GRANDWELL HOLDINGS
versus
ZIMBABWE CONSOLIDATED DIAMOND COMPANY LIMITED
and
COMMISSIONER GENERAL ZIMBABWE REPUBLIC POLICE
and
MBADA DIAMONDS (PRIVATE) LIMITED

Urgent Chamber Application

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 20 & 24 February 2017

S Moyo with *B Mahuni* & *E T Moyo*, *for* the applicant
C Mucheche with Ms *T Mavetera*, for the *1st* respondent
H Magadure, for the 2nd Respondent

TSANGA J: In March 2016 the applicant Grandwell Holdings (Grandwell) which owns a 50% shareholding in Mbada Diamonds [Private] Limited (Mbada), a joint venture initiative for diamond mining in Chiadzwa obtained an interim order under HC 1977 /16 (HH 193-16). The other 50% shareholding in Mbada is owned by Marange Resources [Private] Limited (Marange), a government owned company.

According to the applicant, the elements of the order which was granted entitled its security personnel and its entire chain to return to Chiadzwa in order to safeguard its assets. Among these are said to be diamond ore and unprocessed diamonds that are kept in a vault. The diamond ore which has been crushed awaits removal of diamonds.

What is not in dispute is that from March last year the applicant's security personnel went on site as per the order by the court in HC1977/16. What has brought the applicants back to court on the an urgent basis is its allegation that their security personnel at the diamond site have now been removed and that massive looting of their diamond ore has taken place at the instance of the first respondent, Zimbabwe Consolidated Diamond Company Limited (ZCDC), and continues to take place aided and abetted by the Zimbabwe Republic Police (the police), as the second respondents. The ore is said to being loaded without any

recording or chain of command making it impossible to ascertain what is being taken. With the core mingling of the diamond ore with that being mined by ZCDC, the fear is that it would be impossible to tell which diamonds come from which ore and that therein lies the irreparable harm. Mbada's security personnel have been sterilised by these actions of ZCDC. To compound the problem ZCDC is said to have brought onto the mining site security personnel previously hired by Mbada who know how to open the vault locks. As such a real fear is that of the diamonds being stolen. Further if the ore and the diamonds are taken an equally real fear is that the pending appeal before the Supreme Court would be rendered nugatory.

Having invested US$100 m in Mbada, Grandwell says it has a real and substantial interest in protecting the interests of Mbada and its own investment. An attempt is said to have been made to file the application on behalf of Mbada but it had failed to secure the signatures of representatives on the board of Mbada who represent Marange. Grandwell being a 50% shareholder in Mbada had therefore brought a derivative action to enforce the rights of Mbada and to seek a possessory remedy to restore possession.

The basis upon which Grandwell says that Mbada has been despoilt is para 7 of the order that was granted in HC 1977/16. The paragraph was couched as follows:

> "Paragraph 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".

The police as second respondents were said not the have appealed against the order, whilst the ZCDC which had indeed appealed, had only done so against the finding that it had committed acts of spoliation. The appeal was therefore said to be in part leaving para 7 in essence extant. In addition the fact that there was no appeal against the presence of security personnel as per the court order which is said to be extant was said to be supported by the fact that for almost a year Mbada's security personnel remained firmly on site even as the appeal was pending.

However ZCDC's position is that any removal that has taken place has been as per the court order and arises from the fact that the mining grants which were acknowledged to have expired in the said order of the court have not been renewed. Spoliation per se is denied.

The police say they are there in terms of their constitutional mandate in s 219 to maintain peace and order and safeguard property. They have asserted that they cannot be

interdicted from carrying out a lawful mandate. Furthermore, their standpoint is that no police report was made regarding any theft to diamonds. They too essentially deny despoiling Mbada.

Points in limine

Several technical points *in limine* were raised on behalf of the ZCDC and the Commissioner of Police. Mr *Mucheche* had initially raised an objection on behalf of ZCDC that the word "limited" had been omitted from first respondent's name. An application to amend was made which was granted.

The urgency of the matter was also queried on account that Grandwell had written in January to another set of practitioners with the same complaint. As such it was said that urgency had arisen then and not at this point. With the removal of ore and the denial of security personnel at the site having been said to be ongoing, I cannot see how the matter ceases to be urgent. As highlighted in the case of *Telecel Zimbabwe (Pvt) Ltd* v *Portraz & Ors* HH 446 -15, the essence of an urgent application is that if the court fails to act, the position would be irreversible to the prejudice of the applicant. As was also pointed out in that case by MATHONSI J, the issue of the urgency *vis a vis* the time taken to bring an application has tended to be blown out of proportion. In that case 22 days was said not to be inordinate. *In casu* where the violation is said to be ongoing I cannot see how the matter loses its urgency simply because a letter was written some 18 days prior.

Mr *Magadure* queried the certificate of urgency on account of it being dated 9 February when the actual founding affidavit in the matter was only signed on the 10th. He therefore asserted that there was no proper application before me on account of the certificate of urgency predating the founding affidavit. The case of *Condurago Investments (Pvt) Ltd* v *Mutual Finance Pvt Limited* HH 630-15 was cited.

The explanation given *in casu* by Mr *S Moyo* for the eventuality that had occurred was that the legal practitioner in question had read the application and completed the certificate of urgency whilst the application itself had had to be mailed to Cape Town as a matter of urgency as that is where the Directors of Grandwell are based. Furthermore a supplementary certificate of urgency was filed at the hearing bearing a date that was post the return of the affidavit. The content of the affidavit as regards urgency had not in any way changed. In my view the explanation given that the legal practitioner would have had sight of

the affidavit before it was dispatched is plausible and would explain why its content and that of the affidavit indeed speak to the same exigencies.

Another objection taken to the application is the non-use of the relevant form in the application as required by r 241 (1) of the High Court Rules 1971. As stated in the case of *Marick Trading (Pvt) Ltd* v *Old Mutual Life Assurance Company Zimbabwe Ltd and Anor 2015 (2) ZLR at 343* whilst it is critical for legal practitioners to follow rules, ultimately it may be in the interests of justice to use rule 4C which allows a condonation of departure from the rules where the facts permit. *In casu* where at the heart of the application is spoliation, involving undisclosed though evidently considerable sums of money since diamonds are involved, it would in my view be inane to insist on the technicality of a form when this is clearly an instance that calls for the justified use of r 4 C. The issue of the certificate of urgency and the non-use of the relevant form for urgent applications as modified is therefore condoned in this instance in terms of r 4 C (a).

Mr *S Moyo* also raised an objection on the failure by the counsel of the Commissioner of Police to serve his affidavit on time despite it having been attested to on 15 February well before the hearing which was on the 20th. This was said to reinforce *malafides* on the part of the respondent and was said to justify a special order as to costs. The explanation given by Mr *Magadure* for the delay in my view raised sufficient doubt as to whether the delay was intentional or even *malafide*. He had been out of town at the time that it had been filed. I turn now to the merits.

The merits

Against the backdrop of facts I have already outlined, the bulk of Mr *Mucheche*'s submission were on the competing rights to the ore stemming from the non-renewal of the mining grants. This indeed was of no relevance to an application for spoliation since its purpose is:

> "not the protection and vindication of rights in general, but rather the restoration of the status quo ante where the spoliatus has been unlawfully deprived of a thing, a movable or immovable, that he had been in possession or quasi-possession of"

See *Zulu* v *Minister of Works, KwaZulu and Others* 1992 (1) SA 181 (T).

Key to remedy is the need to stop and reverse self-help in the resolution of disputes between parties. Furthermore as explained in *Yeko* v *Qana* 1973 (4) SA 735 (A) at p 739 drawing in Voet 41.2.16:

> "…..the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that on one is allowed to take the law into his own hands. All that the *spoliatus* has to prove is possession of the kind which warrants protection of the remedy and that he was unlawfully ousted."

An applicant in spoliation proceedings has to establish that they were in peaceful and undisturbed possession of the thing in question at the time they were deprived of possession. As stated in the case of *Gondo NO* v *Gondo* 2001 (1) ZLR 376 at p 378 E-F.

> "In order to obtain a spoliation order an applicant needs to prove no more than that a) he was at the time of the act of spoliation in peaceful and undisturbed possession of the property and b) he was forcibly or wrongfully and against his consent deprived of possession"

Therefore what is of relevance here is whether an act of spoliation has taken place entitling the return of possessory right to the Mbada. Fundamentally also as observed in the case of *Chikodzi & Anor* v *Mashonaland Tobacco Pvt Limited & Anor* HH 392 /15, self-help itself materially runs against the grain of rule of law as articulated in s 3 (1) (a) & (b) of the Constitution of Zimbabwe Amendment Act (No.20) Act 2013 which states in s 3 in its founding values and principles that:

> "Zimbabwe is founded on respect of the following values and principles –
> (a) Supremacy of the Constitution
> (b) The rule of law"

Self-help is inimical to a society in which the rule of law prevails as observed in the case of *Chief Lesapo* v *Northwest Agricultural Bank* 2000 (1) SA 409). Notably this dispute pits a joint venture entity with its foreign investor against a state created entity. It is as such important to bear in mind the broader picture. Among the multitude of factors that have a bearing on investment anywhere in the world is observance of the rule in the settlement of disputes. It matters not that one of the parties feels contractually short-changed or thereby entitled to its actions. The rule of law ought to be the guiding principle and it is the duty of the courts to fearlessly foster dispute resolution through the proper channels at all times. Disregard for the rule of law ultimately does nothing towards fostering a climate of trust for productive investment.

Much of the focus by Mr *Mucheche* addressed the question of rights. The dispute in so far as this aspect is concerned is under appeal. The applicants were emphatic that the gravamen of their complaint is the removal of the security personnel who remain at Chiadzwa but have been confined to the residential areas. In view of the order that was granted in HC

1977/16 of which para 7 has indeed from an examination the notice of appeal not been appealed against by ZCDC the first respondents, then Mbada is entitled to an interim relief in the spirit of part of that remains extant. It has been argued that Mbada has alleged spoliation and yet it seeks an interdict. It is clearly in terms of the rights accorded in para 7 of that order that it bases its application for an interdict. As such the argument that they have not satisfied the requirements of an interdict therefore cannot hold. It has merely sought a remedy that is appropriate to the facts. The interdict seeks among things to stop the removal of its ore. No evidence was placed before the court for this hearing to challenge applicant's assertion that Mbada's security personnel had in fact been on the site undisturbed from the time of the granting of the order up until the recent developments of dispossession.

However, having examined closely the interim relief sought against the final relief claimed, I am undoubtedly of the view that para 1 of the final relief is in fact what should constitute the interim relief whilst para 1 of the interim relief is undoubtedly a part of the final order sought. It is far broader and delves into the issue of actual mining. This was not the subject matter of para 7 of the order granted in HC 1977/16.

Accordingly the provisional order is granted as follows:

INTERIM RELIEF GRANTED

Pending the confirmation of the final order, it is ordered that:

1. The 1st and 2nd Respondents and those acting on their behalf be and are hereby interdicted from collecting, from Third Respondent's concession area, diamond ore mined by the Third Respondent, accessing areas secured by security personnel of the Third Respondent or otherwise interfering in any manner with such security arrangements in relation to the said concession area.
2. Costs will be in the cause.

Scanlen and Holderness, applicant's legal practitioners
Matsikidze & Mucheche Commercial & Labour Law Chambers, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd defendant's legal practitioners