GRANDWELL HOLDINGS (PRIVATE) LIMITED
versus
ZIMBABWE CONSOLIDATED DIAMOND COMPANY (PRIVATE) LIMITED
and
COMMISSIONER GENERAL, ZIMBABWE REPUBLIC POLICE
and
MBADA DIAMONDS (PRIVATE) LIMITED
and
FRANCIS GUDYANGA
and
MORRIS MPOFU
and
DAVID EDGAR HOOVER MURANGARI

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 5 & 21 June 2017

Urgent chamber application

S. Moyo with E T Moyo and B Mahuni, for the applicant
GRJ Sithole, for the 1st, 4th, 5th, 6th respondents
H Magadure, for the 2nd respondent

MUREMBA J: This is an application for leave to execute pending an appeal.

The contents of the applicant's application can be summarised as follows. The applicant holds 50% shares in the third respondent (Mbada Diamonds). The other 50 % is held by Marange Resources (Pvt) Ltd, a company wholly owned by Zimbabwe Mining Development Corporation which in turn is wholly owned by the Government of Zimbabwe. Besides owning shares in the third respondent, the applicant is also the manager of the third respondent's diamond mining activities at Marange diamond fields. In doing so it provides security services to the third respondent. The 1st respondent is a mining company which is under the control of the Government of Zimbabwe. It carries mining activities at Marange diamond fields under the supervision of the Ministry of Mines. The 4th, 5th and 6th respondents are directors of the first respondent.

On 24 February 2017, following an urgent chamber application, the applicant obtained a derivative order in favour of the third respondent and in its own favour under case number HC 1290/17 against the first and second respondents. The provisional order obtained reads as follows.

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

On 17 March 2017, the applicant's legal practitioners received a notice of appeal by the first respondent. The first respondent had filed an appeal in the Supreme Court against the provisional order of 24 February 2017 under case number SC 159/17. Pursuant to that, the applicant then filed in this court an application for leave to execute pending appeal. This court, by consent on 25 April 2017, under HC 2593/17, granted an order for leave to execute pending the determination of the appeal. The leave to execute was worded as follows.

> "It is ordered that:
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> 1.Pending the appeal filed by the first respondent under case number SC159/17, 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 as per interim relief granted by this honourable court on the 24th of February 2017.
>
> 2. Should the first and second respondent fail to comply with paragraph 1 above and to purge their failure to comply with the interim order granted by Justice TSANGA on the 24th of February 2017 under case number 1290/17, they shall be denied audience before this honourable court and any papers filed by them shall be struck out of the record."

This order was made in the presence of the first and second respondents' legal practitioners. Furthermore, the order was served on the first and second respondents on the 25th of April 2017 and 27th of April 2017 respectively. Despite all this, the first and second respondents completely disregarded the order of the court. They continued to deny the third respondent's security personnel access to the red zone which access had originally been granted by an order of this court which was made on the 16th of March 2016 under HC1977/16. The first respondent appealed against that order as well and the appeal is still pending. The respondents complied with that order for almost a year until the spoliation

action which led to the application under HC1290/17 and the order of this court which was granted on 24 February 2017. The applicant's legal practitioners had to write a letter of complaint as evidenced by copies of letters addressed to the first and second respondents' legal practitioners dated 2 May 2017. In that letter he was asking the two respondents to obey the latest court order granting leave to execute pending appeal.

On 9 May 2017, the applicant received an invalid notice of appeal which was filed under SC 290/17 on 5 May 2017 by the first respondent again against the leave to execute pending appeal that had been granted by consent. The applicant averred that the notice of appeal is invalid and incompetent because the first respondent did not obtain the leave of this court prior to filing the notice of appeal seeing that the order that was granted was interim in nature. It was averred that in any case it is an order that had been granted by consent. The applicant went on to attack the grounds of appeal enumerated in the notice of appeal which grounds I find unnecessary to state in this judgment as they are irrelevant for the determination of this matter.

The applicant averred that even though there are appeals pending before the Supreme Court, the notices of appeal were filed in bad faith and solely for the purposes of gaining time to continue rampant theft.

The applicant averred that the present application is urgent because dispossession is taking place right now. Valuable ore and diamonds are being removed without any recorded chain of possession. It is going to be impossible to separate the work and property of the third respondent from that of the first respondent. Even the value of the ore and diamonds removed will be impossible to determine. The conduct of the first and second respondents constitutes a complete disregard and contempt of the order of the court. If the first and second respondents continue with their conduct, rights meant to be secured by litigation pending before the courts, will be rendered nugatory and the applicant and the third respondent will suffer irreparable harm. Recovering any damages from the first respondent will be problematic in that the first respondent doesn't have any significant assets yet. It is a company in respect of which the Minister of Mines publicly admitted that it had been illegally incorporated as the legal framework for joint venture was still to be created at the time it was launched. The Parliamentary Act was not in place when it was incorporated and parliamentarians have continuously complained about its illegal foundations. It is facing severe operational

challenges and has not been able to produce any significant diamonds. The applicant further averred that the fourth, fifth and sixth respondents who are directors of the first respondent have authorised and directed the first respondent to commit the acts of theft of diamond ore, acts of spoliation and contempt of orders of this court. The fourth, fifth and sixth respondents have not responded to letters dated 9 May 2017 demanding them to refrain from violating the court order. It is further averred that instead of complying with the orders of this court, the respondents through the Minister of Mines and Mining Development, Honourable Walter Chidakwa, trivialised the court orders and the appeals pending before the Supreme Court by falsely announcing, before an international forum the Kimberley process, that all legal matters had been settled. It is averred that the respondents and the Minister treated orders made by this court and legal process before this court and the Supreme Court, as being of no consequence. In this application the applicant prays for the following order.

"TERMS OF FINAL ORDER SOUGHT

1. All court papers filed by the first and second respondents before this honourable court be and are hereby struck out of the record.
2. First and second respondents be and are hereby barred from filing any papers before this honourable court until such time as they shall have purged their contempt of court in this matter.
3. Leave to execute the interim orders in Cases Numbers HC 1290 of 2017 and HC 2593 of 2017 be and is hereby granted notwithstanding the filing of any appeal by the first and second respondent.
4. The first and second respondents be and are hereby ordered to allow the third respondent's personnel to return to the red zone of the third respondent's concession area for the purposes of safeguarding the third respondent's vaults, assets (including stockpiles of diamond ore) and anything from which diamonds may be extracted.
5. The first and second respondents shall each pay $1 million a day from the date of service on it of the order in case number 2593/17 to the date they shall have purged their contempt of the order of this honourable court.
6. Each of the fourth, fifth and sixth respondents shall serve 12 months jail for the contempt of this honourable court.
7. The first, second, fourth, fifth and sixth respondents shall jointly and severally the one paying the other to be absolved pay costs of suit for the application on a legal practitioner and client scale.

INTERIM RELIEF GRANTED

1. Notwithstanding any appeal filed or which may be filed by the first and second respondent, the first and second 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 as per interim relief granted by this honourable court on the 24th of February 2017."

In response to the application, the first, fourth, fifth and sixth respondents raised several points in *limine* which are as follows. The application is based on false or misleading information; the matter is not urgent; the relief that the applicant is seeking is incompetent; there is material non-disclosure of facts; there is no cause of action; this court is *functus officio;* the matter is *res judicata* and the fourth respondent was improperly cited as Dr Francis Gudyanga instead of Professor Francis Gudyanga.

The second respondent also raised some points *in limine* in his opposing affidavit. They are as follows. The application does not comply with order 32 r 241 (1) of the High Court Rules, 1971; the matter is not urgent; the application does not comply with order 43 r 388 of the High Court Rules, 1971 and the application does not comply with order 5 r 39 (1) of the High Court Rules,1971. At the hearing, the second respondent's counsel stuck to these points *in limine*, but counsel for the first, fourth, fifth and sixth respondents indicated that the first, fourth, fifth and sixth respondents fully associated themselves with the points *in limine* raised by the second respondent *vis a vis* the application's non-compliance with r 241 (1) and r 388 of the High Court Rules.

I now turn to deal with the points *in limine*.

(i) Non-compliance with Order 32 r 241 (1) of the High Court Rules, 1971

The second respondent's counsel submitted that in terms of r 241 (1), "where a chamber application is to be served on an interested party, it shall be in Form no. 29 with appropriate modifications." He said that in Form no. 29 which should be used with appropriate modifications, the applicant gives notice to the respondents of his application for an order in terms of the draft and that the accompanying affidavits and documents shall be used in support of the application. The respondents are further informed of the procedural steps to be taken. The second respondent's counsel further submitted that the applicant was fully aware that the chamber application would be served on the respondents and as such it ought to have used Form 29, instead of Form 29B which it used. He submitted that since the rule is worded in peremptory terms with the use of the word 'shall', the failure to comply with the rule renders the application invalid. For his submissions Mr *Magadure*, the second

respondent's counsel relied on the case of *Marick Trading (Pvt) Ltd* v *Old Mutual Life Assurance Company Zimbabwe Ltd & Anor* 2015 (2) ZLR (H) at 343 wherein it was held that

> "If a Chamber Application is to be served on an interested party, Order 32 r 241(1) requires that it be in Form 29 with appropriate modifications. Any failure to comply with this rule is fatal to the application".

In response, Mr *Moyo* submitted that for an urgent chamber application, the applicant had used Form 29 B which is the correct form as stipulated in the rules. He further submitted that even if the applicant had used the wrong form, this is a proper case where in the interests of justice, the court should apply r 4C and condone the non-compliance since no prejudice was occasioned by the respondents by virtue of a wrong form having been used.

I am in agreement with Mr *Magadure* that the applicant should have used Form 29 instead of Form 29B in line with the requirements of r 241 (1). However, all the respondents were served with the application and were able to file their opposing papers before the matter was heard. In view of this, no prejudice was occasioned by the use of the wrong form. I am therefore prepared to condone the non-compliance with the rules in terms of r 4C. The objection therefore fails.

(ii) Improper citation of the 4th respondent as Dr Francis Gudyanga instead of Professor Francis Gudyanga

The 4th respondent had been cited as Dr Francis Gudyanga instead of Professor Francis Gudyanga which is his correct title. The parties agreed to the citation of the 4th respondent being amended to Francis Gudyanga with the deletion of the title 'Doctor'.

(iii) Urgency

All the respondents submitted that the matter is not urgent. The second respondent submitted that the matter was not urgent because it was the same matter that had been brought in previous applications which were made under HC 2593/17 and HC1290/17 involving the applicant and the first and second respondents about the same cause of action.
The first, fourth, fifth and sixth respondents submitted that as of 9 May 2017 when the applicant became aware that an appeal had been noted against the order of 25 April 2017 granting leave to execute, it did not approach the court to seek relief until 26 May 2017 when

it filed the application. They said that the applicant ought to have come to court at the earliest convenient date and as such this was self-created urgency.

It is not disputed that before filing this application the applicant had written to the respondents complaining about their alleged non-compliance with the court order of 25 April 2017 and the respondents disputed it. Thereafter the applicant filed the present application, 17 days from 9 May 2017 when it learnt of the filing of the appeal in the Supreme Court. It was stated in *The Prosecutor General* v *Phibion Busangabanye and Magistrate N Mupeyiwa N.O* HH 427/15 that the issue of urgency has now been blown out of proportion. It was said a delay of 22 days cannot be said to be inordinate as litigants do not eat and live on filing court process. Equally in this matter a delay of 17 days cannot be said to be inordinate considering that the applicant had initially tried to engage the respondents. Furthermore, as was correctly submitted by Mr *Moyo*, an application to enforce an order that was granted on an urgent basis is itself urgent. Put differently, an order made on the basis that the matter is urgent means that its enforcement is also urgent. It is illogical to say that enforcement of an urgent order is not urgent.

I thus dismiss the point *in limine*

(iv) The applicant is seeking an incompetent relief; the matter is res judicata and the court is functus officio

The first, fourth, fifth and sixth respondents submitted that the interim relief that the applicant is seeking is the same relief that TSANGA J granted to it in HC 2593/17 on 25 April 2017 when she granted it leave to execute pending appeal which order is now subject of an appeal under SC 290/17. These respondents said that as such this court cannot grant the same relief that it once granted. It was averred that it is now *functus officio* and the matter is now *res judicata.*

Mr *Moyo* did not dispute that the relief that the applicant is seeking is the same as the one that TSANGA J granted on 25 April 2017. He, however, argued that an invalid notice of appeal having been filed against it on 5 May 2017, this court should ignore such an appeal and authorise execution to proceed.

It is not disputed that the applicant is seeking to be granted the same relief it was granted on 25 April 2017 under HC 2593/17 by TSANGA J. The order granted the applicant

leave to execute pending appeal of HC 1290/17 which had been granted on 24 February 2017. That being the case, it is therefore improper for the applicant to come back to this court once again seeking the same relief that it be granted leave to execute, which leave this court has already granted. As was correctly submitted by Mr *Sithole*, the matter is now *res judicata* and this court is now *functus officio*. This court cannot pronounce itself twice on the same matter involving the same cause of action between the same parties.

In *Gillepsies Monumental Works P/L* v *Zim Granite Quarries P/L* 1997 (2) ZLR 436 (H) it was held that an order for leave to execute pending appeal is an interlocutory order as it does not have a final and definitive effect on the main suit and in terms of s 43 (2) (d) of the High Court Act [*Chapter 7:06*] if a litigant wishes to appeal against an interlocutory order or judgment he must obtain leave to appeal from the judge who made the order or granted the judgment. This therefore means that if a litigant files a notice of appeal against an order granting leave to execute without first obtaining the leave to do so, that notice is invalid. Whilst the applicant avers that this is what the first respondent did in the present matter, I, however, do not believe that the applicant's recourse is to come back to this court to seek yet another order for leave to execute because that order is already there. An invalid notice of appeal simply means that no appeal is pending. See *United Bottlers* v *Nkomo* 1994 (2) ZLR 211(S). Therefore, if no appeal is pending, then it is illogical to approach this court again requesting for a second order for leave to execute pending appeal. What if the first respondent appeals again against the second order and in doing so files another invalid notice of appeal? What will the applicant do? Can it come back once again for a third order for leave to execute pending appeal? No, I do not think that that will be proper. This means that there should be another recourse or remedy that the applicant ought to explore other than the one it has sought to explore in the present application.

Another pertinent point that the first; fourth; fifth and sixth respondents raised is that the interim relief the applicant is seeking is the same relief that it is seeking in paragraphs 3 and 4 of the final relief which again is incompetent.

For these reasons I uphold the point *in limine* that the interim relief that the applicant is seeking is incompetent.

(v) Non-compliance with order 43 r 388 and order 5 r 39 (1) of the High Court Rules, 1971

In the final order in paragraphs 1, 2, 5 and 6 the applicant is seeking that the respondents be pronounced to be in contempt of court. All the respondents averred that in terms of Order 43 r 388, contempt of court proceedings are instituted by way of a court application and not through an urgent chamber application. Reference was made to the case of *Jean Pamela Vant* v *George Jeche* HH 440/15 which case shows that contempt of court proceedings are made by way of a court application which is then set down on an urgent basis because the application is urgent in nature. The second respondent further averred that since in the final order the applicant wants him to be pronounced to be in contempt of court, he should have been personally served for the present proceedings as his personal liberty is as stake in line with the provisions of Order 5 r 39 (1) which says that,

> "Any process in relation to a claim for an order affecting the liberty of a person shall be served by delivery of a copy thereof to that person personally".

Mr *Moyo* for the applicant did not respond to the point *in limine* about non-compliance with Order 43 r 388. Instead, he only responded to the point *in limine* about non-compliance with Order 5 r 39 (1). Mr *Moyo* submitted that since the current proceedings are not for the granting of the final relief of contempt of court, but the interim relief which has nothing to do with the relief of contempt of court, there was no need for personal service to be effected on the respondents. He submitted that personal service on the respondents will be effected after the provisional order has been granted before the hearing of the application for confirmation of the provisional order.

I am in agreement with the respondents' counsels that contempt of court proceedings are not instituted by way of an urgent chamber application but by way of a court application. Rule 388 states that,

> "The institution by a party of proceedings for contempt of court shall be made by a court application."

In terms of r 389,

> "such court application shall set forth distinctly the grounds of complaint and shall be supported by an affidavit of the facts."

Clearly, in *casu* the applicant adopted the wrong procedure in bringing contempt of court proceedings through an urgent chamber application. This also renders the interim relief

that the applicant is seeking incompetent as it is predicated upon a final order which cannot be granted through an urgent chamber application. I thus uphold the point *in limine* about non-compliance with Order 43 r 388.

Since contempt of court proceedings cannot be instituted through an urgent chamber application, the point *in limine* about the applicant not having complied with Order 5 r 39 (1) which requires that personal service of process be effected personally upon a person whose liberty is to be affected automatically falls away. It automatically falls away by virtue of the fact that the applicant adopted the wrong procedure in instituting contempt of court proceedings. In the circumstances the issue of service of that court process does not even arise.

(vi) Material non-disclosure of facts

The first, fourth, fifth and sixth respondents averred that this application should be dismissed for the applicant's failure to disclose that there is a third appeal pending in the Supreme Court under SC 165/16 pursuant to a judgment which was granted by MAFUSIRE J in HC 1977/16 in favour of the applicant against some of the respondents in the present matter.

Mr *Moyo* correctly submitted that that other appeal although related to the present application, it is irrelevant for the purposes of the determination of the present matter hence it was immaterial to make that disclosure. In any case I noticed that the applicant did mention in its application about that pending appeal. I thus dismiss the point *in limine*.

(vii) The application is based on false or misleading information

The first, fourth, fifth and sixth respondents averred that the certificate of urgency contains misleading facts or falsehoods, the first falsehood being that the order granting leave to execute pending appeal that was granted on 25 April 2017 in HC 2593/17 was granted by consent. It was said that the other falsehood was that it was averred that the letters which were written to these respondents complaining about contempt of court had not been responded to.

I do not believe that this is an issue which should have been raised as a point *in limine*. It is an issue which is best dealt with in the merits as it touches on the merits of the case. I will thus dismiss it.

Conclusion

Whilst I have dismissed some of the points *in limine,* I have upheld some. Those that I have upheld are fatal to the application. In summary, the interim relief being sought is incompetent as it was once granted. Therefore it is a matter which is now *res judicata* thereby rendering this court *functus officio*. Furthermore, the interim relief is predicated upon a final relief of contempt of court which relief cannot be granted by way of an urgent chamber application. Put differently, both the interim and final reliefs that the applicant is seeking are incompetent. Both reliefs that are being sought being incompetent, I have no application to deal with.

In the result, I hereby dismiss the application with costs.

Scanlen & Holderness, applicant's legal practitioners
Matsikidze & Mucheche, 1st, 4th, 5th and 6th respondents' legal practitioners
Attorney-General, Civil Division, 2nd respondent's legal practitioners