



About the execution of the decision rendered by the Commercial Court of Lubumbashi appointing a Provisional Administrator of Tenke Fugurume Mining [TFM] in the Democratic Republic of Congo

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The Judgement of the Commercial Court of Lubumbashi appointing a Provisional Administrator of Tenke Fugurume Mining in Congo, gives us the opportunity to study the questions of its execution in law.

1. Preliminaries

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Any judicial decision is intended to be executed. There is an ontological and teleological requirement here: the trial is oriented towards the material realization of justice, so that the winner sees his right effectively satisfied.[1]

The enforceability of the judgment [2] is a guarantee of the rule of law, which implies that court decisions and other enforceable titles are respected, and prohibits that individuals can take justice into their own hands for this purpose. It is also, in a more private context, although relating to the organization of the public authorities, a requirement of the equitable trial, which requires that court decisions are effective and that they do not remain a dead letter [3]. It is therefore with good reason that G. de Leval affirms that “ the essential attribute of any judgment is to impose itself; any judgment must be respected” [4]. But, *at what price and under what conditions?*

The decision under RAC 2924 rendered by the Commercial Court of Lubumbashi dated February 28, 2022 appointing a Provisional Administrator of the company Tenke Fugurume Mining [TFM] in the Democratic Republic of Congo, and which is controversial in political, economic, social and legal circles, gives us the opportunity to study the technical question related to its execution from the point of view - purely - of law disregarding other factual considerations or even the merits of the parties' claims on the merits of the dispute.

2. Brief of the litigation and occurrence of the decision of the Lubumbashi Commercial Court

A dispute opposes GECAMINES SA to China Molybdenum [CMOC], shareholders of TENKE FUNGURUME MINING [TFM], whose deposits constitute one of the largest known copper and cobalt reserves in the world. The conflict between the two partners relates to the level of the royalties due to Gécamines SA on the additional copper reserves as well as the revaluation of the shares of this company in which the State is the sole shareholder.

At the genesis of the CMOC-GECAMINES dossier, a special commission was set up by the President of the Republic himself to settle this dispute with implications from the ministers of finances and mines without real progress. This is how Gécamines took legal action.

We can read on the first page of the judgment under RAC 2924 that by its summons to appoint a provisional administrator dated December 23, 2021, Gécamines, brought before the Commercial Court of Lubumbashi, the Company TFM SA, for it to:

- *Declare this case admissible and amply founded, apply article 160-1 and following of the uniform act relating to the law of commercial companies and economic interest groups;*
- *Appoint a temporary administrator at the head of TFM SA and invest him with management powers;*
- *Divesting the current corporate officers of all management powers over the company, losing the entire period of the provisional administration;*
- *State that the provisional administrator has a general management mandate over the company;*
- *Declare the decision to intervene enforceable on minute and this notwithstanding the means of appeal.*

That following this summons, the court granted Gécamines' request by appointing Mr. NGOIE MBAYO Sage as provisional administrator of TFM SA. As for *the provisional execution requested by Gécamines*, the court limits itself to saying that this judgment is enforceable on minute. This is even apparent in its development on the 12th page in these terms: *that with regard to the execution on minute clause [sic] of this decision, the doctrine teaches that in the event of extreme urgency and absolute necessity, the president may request in his interim order, the execution of the latter; That this is why, given the urgency surrounding the appointment of the provisional administrator and the need to ensure peace between the partners...*"

That the judgment alludes to "execution on minute of the decision" instead of "provisional execution notwithstanding any appeal" and that the legal consequences must be drawn.

3. "Decision binding on minute" and "Decision whose provisional execution is decided": Same effects or birds of the same colours?

Execution on minute is not equivalent to provisional execution notwithstanding any recourse. In other words, execution on minute should not be confused with *provisional execution*, even if the two may have the same purpose. If the execution on the minute takes place on a simple original of the judge's decision, that is to say that it can be executed, given the urgency, on the sole presentation of the minute (the original) of the decision of the judge and without it being necessary to serve the debtor in advance with a copy (a copy) of the decision bearing the enforceable formula [5], **provisional execution as for it allows the winner to execute the decision despite the suspensive effect of ordinary remedies**

, but obliges him to have the enforcement form affixed before proceeding with the provisional execution.

As noted above, it appears that the **Commercial Court of Lubumbashi**, by decreeing expressly that "***this judgment is enforceable on minute***", which is not the same thing with "***provisional execution notwithstanding any recourse*** », was in default to pronounce the provisional execution despite being well requested by the plaintiff, Gécamines; and consequently, admits the means of recourse of which the call in the present case, which is suspensive of its execution.

Indeed, court decisions are not all enforceable as soon as they are rendered by the judges because, in principle, the appeal suspends the effects of the contested decision. However, the principle of "*provisional execution*" is an exception to the suspensive effect of the appeal. Consequently, for court decisions to be enforceable despite appeal, **the judge must expressly indicate at the end of his decision that it is enforceable by ordering "*provisional execution*"**. This formula appears not only in the body of the decision and in the "*for these reasons*" which is the conclusion of the judge.

It is in this sense that the Kinshasa - Gombe Court of Appeal recently ruled under RMUA 670 of February 26, 2021, in the case of CINQ CONTINENTS SARL against SCTP SA [Ex - ONATRA] that: "***...The Court finds that the contested decision was rendered enforceable on minute and not notwithstanding any appeal, so that the time limit for appealing as well as the declaration of appeal are suspensive of execution...***"[6]

This judgment, is only a logical continuation of the legal requirements including the law on the creation, organization and functioning of the commercial courts No 002-2001 of July 03, 2001 which provides in its articles 32 and 39 that "*the provisional execution judgment notwithstanding appeal or opposition, may be ordered with or without surety in accordance with article 21 of the Code of Civil Procedure*" and "*appeal against the judgment rendered by the commercial court is brought before the Court of Appeal. It is suspensive, if the judgment does not pronounce provisional execution.*".

In the absence of provisional execution, it will be necessary to wait for the final character of the judgment to continue the execution. The judgment will not become final until :

- After service of a decision rendered in first and last resort (not subject to appeal);
- After the expiry of the appeal period
- In the event of an appeal, after the judgment has been delivered by the court.

4. What to conclude?

Except to affirm that the Commercial Court used **its will as a judge** who retains the power to pronounce or not the provisional execution. Thus, the judge can completely set aside [except in cases where this is expressly prohibited] the application of provisional execution in cases where he considers that it would in reality be incompatible **with the nature of the case**, assessed in abstracto, that is to say, with the nature of the case and not with regard to the factual circumstances.

In view of the stakes in the matter, everything suggests that the court wondered if it was taking the risk of making the situation irreversible by deciding not to set aside the provisional execution. If the answer to this question is positive, then the judge can set aside the application of the provisional execution to prevent it from being a blank check by letting the birds make their nests!

[1] **Van Boxstael , Jean-Louis. *Provisional execution except opposition and notwithstanding appeal*. In: Jean-François van Drooghenbroeck (ed.); "The Judicial Code in potpourri. Promises, realities and perspectives", Larcier , 2016, p. 289-323**

[2] **Any** judgement, therefore including in this category orders and pre-trial measures. Read, Closset -Marchal, " Considerations on the nature and the regime of court decisions " , note under Cass ., January 24, 2013, RCJB, 2014, p. 269, no. 15, and p. 276, no. 29.

[3]J. VAN COMPERNOLLE, "The right to enforcement : a new guarantee of trial fair ", in G. DE LEVAL and M. Storme (eds .), *European procedural & judicial law* , Brussels, The Charter, and Brugge, die Keure , 2003, pp. 475 et seq.

[4] **G. DELEVAL , "The execution provisional of the judgments in heritage material ", in Liber amicorum Paul Martens. Humanism in conflict resolution . Utopia or reality ?? Brussels, Larcier , 2007, p. 251**

[5] J. DJOGBENOU, OHADA: Execution forced , 2nd ed . CREDIJ, Cotonou, 2011, p. 71.

[6]Read to the 9th sheet , 3 rd paragraph of the Judgment in the case CINQ CONTINENTS SARL

against SCTP SA