** **2<sup>ND</sup> APPLICANT**

and

**SPERGEBIET DIAMOND MINING (PTY) LTD** **RESPONDENT**

**Neutral Citation:** *Lewcor Holdings (Pty) Ltd v Spergebiet Diamond Mining (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2024/00005) [2024] NAHCMD 39 (9 February 2024)

**Coram:** MASUKU J  
**Heard:** 23 January 2024  
**Delivered:** 9 February 2024

**Flynote:** Civil Practice – Urgent applications – Rule 73 – requirements to be met by applicant in an urgent application – Interim relief sought – Requirements for the granting of interim relief discussed.

**Summary:** The applicants, approached the court on an urgent basis seeking an order that the matter be heard as one of urgency, in terms of rule 73. Furthermore, they sought an order interdicting and restraining the respondent from removing certain mine assets and/or machinery owned or possessed by the respondent and recorded in an annexure, pending the outcome of an action instituted by the applicants against the respondent under case number HC-MD-CIV-ACT-OTH-2023/05467, in which application the applicants seek the liquidation of the respondent into the hands of the Master of the High Court.

The applicants further seek an order interdicting and restraining the respondent from removing any mine assets and equipment which would fall under the authority of the liquidator, once appointed. The respondents argued that the matter is not one of urgency and the plant and material in question was not sold to avoid its responsibilities towards its creditors. The respondent submitted that the sale is in line with its business strategy and that the application must, on that basis, fail.

*Held:* It is trite that in urgent applications, the court must proceed on the basis that the allegations set out by the applicant, are correct. This accordingly places the applicant on a much firmer path than a respondent, in urgent applications.

*Held that:* A party seeking the granting of an interim interdict must satisfy the court of certain requisites. These were eloquently articulated by Corbett J in *Boshoff Investments (Pty) Ltd v Cape Town Municipality*.<sup>1</sup>

*Held further that:* Regarding the first requirement of the interim interdict, the applicant must not convince the court that it has a clear right. That requirement applies where the party seeks a final interdict. What the applicant must show is that it has a *prima facie* right, even if open to some doubt.

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<sup>1</sup> *Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C), at 267A-F.

*Held:* That the applicants had met the requirements for urgency and that the granting of an interim interdict, was, in the circumstances, justified.

Application granted with costs.

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**ORDER**

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1. This application is heard as one of urgency as contemplated in rule 73, and any non-compliance with the rules relating to forms, time periods and service, is hereby condoned.
2. Pending the outcome of the action instituted under Case Number HC-MD-CIV-ACT-OTH-2023/05467:
  - 2.1 The respondent is hereby interdicted and restrained from removing from the Elizabeth Bay Mine situate at 455R+59P, Elizabeth Bay, Namibia, (the 'Mine') any of the assets and/or machinery and/or equipment listed in the scheduled items to be sent to Zimbabwe Mines, as referred to in the applicants' founding affidavit, marked 'FA6'.
  - 2.2 The respondent is interdicted and restrained from removing from the Mine any assets and/or machinery and/or equipment owned or possessed by the respondent, or which would fall under the authority of the liquidator of the respondent, once appointed.
3. The respondent is ordered to pay the costs of this application consequent upon the employment of one instructing and one instructed legal practitioner.

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## RULING

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### MASUKU J:

#### Introduction

[1] Essentially, two quintessential questions arise for determination in this matter. The first, is whether this is a matter that should be heard by the court on an urgent basis. The second, should the first question be decided in the affirmative, is whether this is a proper case for the court to grant an interim interdict in favour of the applicants.

[2] Should the court find that the first question is answered in favour of the respondent, namely, that the matter is not one deserving to be disposed of on an urgent basis, the application will have to be struck from the roll. In this event, the applicants have a choice, if so advised, to continue with the application in the ordinary course.

#### The parties

[3] The first applicant is Lewcor Holdings (Pty) Ltd, a private company with limited liability and incorporated in terms of the company laws of this Republic. Its place of business is situated at 27 North Street, Okahandja. The second applicant, on the other hand, is Lewcore Plant Hire Oranjemund (Pty) Ltd, a private company, duly incorporated in terms of the company laws of this Republic. Its registered office is at the same address as that of the first applicant.

[4] The respondent, is Sperrgebiet Diamond Mining (Pty) Ltd, a private company, duly incorporated in terms of the company laws of Namibia, with its

principal place of business situated at L and B Secretarial Services CC, Aussenplatz Plaza, Dr Augostinho Neto Road, Windhoek.

[5] The applicants were represented by Mr Heathcote, whereas the respondent, was represented by Ms Lewies. The court records its indebtedness to them both for the assistance they dutifully rendered to the court.

[6] I shall refer to the applicants as such. The respondent, will likewise, be referred to as such. Where reference is made to both parties, they shall be called 'the parties'.

#### Relief sought

[7] The applicants, as foreshadowed above, approached the court on an urgent basis seeking an order that the matter be heard as one of urgency, in terms of rule 73. Furthermore, and more importantly, they sought an order interdicting and restraining the respondent from removing certain mine assets and/or machinery owned or possessed by the respondent and recorded in an annexure to the founding affidavit, pending the outcome of an action instituted by the applicants against the respondent under case number HC-MD-CIV-ACT-OTH-2023/05467. This action, it must be mentioned, is for the liquidation of the respondent into the hands of the Master of the High Court.

[8] The applicants further seek an order interdicting and restraining the respondent from removing any mine assets and equipment which would fall under the authority of the liquidator, once appointed. Last, but by no means least, the applicants seek costs consequent upon the employment of one instructing and one instructed legal practitioner.

[9] Needless to mention, the respondent opposes the relief sought. First, the urgency of the matter is contested by the respondent. The respondent further contends that the interim interdict should not be granted in this matter. These are the two questions that inevitably fall for determination below.

### The applicants' case

[10] Stripped to the bare bones, the applicants' complaint is that the respondent operates and owns a diamond mine called Elizabeth Bay Mine. It appears there were some problems that developed and the mining of diamonds went on intermittently between 2018 and 2023. The respondent's major shareholding, it would appear, was acquired by RZ Muzorewa Holdings Ltd, a company incorporated in terms of the laws of the British Virgin Islands.

[11] It is contended by the applicants that the first applicant holds 17% of the issued capital in the respondent. It is the applicants' case that the mine has not operated profitably for some time, as had been hoped. It stopped operations in April 2023. It further appears that the respondent is heavily indebted to some creditors. In February 2023, it recorded a loss of N\$118 Million. Furthermore, there was an operational loss of N\$204 538 083 and electricity supply to the mine, was terminated in May 2023. The respondent, in view of the bleak performance, opted to retrench some of the employees and operations ceased, as aforesaid, from April 2023.

[12] The applicants claim that they received information from a whistle blower, to the effect that the respondent intended removing some machinery from the mine, to Zimbabwe. It is the applicants' case that the removal of the machinery, which is critical for running a mine, will result in all the machinery at the mine being relocated, thus leaving little or no items of value as residue. Should mining restart, and a new operator takes over, so contend the applicants, the new operator of the mine will find the mine hollow, with little or nothing to work with as critical equipment is due to be removed to Zimbabwe.

[13] The applicants further state that although the respondent appears to allege that the items due for removal are being sold to a subsidiary or a company related to RZM, there are no bank details provided in proof of the

sale alleged. It is alleged that the sale does not appear to be at arm's length in any event.

[14] It is the applicants' case that in the event the machinery is removed from the mine, and transported to Zimbabwe, the money received therefrom, would not take into account the devaluing effect of the removal of the assets on the mine. Furthermore, the money received from the sale and paid out by the respondent to its creditor, will have the ominous effect of preferring some creditors over others and that this would be an undesirable development that should be avoided.

[15] In relation to urgency, it is the applicants' case that there have been some communications between the parties regarding the removal of the assets to Zimbabwe. What appears to have triggered this application, was the presence of a truck at the mine on 8 January 2024, with a driver. It had come to remove the items which weighed 33 tons, earmarked for transportation to Zimbabwe. The applicants claim further that the Ministry of Mines and Energy, was not informed about the impending removal of the machinery from the mine and that this was in violation of the provisions of the Diamond Mining Act 13 of 1999.

[16] Mr Heathcote argued that the respondent speaks of changing its business plan but does not take the court into its confidence, regarding what is anticipated to be done in that endeavour. He quipped that the respondent appeared not to sell diamonds anymore, but to sell the equipment and plant at the mine. Mr Heathcote emphasised that if the court were to eventually grant the liquidation order, as prayed for in the action, a liquidator would be appointed to assume control over the assets of the respondent but would find an empty shell, as it were, with most of the plant and equipment sold and removed from the jurisdiction. This, he submitted, would prejudice the *concursum creditorium*. He emphasised that the right the applicants sought was to protect its interests and that of other creditors of the respondent.

[17] Lastly, on urgency, Mr Heathcote admitted that there was correspondence *inter partes* regarding the removal of the assets, even as late

as October 2023. It was his submission, however, that the trigger, in this particular matter, was the information received from a whistle blower on 8 January 2024, that there was a truck, fully loaded, idling and about to set off for Zimbabwe, with the plant and equipment of the mine. He argued that in the circumstances, it could not be said that the applicants had acted with culpable remissness that would disentitle them from approaching the court on an urgent basis.

#### The respondent's case

[18] To the contrary, the respondent, ably represented by Ms Lewies, denied that this matter is urgent. In this connection, it is deposed on the respondent's behalf that the issue of the removal of the items in question, is not new. Reference is made to correspondence *inter partes*, particularly a letter dated 13 October 2023, where the respondent declared its position that it was reviewing its operations and which would render some of the equipment, which was nearing its usefulness in any event, redundant and that it would be transported to Zimbabwe. There was therefor no reason for the applicants to approach the court on urgency as they knew all along what the applicants' position on the removal of the items was. It was contended in this regard that any urgency in the matter was of the applicants own doing and that the court should not to come to their rescue

[19] Ms Lewies did admit that the respondent's financial woes were well documented and could not be wished away. In this regard, the respondent has had to devise a profitable strategy, which in part entailed dismantling some of the equipment and to sell surplus assets to third parties. It was contended in this regard, that some of the equipment was at the end of its life and to leave it on site, would lead to same expiring or to ultimately fetch no value in due course.

[20] Ms Lewies further argued that the items in question, were sold in June 2023, before the action for liquidation, was instituted. Furthermore, it was her contention that payment for the items was received by the respondent. That



being the case, there was no proper basis upon which the court could properly grant an interim interdict in the instant matter.

[21] In the premises, and taking the sale into account, it was urged on the respondent's behalf that the applicants had not shown that the respondent harboured a subjective intention to defeat the creditor's claims by selling the property in question. In this regard, she argued that the sale of the items was done in the ordinary course of business, as the sale was of items that were a surplus to the respondent's requirements, in light of the turn-around strategy it intended to put in place, to turn the respondent's financial fortunes around.

[22] It was further argued by Ms Lewies that if the sale of the property is stopped, as the applicants pray, the respondent would be stopped dead in its tracks and denied the opportunity, to employ its turn-around strategy of the mine. The efforts to resuscitate the respondent's business, would be thwarted and this, she emphasised, would not be in the best interests of the respondent's creditors nor in its own interests. Last, but by no means least, it was submitted that the respondent's majority shareholder, had provided a written undertaking to support the respondent financially as it took tentative steps to steer its ship away from troubled financial waters.

### Determination

#### *Urgency*

[23] I now proceed to adjudicate on this matter. The requirements an applicant has to meet, are trite and do not bear repetition. An applicant must demonstrate that there are circumstances which render the matter urgent and further demonstrate that there are good reasons why he or she would not be granted substantial relief at a hearing in due course.

[24] What I must first point out, is that it is trite that in urgent applications, the court must proceed on the basis that the allegations set out by the

applicant, are correct. This accordingly places the applicant on a much firmer path than a respondent, in urgent applications.

[25] Whereas it is correct that the issue of the removal of plant and equipment was the subject of correspondence *inter partes*, before the end of the year 2023, there is nothing to gainsay the fact that the applicants received information, that proved true, that the respondent was, on 08 January 2024, on the cusp of removing the plant and equipment from the jurisdiction of this court. In this regard, the court was informed that the truck, fully loaded with the plant and equipment, was already idling, ready to start the great trek to Zimbabwe, as it were.

[26] I am of the considered opinion that whatever previous communications may have been exchanged between the protagonists, regarding the removal of the assets in question, the discovery of the truck, ready to depart from Namibia, to Zimbabwe, carrying the plant and equipment, was a trigger for the urgency. As soon as the applicants gained information of this last activity, they approached the court with requisite speed. I cannot, in the circumstances, hold that they are guilty of culpable remissness in approaching the court.

[27] The issue that in my considered opinion, renders the matter particularly urgent, is not to be determined in relation to the previous correspondence exchanged *inter partes*, about the removal of the plant and equipment. It was the ominous fact that in a matter of hours, if not minutes, the truck was about to depart from the shores of this Republic, leaving in its wake, a possibly hollow order, should the court be eventually minded to grant the prayer for liquidation sought in the action referred to above.

[28] I am, in the circumstances, fortified, that this is a proper case in which to deal with this matter as one of urgency. It may be true, absent the information belatedly delivered by the whistle blower, that the applicants had rested on their laurels and they did not approach the court in good time when they knew fully well what the respondent's endgame, regarding the plant and equipment, was. The game changer, regarding the urgency, was admittedly,

the information imparted by the whistle blower, which enabled the applicants to stop the removal of the property in its tracks by approaching this court urgently.

[29] I am accordingly of the considered opinion that this is a matter that must be dealt with on an urgent basis as the requisites of rule 73 have been met by the applicants, to the court's satisfaction.

### *Interim interdict*

[30] As foreshadowed earlier, the applicants seek an interim interdict. A party, seeking the granting of an interim interdict must satisfy the court of certain requisites. These were eloquently articulated by Corbett J in *Boshoff Investments (Pty) Ltd v Cape Town Municipality*.<sup>2</sup> The learned judge said:

'Briefly these requisites are that the applicant for such temporary relief must show-

- (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
- (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the balance of convenience favours the granting of the interim relief; and
- (d) that the applicant has no other satisfactory remedy.'

[31] The Constitutional Court of South Africa, had occasion to stipulate how the court goes about in satisfying itself that a case is one in which to grant interim relief. It articulated this in *National Gambling Board v Premier, Kwa-Zulu Natal and Others*<sup>3</sup>, in the following terms:

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<sup>2</sup> *Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C), at 267A-F.

<sup>3</sup> *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002 (2) SA 715 (CC) para 49.

‘An interim interdict is by definition a Court Order preserving or restoring the *status quo* pending the final determination of the rights of the parties. It does not involve the final determination of these rights and does not affect their final determination. The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether applying the relevant requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a Court’s jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo. It does not depend on whether it has jurisdiction to decide the main dispute.’

[32] The question that the court has to answer, in this case, is whether this is a proper case in which interim relief is appropriate to be issued. In this regard, the applicants state that the order sought in this case is interim for the reason that an action has been instituted in this court and in which the respondent’s liquidation is sought. It is the applicants’ case that should an interim order not be issued, and the property is transported to Zimbabwe in this case, the net effect will be that by the time the main case is decided, ie relating to the liquidation of the respondent, assets, which could form part of what the liquidator would take charge of, and either be sold or taken over by a new owner of the mine, would have been removed from this jurisdiction and possibly dissipated to the detriment of the applicants and other creditors of the respondent.

[33] Regarding the first requirement of the interim interdict, it is clear that the applicant must not convince the court that it has a clear right. That requirement applies where the party seeks a final interdict. What the applicant must show is that it has a *prima facie* right, even if open to some doubt. The right in this case, I find, is *prima facie* established by the fact that the liquidation of the respondent has been sought before this court.

[34] I am of course, quite alive to the fact that there is no final judgment as that matter is still in progress. What is important for present purposes, is that if the interim interdict were to be refused, the property that is sought to be

transported to Zimbabwe, would not be available for sale at the end of the day should the final liquidation order be granted. In the alternative, should the liquidator be able to sell the mine to a buyer, 33 tons of equipment and plant, would not be available for sale.

[35] There is no guarantee that the liquidation order will be granted in this matter but there is no requirement that the court must be certain about that. The applicants must satisfy the court, even if there is a doubt, that they have established a right in terms of substantive law. I am of the considered view that the applicants have done so in the instant case. This is because, if their application is granted, that would not only benefit them but also the other creditors of the respondent, who are *prima facie* owed money running into hundred millions of dollars. If the order is granted, the assets sought to be kept in Namibia, would form assets and value from which the creditors of the respondent would be paid.

[36] I am also of the considered opinion that the applicants and the other creditors of the respondent would suffer irreparable harm if the order is not granted. I am alive to the fact that if the liquidation order is eventually granted, a process may be embarked upon in respect of which the property in question, could possibly be recovered. That, however, is a process that is likely to be tedious and would take a considerable amount of money and time, as the liquidator would have to institute proceedings in Zimbabwe, for recovery. There is also no guarantee that the assets would be in existence and available for recovery at that time. I find that this would certainly harm the *concursum creditorium*, the applicants included.

[37] I now turn to the balance of convenience. In this regard, the court is required to consider the harm and possible consequences to the parties if the order is granted or not granted. There is no allegation made on oath regarding the harm that the respondent might suffer if the interim relief is granted. I am aware that the respondent alleges that the property was sold to a third party. There is scant information, let alone proof in support of this allegation. If anything, the alleged buyer would be entitled, to bring a vindicatory

application before this court at the appropriate time. As matters stand, that is a mere allegation, devoid of any independent proof, which in my considered view, shows that the balance of convenience, favours the applicants in this case.

[38] Turning to the last requirement, namely, that of no other alternative remedy, I am of the considered opinion that should the property be taken out of this jurisdiction to Zimbabwe, the applicants and the body of creditors of the respondent, are likely to suffer irretrievable loss. There is no guarantee that the assets will be kept in good shape and can be returned in good order, once the liquidation order is refused. As intimated earlier, the fact of the matter is that the applicants would have to litigate in Zimbabwe, at great expense to have the property returned. It must not be lost that this is a temporary order. It is not a final order in nature or effect.

[39] To allow the property, in the circumstances, to leave this jurisdiction, when the allegations by the applicants have been made on oath regarding the possible prejudice to the applicants and the *concursum creditorium*, may be irresponsible. The undertaking by the majority shareholder to fund the respondent cannot, in my view, be enforced should the majority shareholder later show its objective inability to abide by its word. The temporary order for the property to be kept in Namibia, resonates with reason and propriety in my considered view.

[40] I must point out that the court cannot act on prophetic insight in such matters regarding how the parties will or may behave in the future. What the court is required to do, is to objectively consider the facts before it on the information at its disposal and decide whether or not prudence and not certainty, requires it to avoid possible and not certain harm. It must always consider that the preservation of the property in the interregnum retains the *status quo*, whereas a failure to preserve the property in the interim, may result in the property being irreversibly destroyed or incapable of return in the same state, if at all. In this regard, preservation of the property, if later and with the benefit of hindsight, is shown not to have been appropriate, the court

may at that stage make an appropriate order, with little discomfort to the parties.

[41] There was some argument presented by Ms Lewies to the effect that the court should consider that the sale in the instant case, is not shown to be *mala fide*, in the sense that it is meant to avoid the respondent's obligations to its creditors. The sale, so the argument ran, was done in order to align with the respondent's business strategy, and done in the course of normal business. It was contended that the plant and equipment was surplus to requirements and disposed of in the ordinary course of business and before the present application came about. In this regard, reliance was placed by Ms Lewies on the case of *Knox D'Arcy and Others v Jamieson and Others*.<sup>4</sup>

[42] In returning the salvo, Mr Heathcote argued that the only problem in the instant matter, is that the alleged business strategy is not objectively proved to be in line with the business requirements of the entity concerned. He argued that the said strategy remains interned in the recesses of the respondent's heart such that neither the court nor any other third party, for that matter, can independently verify the correctness of the respondent's own *ipse dixit*. As such, one cannot objectively consider this issue and come to a conclusion, in the absence of the necessary facts that the respondent's reliance on *D'Arcy*, is correct. In this regard, he further argued, there is no basis laid for the contention that the property in question, sought to be transported to Zimbabwe, has been rendered redundant.

[43] I am in agreement with Mr Heathcote in his argument. What the court has before it, is the mere *ipse dixit* of the respondent. It is completely devoid of any facts and evidence in support of its views and conclusions. This cannot be sufficient in the circumstances. The issue of the sale alleged by the respondent, as stated earlier, is not supported by any document or other proof, such as a sale agreement.

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<sup>4</sup> *Knox D'Arcy and Others v Jamieson and Others* 1966 (4) SA 348 (A), p 694.

[44] In a case where an interim order is sought and the applicant has made an arguable case, the paucity of information placed before court by the respondent, should entitle the court, in the interregnum, to grant the interim order. There are no sufficient facts and evidence placed before court to show indubitably that the *D'Arcy* principle is applicable in this matter.

[45] Lastly, Mr Heathcote referred in the heads of argument to the anti-dissipatory interdict and cited authority for its application in the instant matter. I am of the considered view that it is not necessary to deal with that issue because it is not addressed by the applicants in its papers and the respondent did not have an opportunity to properly deal with it.

[46] In the premises, I am of the considered view that the application should be granted as prayed. Although the applicants prayed for costs on a punitive scale, there is nothing stated or apparent in the papers, in my considered view that warrants such a drastic order. Mr Heathcote, as I understood him, did not insist on this particular prayer.

### Order

[47] In the premises, I issue the following order:

1. This application is heard as one of urgency as contemplated in rule 73, and any non-compliance with the rules relating to forms, time periods and service, is hereby condoned.
2. Pending the outcome of the action instituted under Case Number HC-MD-CIV-ACT-OTH-2023/05467:
  - 2.1 The respondent is hereby interdicted and restrained from removing from the Elizabeth Bay Mine situate at 455R+59P, Elizabeth Bay, Namibia, (the 'Mine') any of the assets and/or machinery and/or equipment listed in the scheduled items to



be sent to Zimbabwe Mines, as referred to in the applicants' founding affidavit, marked 'FA6'.

- 2.2 The respondent is interdicted and restrained from removing from the Mine any assets and/or machinery and/or equipment owned or possessed by the respondent, or which would fall under the authority of the liquidator of the respondent, once appointed.
3. The respondent is ordered to pay the costs of this application consequent upon the employment of one instructing and one instructed legal practitioner.

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T S MASUKU  
Judge

## APPEARANCES

APPLICANTS:

R Heathcote SC

Instructed by:

Engling, Stritter &amp; Partners, Windhoek

RESPONDENT:

R Lewies

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