

GRANDWELL HOLDINGS [PRIVATE] LIMITED
versus
MINISTER OF MINES & MINING DEVELOPMENT
and
ZIMBABWE MINING DEVELOPMENT CORPORATION
and
MARANGE RESOURCES [PRIVATE] LIMITED
and
ZIMBABWE CONSOLIDATED DIAMOND COMPANY
and
MBADA DIAMONDS [PRIVATE] LIMITED
and
COMMISSIONER-GENERAL, ZIMBABWE REPUBLIC POLICE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 29 February 2016; 2, 4, 8 & 16 March 2016

Urgent chamber application

S. Moyo, with him, *E.T. Moyo* and *B. Mahuni*, for the applicant
Adv. L. Uriri, with him, *M. Magadure*, for the first respondent
Adv. S. Hashiti, with him, *J.R. Tsivama*, for the second, third & fourth respondents
Adv. T. Mpofu, for the fifth respondent
Adv. G.R.J. Sithole, for the sixth respondent

MAFUSIRE J: No one stops government from governing. No one stops government functionaries from crafting and implementing government policy. But in all this, the rule of law must be observed. This is paramount. It is a tenet the courts will defend to the last judge standing. The alternative is anarchy. Law and order are indispensable elements of civilised society. This must sound like a broken record. But unless the need for it falls away, the principle may continue to be re-stated. CHIDYAUSIKU CJ, in *Minister of Lands & Ors v Commercial Farmers Union*¹ put it this way:

“... [T]he law is supreme over decisions and actions of government and private persons. There is ... one law for all. ... [T]he exercise of all public power must find its ultimate source in a legal rule. [T]he relationship between the State and the subject must be regulated by law. So must the relationship between subjects in order to prevent resort to self-help. The rule

¹ 2001 [2] ZLR 457 [S], at pp 479 - 480

against self-help is necessary for the protection of the individual against arbitrary and subjective decisions and conduct of an adversary ...”

[a] **Summary of the dispute**

The proceedings before me were an urgent chamber application for an order *mandament van spolie* and an interdict. The crux of the matter was whether or not certain actions by the first respondent, aided and abetted by one or other of the officials of the second and third respondents, and with officers of the sixth respondent being the executioners, amounted to an illicit dispossession of the fifth respondent in respect of one of the diamond mining sites at the Chiadzwa Diamond Concessions [*“Chiadzwa”*].

Before deciding the main issue above, there were four points *in limine*. The first was whether or not the applicant was *peregrinus* and therefore one required by law to furnish security for the costs of the respondents before the application could proceed. The second was whether respondents 2 to 4 had soiled themselves and were coming to court with ‘dirty hands’, and therefore unfit for the court’s audience. The third was whether the applicant had *locus standi in judicio*. The fourth was a variant of the third. It was whether the application was a derivative action as that expression is understood in company law. But before the details, the background to the whole dispute is necessary.

[b] **Background to the dispute**

Despite occasional attempts at splitting hairs whenever some inconvenient detail stood in the way, it was clear to me that in August 2009 the government of Zimbabwe [*“the government”*], through the first respondent [hereafter referred to as *“the Minister”*], went into a commercial marriage with some foreign investors. The marriage was for the purpose of exploiting diamonds in Chiadzwa for mutual benefit. The marriage was in the form of a joint venture. The marriage would be consummated through proxies. For the foreign investors, the applicant was the proxy [hereafter referred to as *“Grandwell”*]. For the government, the proxy was the second respondent, a parastatal or statutory corporation set up in terms of its enabling Act [hereafter referred to as *“the ZMDC”*]. In turn, ZMDC was fronted by the third respondent, its wholly owned subsidiary [hereafter referred to as *“Marange”*]. Except for the sixth respondent who got joined to the proceedings in the middle, respondents 1 to 4 were effectively a single economic unit for the purposes of this marriage.

During courtship, all the necessary approvals were incepted, not least foreign exchange control authority, foreign investment licences and a Cabinet endorsement. The Cabinet endorsement, addressed to Grandwell on 10 February 2010, read like this:

“Re: IMPLEMENTATION OF THE JOINT VENTURE ARRANGEMENT FOR MARANGE DIAMONDS MINING PROJECTS: MBADA DIAMONDS PVT LTD

This is to confirm that the Government of Zimbabwe has approved and therefore fully supports the joint venture project between Grandwell Holdings Ltd, a company registered in Mauritius and Marange Resources Pvt Ltd a ZMDC investment vehicle, currently carrying on the business of diamond mining under the name Mbada Diamonds [Pvt] Ltd.

Appropriate Government approval was duly obtained both for the identification of investor and the subsequent joint venture agreement.”

Pre-nuptial contracts were executed. They included a joint venture agreement [*“the JVA”*] and a shareholders’ agreement. The parties to these agreements were Marange, on the one hand, and Grandwell, on the other. ZMDC ceded for the project some of the Special Grants, the dispensation under which the diamonds would be mined and exploited.

In the JVA, ZMDC and Marange gave certain undertakings, warranties and guarantees. Among other things, the marriage was virtually in perpetuity. Marange would ensure the continued validity of the Special Grants.

On its part, Grandwell would invest US\$100 million in tranches. The day to day management of the operations and the control of the mine, the recruitment and deployment of staff, the development of business strategies, and the like, were entrusted to it.

Born out of that marriage was the fifth respondent [hereafter referred to as *“Mbada”*]. It was duly incorporated as a private company, owned 50% by Grandwell, and 50% by Marange.

[c] **The facts of the dispute**

The marriage endured for six or seven years. Mbada was happily mining. But apparently the government was brooding. Apart from its marriage with Grandwell, it had entered into several others with other foreign investors. But the government felt its partners were being unfaithful. It felt it was getting little or no remittances. To remedy this, it crafted a policy to merge all the diamond mining companies at Chiadzwa into one single entity. The fourth respondent was born out of this. It would be the special purpose vehicle for the new

venture. All the disparate companies would take up 50% of the equity in it. The government reserved the remaining 50% to itself.

Meetings were convened from about March 2015 over this new initiative. Grandwell was apprehensive. But it said it was not opposed in principle. It required a blue print and certain other details. There were some exchanges. But on 22 February 2016 events took a dramatic turn. Apparently government felt there was little or no progress towards the consolidation. On that date it wrote to Mbada advising, among other things, that it had discovered that the Special Grants had expired, and that, with no title, Mbada had to cease all mining activities with immediate effect and vacate the mining site. Mbada was given 90 days to remove all its equipment and other valuables. Any further access to the mining site would be upon request.

The Minister called a press conference to announce the new development. On the same day of the letter, Mbada's operations were forcibly stopped through armed police. Processing plants were shut down. Mbada's security team was disbanded and expelled from site. Other employees were forcibly evicted both from the workstations and from their site residences. Security systems were paralysed.

It seems diamonds are to humans what fluorescent light bulbs are to flying insects. Despite the perils, they flock to them in droves. Grandwell said utter chaos ensued in the aftermath of the government's actions. There was massive looting of both the crushed and uncrushed diamonds by artisanal miners and other characters that seemed to have had prior knowledge of the events to unfold. Equipment was vandalised. Containers were stolen. Personal belongings from private residences were looted. The loss was said to be phenomenal.

It was said government efforts to incept replacement security was woefully inadequate. The bleeding continued. On 27 February 2016, Grandwell ran to the law. It filed this application. After laying out the above background and complaining about the government's breach of contract, it sought the following relief:

- an order that the respondents 1 to 4, their agents or anyone acting on their behalf, should vacate the mining site;
- an order that Mbada's peaceful and undisturbed possession of the mining site be restored;

- an interdict restraining any further interference with Mbada's operations at the mine;
- an interdict restraining the forcible or inducement or procurement of a breach of contractual obligations.

I now turn to deal with all the issues in the order that they arose.

[d] **Points in limine**

i/ Security for costs, applicant a *peregrinus*

The respondents 2 to 4 said Grandwell was a *peregrinus*. It was a foreign company registered and operating from Mauritius. As such, it had no automatic right of audience with our courts. It was obliged to provide security for their costs. Until it did, the application could not proceed.

In counter, Grandwell and Mbada argued that Grandwell might have been registered in Mauritius, but that a company was capable of having more than one place of residence. *In casu*, by virtue of the agreements, it was carrying on business at Chiadzwa, where it was resident. Among other things, it was the manager of the diamond mine and the one in charge of the day to day operations. In such circumstances, there was no need for security for costs. Furthermore, no prior demand for such costs had been made. In any case, it was capable of furnishing such security in a reasonable amount, or through a bond by its legal practitioners.

I summarily dismissed the point *in limine*. Plainly, it was raised in bad faith. The idea was manifestly to thwart the application before it could even begin. There had been no prior demand for such costs. Admittedly, events were unfolding very fast, the application having been launched on an urgent basis. But for an application that had been served on a Saturday, and an interim hearing held the next Monday, only for the issue to be raised for the first time on the Wednesday to which the matter had been postponed, and without any prior warning, was an unacceptable ambush.

Furthermore, given Grandwell's financial muscle that was manifest in the body of the application, there could have been no genuine fear by any of the respondents that it would be unable to meet any costs of suit that could be awarded against it. The JV seemed a multi-million dollar project. Grandwell was the manager and operator. Among other things, it was

due a management fee. The application also showed that Grandwell had high value equipment on site.

But substantively, an order for security for costs is one entirely in the discretion of the court. It is a rule of practice, not one of substantive law: see *Saker & Co Ltd v Grainger*². Admittedly, the discretion has to be exercised judiciously, not capriciously. Many considerations are taken into account, not least the particular circumstances of the case, the equities and fairness of the request, and even the character of the *peregrinus* itself: see *Magida v Minister of Police*³ and *SA Iron & Steel Corporation Ltd v Abdulnabi*⁴.

Only when there is reason to believe that a company, whether local **or foreign**, may be unable to pay the costs of the defendant or respondent **may** the court order security for costs. This is what s 350 of the Companies Act [*Cap 24: 03*] says. *In casu*, I did not have such belief.

It was for those reasons that I summarily dismissed the point *in limine*.

ii/ Whether respondents 2 to 4 were coming to court with ‘dirty hands’

The issue of ‘dirty hands’ arose during the course of the proceedings. It is now water under the bridge. It is raised herein as an historical account, and for the purposes of furnishing my reasons for the view that I took.

I concluded that the respondents had indeed got themselves dirty at some stage after the start of the proceedings. Thus, until they cleansed themselves, I would not hear them. The respondents had eventually complied.

The urgent chamber application had been filed on 27 February 2016. That was a Saturday. Grandwell had made out a very strong case of dire emergency warranting judicial intervention on an urgent basis. It was said that each hour that passed worsened the plight of Grandwell, Mbada and its workers who had been expelled from their homes. I caused the matter to be set down for hearing on the morning of Monday, 29 February 2016.

Come the Monday, the respondents 2 to 4 sought a two day postponement to enable proper briefing of their legal practitioners. Grandwell strenuously opposed the postponement unless the respondents were prepared to concede to some interim measure to safeguard the property that was continuously under threat at the mine. All parties appreciated the need for

² 1937 AD 223, at pp 226 – 227

³ 1987 [1] SA 1 [A] at p 12B – D

⁴ 1989 [2] SA 224 [T], at p 233C – I

some contingency measure pending the proper hearing of the matter. However, they could not agree the terms. In the end, I granted the postponement but directed that pending the hearing in the following two days, all of Mbada's security personnel, together with their chain of command, would be allowed back on the mining site for the purposes of safeguarding assets at both the work stations and the residences [hereafter referred to as "*the Monday order*"].

When the hearing resumed on the Wednesday, Mr *Moyo*, supported by Mr *Mpofu*, charged that there had been complete defiance of the Monday order. He said upon the order being granted, the Minister had gone on national television to announce his disappointment with it and to express his intention to appeal. To Mr *Moyo*, all that talk about being disappointed and wanting to appeal was just euphemism for defiance.

Mr *Uriri*, for the Minister, and Mr *Hashiti*, for the respondents 2 to 4, strenuously denied that the Monday order had been defied. They submitted that Mbada's security personnel had been allowed back on site but that to get into the more sensitive zone they had had to undergo some security clearance but that they had declined to do so. The respondents applied to lead *viva voce* evidence on the real situation on the ground before I could be called upon to condemn them. Despite fierce opposition, I granted the application.

For the respondents, evidence was led from the Minister and a Mr Mark Mabhudhu [*"Mabhudhu"*] who was Marange's Chief Executive Officer. For Grandwell and Mbada, evidence was led from one Jabulani Mukoko [*"Mukoko"*], Mbada's Chief Security Officer.

The totality of the evidence was that the Monday order had not been complied with. The Minister stressed that he was a law-abiding citizen. It was not in his nature to disobey court orders. On the Monday order, all he had been shown had been a draft. Nonetheless, he had telephoned Mabhudhu advising that he understood that an order for the return of Mbada's security personnel had been issued. He said he had instructed Mabhudhu to facilitate compliance.

On the television interview, the Minister said he had been called to the station and had reacted to a question from one of the journalists. He said he saw no wrong that he had committed as he had merely expressed his disappointment with the Monday order and his intention to appeal as it was his democratic right to do.

On the issue of security clearance, the Minister said diamond sites are highly security sensitive areas. No visitor, no matter who, accesses the red zone without security clearance.

He gave the example of himself and a former head of state of a foreign country when they had visited the mining sites some time before the events of this case. The entire entourage had had to undergo advance security clearance.

As for Mabhudhu, it was clear that he would not take orders from any one, including the court, unless and until his Minister had instructed him to do so. Regarding the Monday order, Mabhudhu, contrary to the Minister's evidence, said the Minister had instructed him to wait for the final order to be issued. He was still waiting.

Mukoko's evidence was that he and his security team had never been asked to undergo any security clearance by anyone but that the police had simply blocked them access at the entrance to the red zone. He had got hold of the Monday order the day it had been issued. He had driven to site the following day. He had passed through three security check points without any problems. It was on the fourth and last check point that he and his team had been told by the police to wait. Consultations had been made on the telephone. Some police detail had been deployed to come and deal with him. His name and that of his team had been jotted down. But from about 6:00 hours to about 12:00 hours no one had come back to him. In the end he and his team had simply left. They had had no food or any ablution facilities.

It was upon the totality of such evidence that I ruled that there had been non-compliance with the Monday order. I ruled that the non-compliance had been due to the wilful and or deliberate acts of commission or omission by the respondents 1 to 4. I was satisfied that if the Minister had really wanted, all he would have done was to instruct whoever mattered that Mbada's security personnel be allowed back on site. The buck stopped with him. The police were on site on his account.

I was satisfied that the reason why Mukoko and his team had not been allowed back on site was not because they had refused to under-go any security clearance. No such thing had been asked of them. At any rate, the need for such clearance was manifestly superfluous. Mbada's security personnel had been riding on the back of a court order. Furthermore, it was that very team that had provided adequate security at the mine for all the preceding years until the disruption on 22 February 2016.

I was also satisfied that to Mabhudhu, the court order meant nothing, unless it was given some badge of authority by his minister. That was brazenly contemptuous.

Having been satisfied that the respondents were coming to court with ‘dirty hands’, I issued another order on Friday, 4 March 2016. It confirmed the respondents’ default. It then withdrew the jurisdiction of this court over the respondents’ cause until such time that they had purged their default. The matter was postponed to Tuesday, 8 March 2016. On that day it would proceed in default of the respondents unless there was evidence of compliance. This was on the basis of the ‘dirty hands’ principle, as enunciated in a number of cases, the leading one of which, in this jurisdiction, is *Associated Newspapers of Zimbabwe [Private] Limited v The Minister of State for Information and Publicity in the President’s Office & Ors*⁵. In that case the Chief Justice said:

“This Court is a court of law, and as such, cannot connive at or condone the applicant’s open defiance of the law. **Citizens are obliged to obey the law of the land and argue afterwards.**” [my emphasis].

However, on the return day, all parties advised that the Monday order had since been complied with. The matter then proceeded in earnest.

iii/ Whether the applicant had *locus standi in judicio*

The respondents said it did not lie in the mouth of Grandwell to complain that it had been despoiled. The argument was that Mbada, and not Grandwell, had been the one that had been in peaceful and undisturbed possession of the mine. Grandwell was merely a shareholder in Mbada. At 50% equity, Mbada could not even be regarded as Grandwell’s subsidiary. So, the argument concluded, only Mbada, and not Grandwell, was the one with the requisite *locus standi in judicio* to move for an order *mandament van spolie*.

Intrinsically linked to the question of *locus standi*, was the question of the competency of Grandwell to bring a derivative action. Although *locus standi* and the right to a derivative action are not necessarily cognates, in the circumstances of this case I found them speaking to the same thing. Therefore, I deal with both at one go.

iv/ Whether it was competent for Grandwell to bring a derivative action

In its founding affidavit, Grandwell said its right to sue, as I understood it, and in my own words, stemmed from the desire to protect its investment in Mbada. Such investment had

⁵ 2004 [1] ZLR 538

suddenly become under threat owing to the abrupt actions by government. Grandwell also said that government's action threatened the very existence of Mbada as a JV project. To the extent that Mbada could not, of its own, seek relief by itself, it being a progeny of Grandwell and the government, it had been open to Grandwell to bring the application in its name, but for the benefit of Mbada itself.

Grandwell argued that government was the sole cause and sole source of the grief. Mbada's board was made up of an equal number of appointees from both shareholders. Under such circumstances, it would have been futile for Grandwell to have sponsored or motivated a resolution to sue government. It was argued that a derivative action was available where not only those controlling the company and bringing harm to it were in the majority. Even negative control suffices. Mr *Moyo* explained negative control as being where, even though not in the majority, as was the case in this matter, the directors could, by their negative vote, defeat a resolution.

The respondents countered that it was not correct to say that Mbada had been unable to bring, or had been disabled from mounting, the application in its own name and in its own right. They gave two illustrations. The one was a letter of demand on 23 February 2016 from Werksmans, Mbada's South African based attorneys. The letter was reacting to the one from the Minister's Permanent Secretary the day before. After recapping the events of the previous day and referring to the agreements, and after demanding the restoration of the status *quo ante*, Werksmans' letter concluded:

“Should you fail to provide us with the written confirmation as hereinbefore demanded, our Clients will have no alternative but to take whatever legal steps/action as are available to them in order to protect their rights against the appropriate parties, which it shall do forthwith and without any further notice. Such remedies shall include, without limitation, an urgent court application to secure our Clients' rights and/or a claim for damages suffered.”

To the respondents, the letter was sufficient evidence that Mbada had been conscious of the fact that only it alone could have brought the application that was now before me.

The other illustration by the respondents was an affidavit by the Chief Executive Officer of Mbada, one Thomas Lusiyano [*“Lusiyano”*]. It was filed on the day of the hearing on the first day. In it, Lusiyano said Mbada supported the application and the relief sought. He said he had taken instructions from Mbada's Chairman, to whom he reported.

Whilst questioning Lusiyano's authority to file such an affidavit, the authenticity of that affidavit and the veracity of certain allegations in it, the Respondents' major argument was that if Lusiyano could file papers supporting the application, purportedly on behalf of Mbada, then there was no reason why Mbada itself could not have brought the application. As such, the argument concluded, the right to a derivative action was not available to Grandwell.

A derivative action is recognised in our law: see *L Piras & Son [Pvt] Ltd v Piras*⁶. It is one of the exceptions to the general rule of company law that says that only the company can sue for wrongs done to it. In such a situation, the company is the proper plaintiff. This principle is called the rule in *Foss v Harbottle*⁷, after the nineteenth century English case in which it was espoused.

The rule in *Foss v Harbottle* is of universal application. But there are exceptions. One such is the derivative action. In its classical form, this exception says that if a shareholder alleges that a wrong has been done to the company by persons in control of it, he may bring a derivative action against the wrongdoers, deriving his authority from his corporate right to sue on behalf of the company. The company is also cited as a co-defendant so that it is also brought before the court. The benefit from the suit flows directly to the company, not the disgruntled shareholder. He will be content with getting justice, and, to an extent, the appreciation or preservation of the value of the shares in the company, including his own.

That there could be exceptions to the proper plaintiff rule was even recognised by the court in the *Foss v Harbottle* case itself when one of the judges, WIGRAM V-C⁸ talked of the unfairness that would ensue if shareholders, just because of their corporate status, would be deprived of their civil rights *inter se*:

“If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of the rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham would apply, **and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.**” [my emphasis]

⁶ 1993 [2] ZLR 245 [S]

⁷ [1843] 2 Hare 461, 67 ER 189

⁸ At p 492 -493

The exception was subsequently adopted and restated in various ways in various jurisdictions. In *Wallersteiner v Moir [No2]*⁹, a case quoted with approval by our Supreme Court in *L Piras* above¹⁰; LORD DENNING MR, with characteristic clarity of expression, said¹¹:

“It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for damage. Such is the rule in *Foss v Habottle*. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs – by directors who hold a majority of the shares – who then can sue for damages? These directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. It is the one person who should sue. **In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress.**” [my emphasis]

GOWER’s *Principles of Modern Company Law*, 4th ed. at p 650, says that English case law authority, unlike American, establishes that there is no point in the disgruntled shareholder formally asking the directors to institute the proceedings where they will end up being the defendants. Further, it is not necessary to convene a general meeting and to invite it to resolve upon proceedings in the name of the company, provided that the court can be satisfied *aliunde* that the wrongdoers are in effective control.

GOWER also notes that it is not necessary to prove control [of the company by the wrongdoers], but merely to allege facts which, if proved, would establish control. The author however, further notes that the American courts are generally stricter in that they insist upon proof of an abortive demand having been made on the directors and, sometimes, a reference to the shareholders in a general meeting.

In casu, the position of the American courts, as stated by GOWER above, seemed to have been Mr *Hashiti*’s point. He submitted that in the absence of an invitation by Grandwell to Marange for a meeting to pass a resolution to sue in the name of Mbada; that in the

⁹ [1975] 1 All ER 849 [CA]

¹⁰ At pp 250H – 251A - D

¹¹ At p 857d - f

absence of evidence that such an invitation had been turned down; that coupled with Werksmans' letter aforesaid, and Lusiyano's affidavit, it could not be said Mbada had been unable to bring the urgent chamber application by itself and that therefore the derivative action was not available to Grandwell.

I recognise the force of the respondents' argument. But in my view, the position of the English courts seems to accord more with notions of justice and the spirit of the derivative action. The law must not be rendered impotent. *In casu*, the Minister moved with exceeding speed. For six or seven years operations at Chiadzwa had gone on unhindered. But on 22 February 2016, in one fell swoop, things were turned upside down. Mining was abruptly terminated; Mbada's personnel were forcibly expelled from site; inadequate security had exposed the precious diamonds, the expensive equipment, personal belongings, and more, to destruction and theft. The situation was one of dire emergency. Werksmans letter of demand on 23 February 2016, sent by e-mail, had been ignored. There had been no let-up in the looting, forcing Grandwell, four days later, to run to the law.

Marange itself had already passed a resolution to adopt the Minister's plans for the consolidation of diamond mining companies, including Mbada, into one single entity without agreement with Grandwell, its co-shareholder. This was in spite of the outstanding details Grandwell had requested on the proposed scheme. Furthermore, the evidence showed that it was officials from Mbada, as the Minister's representatives, with the assistance of the police, who had executed the Minister's directive.

In my view, the spirit of the derivative action, being an exception to the rule in *Foss v Harbottle*, is that "... **the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue**" [my emphasis]

In *L Piras, supra*, there were only two shareholders. They were also the sole directors. They had equal control of the company. The one shareholder started doing sinister things behind the other's back: like suing the company for a debt that he knew the company did not owe; like serving the summons on his own wife, at his own residence, albeit also the company's registered office; and like not only refraining from entering an appearance to defend on behalf of the company, but also proceeding to enter judgment against it. When the other director eventually got to know about it, he applied to be joined to the suit against the company. The Supreme Court allowed the application under the derivative action.

I agree with Mr *Moyo*. The derivative action is available, not in situations of fraud to the company only, but also in all situations in which the company is harmed by those in control. The term fraud covers more than just the ordinary common law fraud. It also covers situations of intentional or unintentional, fraudulent or negligent wrongdoing: see *Daniels v Daniels*¹². Control need not be control by the majority shareholders. Negative control, that is, where a resolution to sue in the name of the company is defeated by a negative vote cast, should suffice: see *East Pant Du Lead Mining Co v Meryweather*¹³. *In casu*, it would have been futile for Grandwell to have sponsored a resolution to sue the respondents given the stance Marange had already taken. At any rate, I was satisfied with events *aliunde* that Marange would not have tagged along with Grandwell. Among other things, it energetically opposed the application. Not only that, but Mabhudhu consciously and openly defied the Monday order. The reference to Werksmans' letter and Lusiyano's affidavit was a red herring. IN spite of them, it would still have been futile for Grandwell to successfully sponsor a resolution to sue the respondents.

Therefore, the respondents' point *in limine* that the right to a derivative action was not available to Grandwell is hereby dismissed. That should put paid to the objection on *locus standi*. But there is an additional point.

Locus standi refers to the **direct and substantial** interest one has in a *lis*, or suit: see *Zimbabwe Teachers Association & Ors v Minister of Education and Culture*¹⁴. In my view, there can be no question that Grandwell had such a direct and substantial interest in the present matter. Colloquially, it 'owned' half of Mbada. That, by itself is a huge legal interest. Furthermore, the application before me was for spoliatory relief. By virtue of the agreements, not only did Grandwell have the right to the occupation of the mine as the day to day manager of the project, but also, and as a matter-of-fact, it had been in physical occupation until the respondents abruptly caused the operations to stop. In the circumstances, Grandwell had the requisite *locus standi in judicio* to bring the derivative action.

¹² [1978] Ch 406

¹³ (1864) 2 H & M 254

¹⁴ 1990 (2) ZLR 48 (HC)

[e] **The merits**

Whether or not Grandwell is entitled to an order *mandament van spolie* and to an interdict

The remedy of spoliation, or *mandament van spolie*, is designed to restore at once possession that has been deprived unlawfully: see SILBERBERG AND SCHOEMAN'S *The Law of Property*, 5th ed., para 13.2.1.2 at p 288. See also *Kama Construction [Pvt] Ltd v Cold Comfort Farm Co-operative & Ors*¹⁵. The applicant must show that he was in peaceful and undisturbed possession of the thing and that he was unlawfully deprived of such possession: *Kama Construction (Pvt) Ltd, supra*, and *Botha & Anor v Barrett*¹⁶.

Spoliation is a quick remedy. Its rationale is to prevent anarchy in society: see *Muller v Muller*¹⁷. People must not resort to self-help each time they want to recover things they feel belong to them and which may be in the possession of another. In *Shoprite Checkers Ltd v Pangbourne Properties Ltd*¹⁸, the rationale was expressed this way¹⁹:

“All of this of course is based upon the fundamental principle that no man is allowed to take the law into his own hands and that no one is permitted to dispossess another forcibly or wrongfully and against his consent ‘of the possession of property, whether movable or immovable’ **and that if he does so ‘the Court will summarily restore the status quo ante and will do that as a preliminary to any enquiry or investigation into the merits of the dispute.’**” [emphasis added]

In casu, the respondents argued that the dispensation by which Mbada was able to be mining the diamonds, to be on the site, and to be enjoying all the rights that went with the JVA and the shareholders agreement, had since expired. This dispensation was the Special Grants. They had not been renewed. Some had expired way back in 2010 and others in 2013. Although a third lot suggested that the period of expiry was still open, there was nothing of the sort. Despite the agreements purporting to grant a perpetual right to the diamonds, the Mines and Minerals Act, *Cap 21: 05*, gave no such right. Mining rights are granted, or are required to be granted, for specified periods which have to be spelt out and incorporated in the Special Grants. In this case, the respondents submitted, those Special Grants said to be

¹⁵ 1999 [2] ZLR 19 [SC]

¹⁶ 1996 [2] ZLR 73 [S], at p 79D – F

¹⁷ 1915 TPD 29, at p 31

¹⁸ 1994 [1] SA 616 [W]

¹⁹ At p 619H, per ZULMAN J

still open had to be deemed to have been valid for twelve months only as had been stated in them.

Relevant portions of s 291 of the Mines and Minerals Act say:

“291 Issue of special grants

[1] The Secretary may issue to any person –

[a] a special grant to carry out prospecting operations; or

[b] a special grant to carry out mining operations or any other operations for mining purposes; upon a defined area situated within an area which has been reserved against prospecting or pegging under section *thirty-five* for a period which shall be specified in such special grant and on such terms and conditions, including terms and conditions relating to the amendment or cancellation thereof, as may be approved by the Minister and shall be incorporated in such grant.”

Both Mr *Uriri* and Mr *Hashiti* argued forcefully that, without the right to mine, Mbada or Grandwell’s continued presence at the site had become illegal. The Special Grants had expired by reason of their own failure to renew. That the JVA and the shareholders’ agreements might have provided for certain rights in perpetuity could not override the provisions of an Act of Parliament which are superior to any provisions of a private agreement. The Minister is the regulator of all mining rights. The action that he took was to restore the law.

The respondents’ additional argument was that, on the authority of *Kama Construction, supra*, Grandwell had moved for the wrong remedy. Spoliation was unavailable to it. All it could have sued for was specific performance, coupled with an interdict.

In *Kama Construction* the applicant had a management agreement with the respondent cooperative society, to restore its financial viability. It was the applicant that ran the day to day operations of the cooperative society. Later on, the cooperative society abruptly terminated the management agreement. There was a dispute as to whether or not the keys to the offices, the workshops, the vehicles, etc. had been forcibly taken away from the possession of the applicant. In this court, the applicant got a provisional order of spoliation. However, on the return day, the provisional order was discharged. On appeal, the Supreme Court confirmed the discharge. It held that a spoliation order had not been the proper remedy for the kind of wrong complained of by the applicant/appellant. It should have sued for

specific performance of the management contract, together with interlocutory relief in the form of an interdict. The Supreme Court also said that the appellant could have been entitled to an interdict if it had established possession and unlawful dispossession. However, the court held that the appellant had not been in possession of the cooperative society's farmlands but that it merely had had rights of access as a member of the society.

Mr *Moyo* and Mr *Mpofu* blasted the respondents' attempted reliance on the expired Special Grants. They argued that, among other things, in terms of the agreements, the obligation to renew those Special Grants and to ensure their continued validity had been thrust on Marange, the government company. That they had not been renewed on expiry was the government's own fault. As such, the respondents were precluded from trying to profit from their own wrong. The law says no one maintains an action from his own wrong: see *Riggs v Palmer*²⁰.

But the major argument by Messrs *Moyo* and *Mpofu* was that the matter before me was not about the rights and wrongs of the respective parties. It was not about the validity or otherwise of Mbada's title to mine. That was a matter for another court on another day. Spoliatory relief was confined to the restoration of rights of possession, not ownership. Grandwell had shown that Mbada had been in peaceful and undisturbed possession of the mining site immediately prior to 22 February 2016. The respondents had taken the law into their own hands and had deprived Mbada of such possession. On that basis Mbada was entitled to relief.

On the *Kama Construction* case, Messrs *Moyo* and *Mpofu* said the case was distinguishable. Among other things, *in casu*, the Minister had not been a party to the agreements. Therefore, Grandwell could not have sought specific performance against a non-party. Furthermore, unlike Grandwell, in *Kama Construction* the applicant/appellant had not been in possession.

In my view, the respondents' actions were classically an act of spoliation. The matter before me was not about the right to possession [*ius possidendi*]. It was about the right of possession [*ius possessionis*] having been lost. The purpose of the *mandament van spolie* is to restore at once possession to the possessor where he has been unlawfully deprived of it. This

²⁰ [1899] 115 NY 506, NE 188: "All courts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit from his own fraud, or to take advantage of his own wrong, or to found his own claim upon his own inequity or to acquire property by his own crime."

is so, in order to prevent people, governments included, from taking the law into their own hands: see *Mans v Marais*²¹. The purpose of spoliatory relief is merely to restore the right *of* possession, to restore the *status quo ante*. As ZULMAN J said in *Shoprite Checkers Ltd*: “... the Court will summarily restore the *status quo ante* **and will do that as a preliminary to any enquiry or investigation into the merits of the dispute.**”

If the respondents suddenly discovered that the Special Grants had expired and wanted to terminate the marriage, they were obliged to follow the law. They were not entitled to take the law into their own hands and cause the forcible closure of the mine.

At any rate, in the circumstances of this case, the respondents’ actions are difficult to understand. It seemed true that some of the Special Grants had indeed expired in 2010 and others in 2013. Yet Mbada had remained mining. For action only to be taken as late as February 2016 seemed to lend credence to the complaint by Grandwell that the government was punishing the foreign investors for seemingly dragging their feet, or refusing to comply, with the consolidation scheme.

Furthermore, the claim in the letter from the Minister’s Permanent Secretary on 22 February 2016, among other things, that it had come to his attention that the Special Grants in question had since expired seemed to suggest a sudden discovery of that fact. Yet, as early as 30 September 2015, ZMDC had written to the Permanent Secretary himself, expressly pointing out that the Special Grants had expired, and seeking a further exemption. The government did not move in to shut down the mine then. The government had had all the time to act lawfully. So why the rush? Why the sudden emergency?

The case of *Kama Construction* is distinguishable, not because the Minister was not a party to the agreements in question as Mr *Moyo* submitted. I have already intimated the government was the other party to the agreements, albeit indirectly. The respondents 1 to 4 formed a single economic unit. *Kama Construction* is distinguishable because there the court found, as a matter of fact, that the applicant/appellant had not been in possession of the cooperative society’s farming units.

Therefore, in my finding, an act of spoliation was committed by the respondents on Mbada. However, that is not the end of the matter. I must deal with the nature of the relief sought.

²¹ 1932 CPD 352 at 356

[f] **The nature of the relief sought**

The substance of the relief sought by Grandwell is a return to the *status quo ante* so that the operations at the mine may resume as before, and continue unhindered by the respondents. The order seeks that respondents 1 to 4, their agents, or anyone acting on their behalf, or under their instructions or authority, be ordered to vacate the mining site.

In principle, and in my view, such a remedy would be available under normal circumstances. If one lends one's vehicle to another, with permission for the borrower to drive it anywhere and everywhere, but with instructions to return the car on a particular day, the owner/lender is precluded by law from forcibly recovering his vehicle if the borrower should fail to return the vehicle by the given date. If the owner/lender forcibly recovers the vehicle, the law will brand his action as self-help, i.e. an act of spoliation. The court will order the owner/lender to restore at once possession of the vehicle to the borrower until he comes to court for an order to recover his vehicle. The issue of his ownership of the vehicle or of his instruction which was disobeyed, will not be determined at that stage.

However, in ordering the restoration of the *status quo ante*, it would be, in my view, contrary to public policy were the court to allow the borrower, or create a situation where the borrower, can drive the vehicle everywhere and anywhere as before when, to the court's knowledge, the vehicle's licence and/or roadworthy permit and/or third party insurance has/have expired, these being the basis upon which the owner/lender may have lent the vehicle to the borrower.

In the present case, whilst the issue pertaining to the propriety of the Minister's desire to consolidate all the mining companies at Chiadzwa into a single conglomerate in the face of the contractual agreements; the issue whether or not Mbada's title to mine had expired, and if so, the issue as to whose fault it was, were not the primary matter before me, nonetheless, it seems obvious that the relevant Special Grants in question had expired. With that, Mbada's right *to* possession [*ius possidendi*] had terminated. Efforts to renew the Special Grants in September 2015 failed. In terms of s 291 of the Mines and Minerals Act, a Special Grant is the authority that grants one the title to the minerals. In terms of s 2, the dominium in, and the right of searching, mining and disposing of all minerals is vested in the State President. *In casu*, to allow Mbada to resume mining operations as before, when the right to do so expired, is to sanction an illegality. That, in my view, is contrary to public policy. In the circumstances, the remedy that Mbada, or Grandwell, may be entitled to cannot be one that

entitles the enjoyment of the rights accorded by the Special Grants when title to them has not been regularised.

[g] **Costs**

The issue of costs is normally one for determination on the return date. It was not argued before me. But an order of spoliation is a final order. It does not have an interlocutory nature: see *Mankowitz v Loewenthal*²² and SILBERBERG AND SCHOEMAN, *supra*, para 13.2.1.3 at p 292. The two elements of spoliation, namely peaceful and undisturbed possession, and the act of spoliation, have to be proved on a balance of probabilities. Thus, Grandwell having proved spoliation on a balance of probabilities, it is entitled to a final order. Costs normally follow the event. However, given that in this matter Grandwell did not seek a final order of spoliation, and given that the issue of costs was not argued, and given the manner that I have decided to dispose of the matter, it is only proper that the costs be in the cause.

[h] **DISPOSITION**

i/ **The following final relief is hereby granted:**

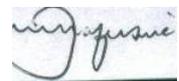
- 1 It is hereby declared that the actions of the respondents on 22 February 2016 amounted to an act of spoliation against the fifth respondent in respect of its occupation of, and operations at, the diamond mining site at the Chiadzwa Concession.
- 2 However, notwithstanding the declaration in paragraph 1 above, but subject to paragraph 7 below, the rights normally accorded by the relevant Special Grants in respect of the Chiadzwa Concession as they pertain to the fifth respondent, shall not be restored until such time that the validity of such Special Grants has been regularised in accordance with the law.
- 3 The costs shall be in the cause.

²² 1982 [3] SA 758, at p 767F - H

ii/ **The following interim relief is hereby granted:**

- 4 Once the validity of the Special Grants aforesaid has been regularised as envisaged in paragraph 2 above, the first, third, fourth and sixth respondents, their agents, or anyone acting on their behalf, or under their instructions, shall be interdicted from interfering with the fifth respondent's lawful operations at the mine.
- 5 The first, second, fourth and sixth respondents are hereby interdicted from inducing, or forcing, or in any manner procuring, a breach of the third respondent's contractual relationships with the applicant and the fifth respondent.
- 6 Furthermore, the first and fourth respondents are hereby interdicted from inducing, or forcing, or in any manner procuring, a breach of the contractual relationships between the applicant and the fifth respondent on the one hand, and the second and third respondents on the other.
- 7 For the purposes of safeguarding assets, all of the fifth respondent's security personnel, with all their chain of command, shall be entitled, authorised and empowered to remain at the fifth respondent's mining site at Chiadzwa Diamond Concession, as directed in paragraph 2 of the order of this court on 29 February 2016, until the resolution of this matter.

16 March 2016



Scanlen & Holderness, legal practitioners for the applicant;
Civil Division, Attorney-General's Office, legal practitioners for the first and sixth respondents;
Sawyer & Mkushi, legal practitioners for the second, third and fourth respondents.