REPORTABLE (1)

Judgment No. SC 1/10
Civil Application No. 230/09

(1) ZIMBABWE MINING DEVELOPMENT CORPORATION
(2) MINERALS MARKETING CORPORATION OF ZIMBABWE

v

(1) AFRICAN CONSOLIDATED RESOURCES PLC
(2) CANAPE INVESTMENTS (PRIVATE) LIMITED
(3) DASHALOO INVESTMENTS (PRIVATE) LIMITED
(4) POSSESSION INVESTMENTS (PRIVATE) LIMITED
(5) HEAVY STUFF INVESTMENTS (PRIVATE) LIMITED
(6) OLEBILE INVESTMENTS (PRIVATE) LIMITED
(7) THE MINISTER OF MINES AND MINING DEVELOPMENT

SUPREME COURT OF ZIMBABWE
HARARE, OCTOBER 20 & NOVEMBER 18, 2009 & JANUARY 25, 2010

J R Tsivama, for the first applicant

J Muchada, for the second applicant

J Samukange, for the first to the sixth respondents

N Mutsonziwa, for the seventh respondent

Before: CHIDYAUSIKU CJ, In Chambers

This is a Chamber application in which the applicants seek to set aside an order by HUNGWE J. The order sought to be set aside provides that the learned Judge's judgment will not be suspended by the noting of an appeal. The order of the court *a quo* provides as follows:

"I therefore issue the following order:

1 The African Consolidated Resources P/L claims issued to the third, fourth, fifth and sixth applicants within the area previously covered by Extension Prospecting Order 1523 held by Kimberlitic Searches P/L are valid and have remained valid since the date they were originally pegged.

2 The right granted to the third respondent by virtue of the Special Grant shall not apply in respect of the African Consolidated Resources P/L claims area as indicated on annexure 'B' to the papers. In that regard, it is hereby ordered that the third respondent cease its prospecting and diamond mining activities in the said area.

IT IS FURTHER ORDERED AS FOLLOWS:

3 That the second respondent return to the applicants possession of the 129 400 carats of diamonds seized from the applicants' offices in Harare on 15 January 2007.

4 The second respondent return to the applicants all diamond(s) acquired by the second respondent from the African Consolidated Resources (P/L) claims area using the register kept by the second respondent in compliance with the Kimberley Process Certification Scheme.

5 That the fourth respondent be and is hereby ordered to direct (the) police to cease interfering with the applicants' prospecting and mining activities.

6 That the first, second and third respondents (pay) the applicants' cost(s) on a legal practitioner and client scale, the one paying the other to be absolved.

7 Any appeal noted against this order shall not suspend the operation of the order."

Paragraph 7 of the above order authorises the respondents to execute the judgment despite the noting of an appeal against that judgment. The applicants are dissatisfied

with the order and, having noted an appeal against the judgment, have filed this Chamber application.

The applicants contend that HUNGWE J misdirected himself in ordering execution of his judgment despite the noting of an appeal. They submitted that the grant of such an order prior to the noting of an appeal was irregular and should be set aside. The applicants' case is set out in paras 13-15 of the founding affidavit, which provide as follows:

> "13. During argument, the respondents who were the applicants in that matter indicated to the court *a quo* that they would be amending their draft order to include a seventh paragraph to the effect that any appeal noted against that order would not suspend its operation.
>
> 14. Although no submissions were made by the first to the sixth respondents to justify the proposed amendment it was submitted on the applicants' behalf that such order was incompetent at this stage. It was also submitted that an applicant's recourse would be to apply for leave to execute pending appeal. It was further submitted that it is only after judgment has been delivered that any proper assessment can be made whether there has been any misdirection or not and that sometimes the aggrieved party may even easily show to the satisfaction of the court that indeed there has been such (misdirection).
>
> 15. The court *a quo* in its judgment handed down later that day (the 24th of September 2009) granted the order as amended such that the appeal that the applicants subsequently filed under **Case No. SC 230/09** did not suspend the operation of that order. A copy of the operative part of the judgment is attached hereto and marked '**A**' and the yet to be typed full judgment as **ANNEXURE 'B'**."

The respondents did not file any opposing affidavits. Mr *Samukange*, for the first to the sixth respondents (hereinafter referred to as "the respondents"), during the course of his submissions made averments to the effect that the application for execution

of judgment despite the noting of an appeal was made during the course of the main hearing before judgment was given. He, however, did not give details of the application. I will assume no detailed basis for the application was submitted to the court *a quo*.

The law on the effect of the noting of an appeal against a judgment is well settled. At common law the noting of an appeal against a judgment suspends the operation of that judgment. It is also trite that at common law the court granting the judgment enjoys inherent jurisdiction to order the execution of that judgment despite the noting of an appeal. In the leading case of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) CORBETT JA at pp 544-546 had this to say:

> "Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland (as to which see *Ruby's Cash Store (Pty) Ltd v Estate Marks and Anor*, 1961 (2) SA 118 (T) at pp 120-3), it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave, the party in whose favour the judgment was given must make special application. (See generally *Olifants Tin 'B' Syndicate v De Jager* 1912 AD 377 at p 481; *Reid and Anor v Godart and Anor* 1938 AD 511 at p 513; *Gentiruco A.G. v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (AD) at p 667; *Standard Bank of SA (Pty) Ltd v Stama (Pty) Ltd* 1975 (1) SA 730 (AD) at p 746). The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from (*Reid's* case *supra* at p 513). The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see *Voet* 49.7.3; *Ruby's Cash Store (Pty) Ltd v Estate Marks and Anor supra* at p 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf. *Fismer v Thornton* 1929 AD 17 at p 19). In exercising this discretion the Court should, in my view,

determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:

(1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (the respondent in the application) if leave to execute were to be granted;

(2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (the applicant in the application) if leave to execute were to be refused;

(3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and

(4) where there is the potentiality of irreparable harm or prejudice to both (the) appellant and (the) respondent, the balance of hardship or convenience, as the case may be.

(See in this connection *Ruby's* case *supra* at pp 127-8; also *Rood v Wallach* 1904 TS 257 at p 259; *Weber v Spira* 1912 TPD 331 at pp 333-4; *Rand Daily Mails Ltd v Johnston* 1928 WLD 85; *Frankel v Pirie* 1936 EDL 106 at pp 114-6; *Leask v French and Ors* 1949 (4) SA 887 (C) at pp 892-4; *Ismail v Keshavjee* 1957 (1) SA 684 (T) at pp 688-9; *Du Plessis v Van der Merwe* 1960 (2) SA 319 (O)). Although most of the cases just cited dealt with the exercise of the Court's discretion under a statutory provision or Rule of Court, the statute or Rule concerned did not prescribe the nature of the discretion except in broad general terms (e.g. secs 36 and 39 of Proc. 14 of 1902 (T) empower the Court to give directions as

> 'may in each case appear to be most consistent with real and substantial justice')

and the same general approach would be appropriate to the exercise of a discretion under the aforementioned rule of practice."

The *South Cape Corporation* case *supra* is clear authority for the proposition that before a court can exercise the discretion to order execution despite the noting of an appeal, the successful party has to make a special application for such relief. For the court to be able to exercise this discretion properly, the special application must

set out in some detail the basis for seeking such relief. The respondent is entitled to an opportunity to respond to the application.

It is common cause that none of the respondents (then the applicants) in this case made a special application for leave to execute. They simply applied to amend the draft order to include para 7 at some stage in the course of proceedings before judgment. This, in my view, is totally inadequate because the court was not provided with details necessary for the proper exercise of its discretion.

The *South Cape Corporation* case *supra* sets out in some detail the factors that a court takes into account in determining whether to grant or refuse the relief of execution despite the noting of an appeal.

There is no indication on the record, in particular in the reasons for judgment, that the learned Judge in the court *a quo* gave consideration to these or any other factors. The reasons for judgment do not indicate what the learned Judge took into account and what he did not take into account in arriving at the conclusion that there should be execution despite the noting of an appeal. Without reasons, it is impossible to understand the learned Judge's reasoning. Failure to give reasons in an application to execute despite the noting of an appeal is a serious misdirection justifying the setting aside of such a determination.

On this ground alone, I would set aside the court *a quo's* order that there should be execution despite the noting of an appeal.

I have serious reservations on the propriety of a Judge including in his main judgment an order authorising execution despite the noting of an appeal against that judgment. It is only in exceptional circumstances that such an order should be made part of the main judgment. For instance, if in a dispute over the custody of a minor child it is clear that the noting of an appeal will be used to facilitate the removal of the minor child from the jurisdiction of the court, such a course might be justified. In the absence of exceptional circumstances, due process must be observed before issuing such an order. I hold this view because the litigant's right to appeal should not be abrogated lightly and without due process.

The right of appeal is fundamental and critical to our justice system. Where the law confers the right of appeal on a litigant it should not be rendered nugatory or abrogated without due process. Due process requires that a case proceeds to finality, namely the giving of a judgment. Once a judgment is given, the losing party who has a right to appeal is entitled, if he so wishes, to note an appeal. The noting of an appeal has the effect of suspending the judgment. It is only then that the successful party can make a special application for leave to execute the judgment despite the noting of an appeal. The losing litigant is entitled to respond to that application. It is only after hearing both parties to the special application for leave to execute that a court can properly exercise its discretion on the matter. No doubt in the making of that determination the court will be

guided by the factors set out in the *South Cape Corporation* case *supra* and other factors relevant to the application.

This was not done in this case. The applicants' right to be heard by the highest court in the land was rendered nugatory without any semblance of due process. No reasons were given. The failure to give reasons in this case smacks of arbitrariness and the ruling cannot be allowed to stand.

After taking into account the facts of this case, it was clear to me that the diamonds in question could easily disappear without trace pending the hearing of the appeal irrespective of which of the parties had possession of the diamonds and that any mining activities pending the appeal had the potential of causing irreparable damage to the party who was not mining during that period. For these reasons, I concluded that a standstill position pending the appeal was the most equitable solution.

I made it very clear to the parties at the conclusion of their submissions that I intended to set aside the order to execute judgment despite the noting of an appeal made by HUNGWE J and that I intended to substitute that order with a more equitable arrangement. To that end, I directed the parties to nominate a banker who could keep the diamonds in dispute pending the determination of this matter on appeal. The parties subsequently advised that they were unable to agree on a banker to act as an honest broker.

When I was advised of this, I directed the parties to enquire from the Reserve Bank of Zimbabwe ("the Reserve Bank") if it could keep the diamonds pending the appeal. As the Reserve Bank was not a party to these proceedings, the parties were directed to jointly enquire into the attitude of the Reserve Bank. Mr *Samukange*, for the respondents, advised that the Reserve Bank was agreeable to this arrangement. In a letter dated 18 November 2009 the applicants submitted their position. Regrettably the letter from the applicants was filed in the case file without being brought to my attention. The letter only came to my attention on 23 January 2010 when the applicants advised the Registrar that the respondents were seeking to execute against the diamonds on the basis of the judgment of HUNGWE J, which had not been formally set aside. I immediately issued the following order on 25 January 2010 pending these reasons for judgment:

"IT IS ORDERED THAT:

(1) All the diamonds referred to in paragraphs 3 and 4 of the High Court Order in judgment no. HC 6411/07 of the High Court be surrendered to the Reserve Bank of Zimbabwe for safekeeping pending the determination of the appeal noted against that judgment.

(2) Execution of costs granted in terms of paragraph 6 of the same order is suspended pending the determination of the said appeal.

(3) Costs of this Chamber application will be costs in the cause."

Shortly after the issuance of the above order, through correspondence to the Registrar I learned that the respondents were seeking to evict the applicants from the disputed claim on the basis of the judgment of HUNGWE J and that the parties were seeking guidance on whether my order of 25 January 2010 suspended the eviction of the applicants. I directed the Registrar to advise both parties that the effect of my order was

to suspend the enforcement of JUSTICE HUNGWE's order. Her letter to the parties reads as follows:

> "Previous correspondence refers.
>
> Please be advised that the Honourable Chief Justice has advised that the order granted on 25 January 2010 suspends the whole of the Honourable Justice Hungwe's judgment as will appear more fully in the reasons for judgment that His Lordship will hand down shortly."

Paragraph 1 of my order of 25 January 2010 is very explicit. In terms of that paragraph the diamonds are to be kept at the Reserve Bank until the finalisation of the appeal. To interpret the letter of the Registrar to the parties as reversing my very clear order of 25 January 2010 that the diamonds are to be kept at the Reserve Bank pending appeal is the height of mischief. If anyone has removed the diamonds from the Reserve Bank, he has done so unlawfully and in contempt of the order of this Court. The diamonds must be returned to the Reserve Bank immediately in order to purge the contempt. Failure to do so should attract serious consequences.

As regards the situation on the disputed claims, the fact of the matter is that the applicants are in physical control of those claims. The balance of convenience favours the applicants remaining on the site of the claims pending appeal but they must cease all mining activities and it is so ordered. Allowing the applicants to continue mining pending appeal has the potential of causing irreparable damage to the respondents should the appeal fail.

As indicated in my order of 25 January 2010 the costs in this case will be costs in the cause.

Sawyer & Mkushi, first applicant's legal practitioners

Dube, Manikai & Hwacha, second applicant's legal practitioners

Venturas & Samukange, first, second, third, fourth, fifth and sixth respondents' legal practitioners

Civil Division of the Attorney-General's Office, seventh respondent's legal practitioners