GRANDWELL HOLDINGS (PVT) LTD
versus
ZIMBABWE CONSOLIDATED DIAMOND COMPANY (PVT) LTD
and
MBADA DIAMONDS (PVT) LTD
and
MINERALS MARKETING CORPORATION OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 March 2018 & 23 September 2019

Urgent Chamber Application – Reasons for judgment

S Moyo with *E Moyo & B Mahuni,* for the applicant
G R J Sithole with *C Mucheche,* for the1st respondent
G Zinderi, for the 3rd respondent

CHITAPI J: The Registrar has placed the record in this matter before me so that I compose a full judgment detailing my reasons for granting the provisional order prayed for by the applicant on 18 March 2018. The reasons are necessary to be furnished so that the Supreme Court may holistically determine an appeal against my order aforesaid, noted by the first respondent as appellant on 21 March 2018 under case No. SC 254/18. I furnish the reasons for my order hereunder.

At the commencement of the hearing, a legal officer *G Zinderi* indicated that the third respondent had mandated her to sit in and observe the proceedings and that the third respondent did not wish to make any input and would abide the court's decision. Notwithstanding that the third respondent indicated that it would be a passive observer, the presence of the representative assisted me to make the order which appears numbered 1.3 in the provisional order. Ms *Zinderi* did confirm that the third respondent was selling and had sold diamonds in issue in this application at the instance of the first respondent. The issue of whether or not the first respondent was selling the diamonds whose rights of ownership founded the basis of the prayer in the provisional order seeking an interdict against their continued sale pending the

determination of the ownership dispute was answered by the confirmation given by Ms *Zinderi.* I should indicate that is seeking confirmation of whether or not the disputed diamonds were on sale, I used the provisions of r 246 (1) (a) which permit a judge in the determination of an urgent chamber application to require any other person apart from the applicant or a deponent to any affidavit to provide on oath or otherwise such information as the judge may require. I should also indicate that Mr *Sithole* abandoned the first respondent's objection that the matter was not urgent. It became unnecessary to interrogate the point. I now turn to address the substance of the application.

The background material facts of the application can be summarised as herein following. The applicant is a foreign registered company headquartered in Mauritius. The applicant holds 50% of the issued share capital in a locally registered company being the second respondent. Another company Marange Resources a locally registered company and wholly owned by a local statutory corporation, *viz*, Zimbabwe Mining Development Corporation (ZMDC) is the holder of the other 50% issued share capital in the second respondent. ZMDC is wholly owned by the Government of Zimbabwe. The Government of Zimbabwe therefore through ZMDC has control over Marange Resources (Pvt) Ltd. The first and second respondents are thus locally incorporated companies carrying out business in Zimbabwe and the Government of Zimbabwe has interests in both or one or other of them.

The parties are not strangers in the courts. There had been various litigation centred around the same subject of the control possession and/or ownership rights in a diamond mining concession in Chiadzwa. In judgment No. HH 125/17 which TSANGA J determined under case No. HC 1290/17 the applicant sued the first respondent together with the Commissioner of Police and the second respondent herein over rights and interests in the mining concession. The learned judge set out the background facts to this unending feud between the parties. The learned judge in summary made the factual findings that the applicant therein which is still the applicant herein was a 50% shareholder in Mbada Diamonds (Pvt) Ltd which is the second respondent in this application. In case No. HC 1977/16 (HH 193/16) the second respondent which had been controversially elbowed out of the diamond mining concession in dispute allegedly by the first respondent which took control of the concession obtained an interim order in this court. The terms of the interim order *inter alia* entitled the second respondent's security personnel to return to Chiadzwa and safeguard its assets. The assets included diamond ore and unprocessed diamonds that were allegedly kept in a vault.

In the case before TSANGA J, the applicant came to court on an urgent basis alleging that albeit having redeployed its security personnel to safeguard its assets as ordered under case No. HC 1977/16, the first respondent had in defiance of that order forcibly removed the security personnel and engaged in plunder and looting of the diamond ore hitherto under guard. The police were alleged to have aided and abetted the hostile take-over of the guarded diamond ore in circumstances where there was no record of what was being removed. TSANGA J on the merits made a factual finding that the first respondent together with the police had committed an act of spoliation. The learned judge took a swipe at acts of unlawfulness committed in circumstances where a foreign investor such as the applicant was involved. She commented that the non-observance of the rule of law apart from it being unlawful would dissuade foreign investment to the detriment of the growth of the economy of the country. The learned judge took note of the appeal filed by the first respondent in case no. HC 1977/16. She however determined that as the appeal was concerned with resolution of ownership rights to the concession, it did not debar the judge from granting the interim relief sought in terms of which the first respondent and the police were interdicted from collecting from the disputed concession, herein concession diamond ore mined by the second respondent, nor accessing areas secured by the second respondents' personnel or interfering with the security arrangements put in place.

In this application the applicant averred that it brought the claim in its own name as a derivative action to enforce the rights of the second respondent in which the applicant is a 50% shareholder. The applicant averred that it had failed to obtain a resolution of the second respondent to bring the claim because of the non-co-operation of the directors representing Marange Resources (Pvt) Ltd which holds the other 50% shareholding in second respondent. The applicant averred that because of the common ownership and control by the Government of Zimbabwe of Marange Resources (Pvt) Ltd, it made it difficult to get authorization for the institution of legal proceedings against another government owned and controlled entity. The applicant further averred that it was the manager of the second respondent in whom the applicant has sunk money running into millions of dollars. It averred that the action by the first respondent had the effect of threatening the applicant's right to management fees due to it apart from managing the millions of dollars in investments put in the second respondent. For those reasons the applicant submitted that it had a real and substantial interest in the order which it sought.

If of course the applicant can show that the second respondent is not taking action to safeguard its operations and that the latter's acts of commission or omission threaten the applicant's investment to the applicant's prejudice as shareholder, then a derivative action is justified to be brought by the applicant. I was satisfied on the papers that the applicant established *prima facie* justification to institute the derivative application to protect its rights and interest in the subject matter sought to be protected.

The applicant in its draft order prayed for the following relief:

TERMS OF FINAL ORDER SOUGHT

1. It be and is hereby declared that the conduct by the 1st respondent to extract diamonds from ore mined by the 2nd respondent at its mining site in the Chiadzwa concession area is unlawful.
2. The 1st respondent be and is hereby ordered and directed to deliver to the 2nd respondent all diamonds extracted from ore mined by the 2nd respondent at its mining site in the Chiadzwa concession area and the vault with actual diamonds which is in its control.
3. The 1st respondent (and in the event of opposition by the 3rd respondent, the 1st and 3rd respondents jointly and severally) shall pay costs of suit for this application on a legal practitioner and client scale.

INTERIM RELIEF GRANTED

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

1. The 1st and 3rd respondents be and are hereby interdicted from and ordered not to sell, whether directly or indirectly through any third party, any diamonds from:

   1.1. the concession areas ("the concession areas") on which the 2nd respondent was carrying out mining operations as described in the Joint Venture and Shareholders Agreements between Marange Resources (Pvt) Ltd and the applicant dated 21 July 2009 and 13 August 2009 respectively;

   1.2. the 2nd respondent's mining site in the concession areas which are the subject of pending litigation before the courts,

   Including, without limitation, the 1,56 million carats of diamonds referenced in Annexure "A" to the founding affidavit in this application.
2. Should the 1st and / or 3rd respondents fail to comply with paragraph 1 above they shall be denied audience before this honourable court and any papers filed by them shall be struck out of the record.

At the end of the hearing, I granted the provisional order as varied in para 1.2 by the deletion of the words "including, without limitation, the 1.56 million carats of diamonds reference in annexure "A" to the founding affidavit on this application." I however added para 1.3 to read as follows:

> "1.3 Consequent to an admission by 3rd respondent that the sale of diamonds by the 3rd respondent at the instance of the 1st respondent has been ongoing including today, the 1st respondent shall deposit the proceeds realized from the sale of diamonds mined from the disputed concession area with the Sheriff to be held pending the return date of this order and the making of a final order by the court."

The gist and thrust of the interim order which I made was to protect all interested parties from potential financial prejudice which could result were the proceeds of the sale of diamonds the rights to which were in dispute and still to be determined by the court were not safeguarded.

The first respondent in its opposing affidavit apart from taking technical objections to the application as set out in para 2 to 6 inclusive (the point *in limine* on urgency having been abandoned), denied in para 7 that the first respondent had committed the act of spoliation complained of. It denied that it was selling diamonds from the disputed concession. It averred that the diamonds and ore which the applicant had an interest in were held under judicial attachment by the Sheriff. The first respondent denied mining on the disputed area and averred that there was pending litigation in the Supreme Court and that this application was intended to subvert the Supreme Court hearing. The first respondent did not provide details of the Supreme Court litigation. I could not surmise on what the litigation pending in the Supreme Court pertained to. Various other allegations were made to impugn the application including the allegation that the second respondent had operated without mining rights between 2010 and 2013 and that it has not acquired mining rights since then.

The first respondent averred that the applicant was through this application seeking to sneak in a contempt of court application through the back door. It denied having possession or control of the second respondent's diamonds or interfering with the second respondent's vaults. Significantly, the first respondent averred that it did not intend to sell "disputed diamonds". It further averred in para 12 of the opposing affidavit that it keeps and maintains a record of the diamonds it produces and that the diamonds on its records do not include diamonds belonging to the second respondent.

This being an urgent application for a provisional order, the matter had to be considered bearing in mind the provisions of r 246 (2) of the High Court rules. The rule provides as follows:

> "2. Where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case he shall be grant a provisional order either in terms of the draft filed or as varied."

I granted an order as varied to the extent I have already indicated having been satisfied that the applicant's papers established a prima facie case. *Prima facie* means at first view or on the face of it. A *prima facie* case therefore is established where the facts alleged by the applicant if proved would lead to a probability of success. A *prima facie* is one based upon a cursory impression which the judge reaches from the facts. It is because the decision of the judge whether or not to grant the provisional order is based on the *prima facie* consideration that r 246 (3) gives the court a discretion depending on the nature of the interim order granted, to order that the applicant should provide security for any damages which may be caused by the order.

The provisional order itself in terms of r 247 (1) (a) shall be in form 29C. Form 29C permits the respondent to anticipate the return date for confirmation or discharge of the provisional order. The respondent can also apply for a variation of the order. Experience on the bench has shown that the respondents scarcely utilize the provisions of anticipation of the return date. Instead respondents opt to note appeals against provisional orders in most cases. The appeals, unless the provisional order is final in content, are subject to leave to appeal being applied for and if refused, the respondent is still intent on appealing, then appealing against the order refusing leave to a judge of the Supreme Court. The process becomes cumbersome, costly and time consuming yet the provisional order provides for a window to have the provisional order changed or discharged which in essence means that the application is argued on the merits earlier than the normal rules would provide for. Whilst I do not purport to suggest to respondents generally or the first respondent herein on how best to deal with the discharge of a provisional order, it would appear logical that where circumstances permit, the utilization of the window to anticipate the return date looks likely to lead to a more expeditious resolution of the application because an early hearing ensures that the application is determined to finality with an appeal being available to pursue as of right.

Be that as it may, the *prima facie* case was in my view established inter alia by the following factual considerations:

(a) That the first and second respondents indeed had an on-going dispute in regard to the diamond ore and diamonds from the concession in dispute.

(b) The applicant had a financial interest in the diamonds and ore mined from the concession, a fact not really disputed by the 1st respondent, the interest of the applicant having been determined to be present by the court in previous decisions and that there was no indication that any appeals pending in the Supreme Court were directed against the determination or acceptance by the court that the applicant has a financial interest in the diamonds and ore and would thus be prejudiced financially if its rights in the diamonds or proceeds from the sale of the same other than through its participation were not protected.

(c) That the first respondent did accept the existence of the diamond ore and vaulted diamonds to which the applicant was laying claim to but albeit disputing interfering with the applicant's possession thereof.

(d) The 1st respondent admitted that it was in the process of selling diamonds but that such diamonds were not part of the disputed diamond ore nor that the diamonds originated from the 2nd respondent's vaults. The applicant on the other hand was insistent that the diamonds being sold by the first respondent originated from 2nd respondent's ore and vaults. The polarized position related to a material dispute which the court would have to resolve on the return date. The question arising then would be to determine the origin of the diamonds on sale by the 1st respondent.

(e) That the 3rd respondent's representative confirmed that it was conducting sales of diamonds on behalf of the 1st respondent whose origin was or could be the disputed concession. This information led me to impose paragraph 1-3 of the provisional order in the absence of evidence by the first respondent of the origin of the diamonds which it was offering for sale through the 3rd respondent.

(f) That the balance of convenience favoured the grant of the amended provisional order because the 1st respondent albeit averring in the opposing affidavit that it had a paper trial and records of the origin of the diamonds it was selling, such information was not availed to court. The first respondent was not without an immediate remedy if it was not satisfied with the order that the sale proceeds be held in trust. It could still anticipate the return date, place evidence of origin of the diamonds and seek a variation of the provisional order or its setting aside in terms of r 247. I did not therefore consider that the provisional order would operate

harshly against the 1st respondent but that it protected the interests of all the affected parties.

(g) The rest of other issues raised would be argued on the return date because the *prima facie* case which concerned me and was central to the application became the origin of the diamonds ore being exploited by the 1st respondent and diamonds being sold though the 3rd respondent in the light of the undisputed fact that the 2nd respondent had court orders in its favour which protected its diamond ore and diamonds stored in vaults from being interfered with by all unauthorized person including the 1st respondent.

I was thus persuaded to grant the provisional order and these are my reasons for granting it.

Scanlen and Holderness, applicant's legal practitioners
Matsikidze & Mucheche, 3rd respondent's legal practitioners