

HB 32/07
 Judgment No. HB 32/07
 Case No. HC 200/07

FALCON GOLD ZIMBABWE LIMITED

AND

**JOHN MACK AND COMPANY T/A
 GOLDEN VALLEY MINE**

VERSUS

THE ATTORNEY GENERAL

AND

**THE OFFICER IN CHARGE ZIMBABWE
 REPUBLIC POLICE GOLD UNIT, BULAWAYO**

AND

THE COMMISSIONER OF POLICE, HARARE

IN THE HIGH COURT OF ZIMBABWE
 NDOU J
 BULAWAYO 9 FEBRUARY 2007 AND 1 MARCH 2007

Advocate T. Cherry, for the applicants
Ms Mukuruva, for the respondents

NDOU J: The applicants seek an order in the following terms:-

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

- (a) That the first applicant be and is hereby authorised immediately to deposit the gold bullion, being 23,2444 kilograms in weight seized by the Second Respondent on the 8th January 2007, with the Reserve Bank (Fidelity)
- (b) That the gold bullion referred to in paragraph (a) herein is declared to be the lawful property of the Second Applicant.

INTERIM RELIEF GRANTED

Pending determination of this matter, the First Applicant is granted the following relief: -

- (c) That the gold bullion presently held by the Second Respondent, be immediately returned to the First Applicant and to be held and retained by the First Applicant until such time as the court determine the final relief sought herein in terms of paragraphs (a) and (b)”

The background facts of the matter are the following. The First Applicant is a public

company which carries out business, inter alia, of consultants and managers. The First

Applicant was acting in their capacity as consultants and managers to the Second Applicant

during the period to which this application relates.

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The Second Applicant is a company of limited liability trading under the name Golden Valley Mine which is a gold mine in the Chakari/Kadoma district.

The two applicants seek the return of the above-mentioned quantity of gold bullion which the Second Respondent seized during a Gold Unit investigation from the premises of the First Applicant. The gold bullion began its life when the ore was mined at Golden Valley Mine. First Applicant, as alluded to above, acted as consultants to the Mine. Golden Valley Mine processes the ore and it is reduced to slimes or sludge.

This is then transported to Bulawayo where it undergoes another process, smelting, where it again changes form to gold bullion. The smelting is done by Rossal Mining (Pvt) Ltd. It is at this stage where the First Applicant comes into the picture. A professional employee of the First Applicant, one Peter Mark Johnstone, the company metallurgist, traveled to Rossal Mining (Pvt) Ltd and collected the gold bullion which he then picked up and brought to the First Applicant offices in Bulawayo. He signed for the weight of gold that he collected and noted its purity. He noted the identification marks and placed it in the First Applicant's safe. There were three consignments, combined in one, waiting for collection which was placed in a sealed box. He then arranged for Fawcetts Security to collect this box to convey it to the Reserve Bank (Fidelity). There is evidence to this effect from Fawcetts Security. In the normal course of events it would be re-weighed and its purity verified, its identity and origin verified and the owner, Second Applicant be paid by the Reserve Bank (through its agent Fidelity). However, in this case the sequence was broken by the actions of the Second Respondent. After the gold bullion had been placed in the First Applicant's safe, Mr Johnstone phoned Fawcetts Security and asked them to come and collect it. He made the phone call at about 0830 or 0930 on the morning of the 8th January 2007 and asked them to collect it at 1100 hours.

Shortly before Fawcetts Security arrived, officers of the Second Respondent arrived and demanded that he produce the gold. He did so. They seized the gold bullion. Fawcetts Security arrived to collect the gold bullion as arranged. The Second Respondent allowed the

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gold to be taken to the Reserve Bank merely to certify its weight but not for lodgment. The Second Respondent then seized the gold and placed it in its own safe where it has remained ever since. The police then arrested and detained Mr Johnstone on a charge of illegal possession of the gold and with the alternative charge of failing to maintain a register. Mr Johnstone was taken to the Magistrates Court. The intention of the Second Respondent was to place him on remand in custody. But, the Area Public Prosecutor declined to place him on remand altogether. This was based, it seems, on the fact that there was no case for him to answer on the papers placed before him. It would appear that the officers employed under the Second Respondent were dissatisfied with Area Public Prosecutor's decision and endeavored to re-arrest Mr Johnstone immediately outside the court building. He was, however, allowed his liberty a short while later. On the 12th January 2007, an officer under the Second Respondent endeavoured to serve a summons on Mr Johnstone.

This was not served personally but on another employee of First Applicant. The latter attended court with First Applicant's legal practitioners on 15th January 2007, that is, the date as per the summons. The matter was not set down before a magistrate and nothing happened in court.

Thereafter Police officers from the Second Respondent and Kwekwe, have visited the premises of the First Applicant on a total of six to eight times. They have demanded and been supplied with various documents. As there were no charges preferred the Applicants have repeatedly demanded the release of the gold bullion.

Because of the urgency of the matter, the Respondents were unable to file opposing affidavits. But from the submission by their legal practitioner, Ms Mukuruva, the Respondents seek sufficient time to carry out their investigations in respect of the source of the gold. She said that the Respondents' view, or rather suspicion is that the gold was not intended for the Reserve Bank but the parallel market. It is not clear how they will prove this beyond a reasonable doubt. In any event it does not seem a mere intent (assuming they are able to prove that) would necessarily constitute an offence.

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It is not necessary to dwell on that issue at this stage but their prosecution ambition should be viewed in light of the above-mentioned decision taken by the Area Public Prosecutor which is in line with the principles set out in *Attorney General v Blumears and Another* 1991(1) ZLR 118(SC). In this case the Applicants have cooperated and afforded the Second Respondent access to all documents they demand. They have offered assistance in any way they can. The difficulty is that the Second Respondent has never clearly set out what it is they really want or what precise offence they believe the Applicants to have committed *Martin v Attorney General and Another* 1993(1) RLR 153(S) and *Smyth v Ushewokunze and Another* 1997(2) ZLR 544(S).

The Police have no common-law right of search and seizure, they may exercise such a right only when expressly empowered by statute- *Mazunga and Others v Minister of Home Affairs and Others* HB 98/03. (See also *Zuma and Another v National Director of Public Prosecutions and Others* [2006]2 All SA 91 (D)). Further, a Police officer, when deciding whether he will seize a particular article, must use his judgment as to whether it may afford evidence of the commission of the particular crime being investigated.

In the circumstances, the seizure of gold bullion in this case can either be in terms of Section 49 of the Criminal Procedure and Evidence Act [Chapter 9:07] or Section 29 (C) of the Gold Trade Act [Chapter 21:03]. From the submissions made on behalf of the Respondents it seems to me that the gold bullion is in Respondents custody for purposes of forfeiture in the event of the First Respondent securing a conviction- Section 30 of the Gold Trade Act, *supra*.

It is in my view, unnecessary custody of the gold bullion in this case as it has been weighed, identified and documented by the Applicants, the Second Respondent and the Reserve Bank (at the behest of the Second Respondent). In the event of the Applicants being prosecuted there is sufficient documentary evidence to identify the gold bullion and its weight. I find that the Applicants have made out a case for a provisional order but there is a need to amend it to be in line with what has been established by the papers.

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On the issue of urgency, the quantity and value of the gold bullion makes the matter urgent. Commercial interests constitute urgency in certain exceptional instances, and this case is one such exception.

Accordingly I grant the following provisional order in the following amended terms:

INTERIM RELIEF GRANTED

Pending the determination of this matter, the First Applicant is granted the following relief:-

- (a) That the gold bullion presently held by the Second Respondent, namely 23,2446kg of gold bullion, seized on 8 January, 2007 by Second Respondent, be immediately deposited by Second Respondent in the presence of the Applicants' representative, with the Reserve Bank, Fidelity.

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

- (b) That the gold bullion referred to in paragraph (a), herein, is declared to be the lawful property of the Second Applicant.
- (c) Costs of suit.

SERVICE OF PROVISIONAL ORDER

Service on the First and Third Respondents shall be by delivery on them by the Applicants' legal practitioners' corresponding legal practitioners in Harare, Kantor and Immerman.

Service on the Second Respondent shall be in terms of the Rules.

Joel Pincus, Konson and Wolhuter, applicants' legal practitioners
Civil Division, Attorney General's office, respondents' legal practitioners.