IN THE HIGH COURT OF ZIMBABWE

HELD AT HARARE

In the matter between:-

AFRICAN CONSOLIDATED RESOURCES Plc

and

DASHALOO INVESTMENTS (PVT) LTD

and

POSSESSION INVESTMENTS (PVT) LTD

and

HEAVY STUFF INVESTMENTS (PVT) LTD

and

OLEBILE INVESTMENTS (PVT) LTD

versus

THE MINISTER OF MINES AND MINING DEVELOPMENT

and

ZIMBABWE MINING DEVELOPMENT CORPORATION

and

THE COMMISSIONER OF POLICE

Opposed Application

HIGH COURT OF ZIMBABWE

HUNGWE J

HARARE, 25 August & 6 September 2010

Mr *J Samukange,* for the applicants

Mr *F Mutamangira* for the first respondent

Mr *J Muchada* for the second respondent

Mr *JR Tsivama* for the third respondent

HUNGWE J: This is an application for the rescission of a judgment of my own that I gave on 24 September 2009 in favour of the applicant's regarding the legality of the registration of various mining claims in the names of the applicants. It is important that I set out the order which I gave then and what thereafter occurred leading to the present proceedings.

On 24 September 2009, I gave the following order:

"1. African Consolidated Resources plc claims issued to the third, fourth, fifth and sixth applicants within the area previously covered by Exclusive prospecting order 1523 held by Kimberlitic Searches (Pvt) Ltd 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 plc claims area as indicated on annexure 'B' to the papers. In that regard it is hereby ordered that third respondent cease all its prospecting and mining activities in the said area.

IT IS FURTHER ORDERED AS FOLLOWS:

3. That the second respondent returns to the applicants' possession the 129 000 carats of diamonds seized from the applicants' offices in Harare on 15 January 2007.

4. The second respondent returns to the applicants all diamonds acquired by the second respondent from the African Consolidated Resources plc claims area using the register kept by the second respondent in compliance with the Kimberley Process Certification Scheme.

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

6. That first, second and third respondents pay applicants' costs on a legal practitioner and client scale, the one paying the others to be absolved.

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

The second and third respondents noted an appeal to the Supreme Court. They made a chamber application under SC 230/09 seeking to set aside para 7 of the above order. In SC 1/10 the Supreme Court issued an order effectively setting aside that paragraph. The appeal is, however, still pending in the Supreme Court.

In the meantime, on 28 April 2010, first respondent, through his legal practitioners, addressed correspondence to the registrar of this court seeking directions in terms of Rule 4C of the Rules of this Court. The relevant portion of that correspondence reads:

"3. In arriving at this decision (the order of 24 September 2009 above) the court determined the issue of the currency of De Beers 1520 and 1523 Exclusive Prospecting Orders, ("EPOs") over the Marange area ("Marange") and whether an application for the extension of EPO 1523 had the effect of reserving the ACR claims area from prospecting and pegging.

4. The court held that the EPO's were invalid by reason of their expiration and that, consequently, the application for extension of EPO 1523 did not have the effect of reserving the ACR claims area.

5. The Court further held that the ACR claims area was open for prospecting and pegging at the time that ACR pegged and registered their claims, and further that the ACR claims were valid and remained valid from the date they were pegged.

6. In arriving at the decisions aforementioned, the ACR group concealed certain fundamental facts which completely disentitle the ACR group of the relief which the court granted. The ACR group fraudulently concealed the facts in order to gain an unfair advantage and for the purpose of procuring a favourable judgment. It is therefore our humble request that the Court, having regard to the fraud committed by the ACR group, give directions, on the proper course of action and procedure to be taken at law in order to procure the rescission of the Judgment procured by fraud.

7. We assert that the following facts were fraudulently concealed by the ACR group:-

7.1 The subsidiary companies; Dashaloo Investments (Private) Limited, Possession Investments (Private) Limited, Olebile Investments (Private) Limited, and Heavy Stuff Investments (Private) Limited ("the ACR subsidiaries") did not exist at the time of the prospecting, pegging and registration of the mining title that is subject of the above matter.

7.2 section 20 of the Act provides that only a 'person' can be granted a prospecting licence. A 'person' in this context refers to a juristic person, so constituted by the act of incorporation, or a natural person;

7.3 It is clear that at the time that the Certificates of registration were issued to the ACR subsidiaries, there was no such person to who such certificates could be granted because all mining rights purportedly held by the ACR subsidiaries were acquired between 4 April and 19 June 2006, yet the ACR subsidiaries were incorporated on 29 June 2006 up to 14 July 2006, after the purported issue of the certificates of registration (mining claims);

7.4 … ……………………………………………………………………………

7.5 ………………………………………………………………………………..

7.6 Further and more importantly, at the time of the ACR group pegged their claims, the Marange area was reserved against prospecting and pegging by virtue of the operation of Reservation Notice 1518 issued on 19 February 2004, which notice was posted on the Notice Boards of the Mining Commissioner's offices in Mutare and Harare, and recorded in a 'Reservation Notice Register'.

7.7 It is incompetent to acquire mining title through a prospecting licence or the pegging of claims in an area reserved against prospecting and pegging. The ACR group fraudulently concealed the fact of the existence of the reservation from the court and procured the registration of their claims by fraud……….

I directed the registrar to seek the other parties' response to the request. On 19 May 2010 the applicants, through their legal practitioners, responded in the following terms:

"1. As the honourable judge has handed down his judgment and an appeal has been noted, the honourable judge is functus officio. He can no longer deal with the matter and indeed it is not 'before him' as contemplated in rule 4(C) of the High Court Rules. His decision in HC 6411/07 can only be considered by the Supreme Court on appeal.

2. Nonetheless our clients have requested that for record purposes we respond to the false allegations made on behalf of the Minister of Mines and Mining Development, without in any way conceding that they give rise to a need for directions in terms of rule 4(C) of the High Court Rules.

3. Our clients deny that they have fraudulently concealed that their subsidiary companies did not exist at the time the ACR claims were duly registered by the Assistant Mining Commissioner Mutare. When our clients decided to register the claims that had been pegged, they purchased shelf companies for this purpose from a local company, Paracor Company registration Services. This is common practice and indeed our client has purchased over 80 shelf companies from Paracor in this manner. Our clients were assured that the companies had been duly registered and accordingly they utilized the names of the shelf companies in order to obtain registration of the claims. To knowingly use unregistered companies would have been of no benefit to ACR and indeed would have been inexplicable in logic.

   The Minister was however a party to case number HC 6411/07 and he filed opposing papers. In none of the opposing papers filed by him were any of these "new" and supposedly fraudulent issues mentioned, despite their existence at that time. It would seem that the reckless and unsubstantiated allegation of fraud is merely an attempt to conceal the incompetence and ineptitude on the part of the Minister in failing to mention these objections (which, surprisingly, now seem to have assumed huge importance).

4. Even if the shelf companies were incorporated a short time after the claims were registered in their names, there was no prejudice to the public interest. In Rajah & Rajah (Pvt) Ltd v Ventersdorp Municipality & Others 1961 (4) SA 402 (A) the

Appellate Division considered a case where a trading licence had been issued to a company which had not been registered at the time the licence was issued. The court held that since there had been no intention to deceive on the part of the brothers who had applied for the licence in the name of the company, and in view of the fact that the municipality had failed to prove that there had been any prejudice or that it would be in the public interest to cancel the existing licence of the company, the licence would be considered valid………………………………..

5. Furthermore section 58 of the Mines and minerals Act provides for the barring of impeachment of title where a mining location has been registered for a period exceeding 2 years. It is not competent in terms of that section for any person to dispute the validity of title to the ACR claims on the ground that the pegging was invalid or illegal or the provisions of the Act were not complied with prior to the issue of the certificates of registration…………………………..

6. Our clients deny that when the ACR group registered the claims the Marange Area was reserved against prospecting and pegging in terms of RA 1518 that was purportedly issued in 2004. Minister does not admit, although he is well aware of it, that the Mining Commissioner, Harare purported to exercise her powers outside her area of jurisdiction. He also fails to disclose that notice of the said RA was not advertised in the Gazette as required by s.35(1) of the Act. …………. Further he does not disclose that in 2006 the Mining Commissioner Harare and the Mining Commissioner, Mutare recommended that the reserved area mentioned in RA 1518 "be extended" to include the Marange area and it was extended long after the ACR claims had been registered……….."

Upon careful consideration of the matters raised in both correspondences and having due regard to and mindful of the need for finality to litigation, I decided that it would not be in the interest of justice to ignore a party's effort to draw the court to a possible fraud. I therefore directed that the first respondent files a court application in terms of Rule 449 of the esteemed Rules of Court dealing with the issues he raised in the correspondence. Consequently, papers were filed in which the first respondent seeks rescission of judgment on the basis that applicant had obtained a judgment favourable to its case by fraudulently suppressing certain information which would have disentitled it to the orders it eventually got in its favour.

The applicants strenuously oppose the application for rescission and raise five points *in limine* which, in the applicants' view, ought to preclude this court from hearing the application. As I understood it, the first point raised on behalf of the applicants was that this court should not allow the respondents any audience since they come to this court with dirty hands. They had flagrantly and contemptuously refused to comply with the Supreme Court order of 25 January 2010. *Mr Samukange* who appeared for the applicants put this issue as follows:

> "The Respondents have not complied with this order. They have not ceased all mining operations as ordered by the Chief Justice. They have gone further and auctioned the diamonds mined from Applicants' claims, in total violation of the Chief Justice's order. They have therefore approached the court with dirty hands. They should not be heard. The respondents have not shown respect for the rule of law. The principle for the rule of law is that court orders are obeyed, especially by the first respondent who took an oath to obey the laws of this country……."

Mr Samukange submits that the respondents, by failing to comply with the order of the Supreme Court in the particular circumstances in which they have done so, have approached this court with dirty hands; and that by reason of that status they have forfeited the right to apply for any such indulgence as they now apply for. He relies for this submission on a number of cases. The first such case is an unreported 2005 judgment of this court in which reliance was placed on the American case of *Tegan v Casaus* (the citation of which is not given). He also placed reliance on a paragraph recited by the judge in the unreported 2005 judgment of this court from the judgment of De Waal J in the South African case of *Mulligan v Mulligan* 1925 WLD 164**.**

Secondly, Mr *Samukange* took the point that as this court had pronounced itself in the judgment of the 24 September 2009, this court was *functus officio*.

The third point taken by the applicants was that as the matter is under appeal in the Supreme Court, and since that court had made an order suspending the order of this court, then this court has no jurisdiction to entertain this application.

The fourth point *in limine* was that there is another pending matter i.e. HC 2230/10 brought by applicant against the respondents where first respondent's decision is being challenged. First respondent can still raise these issues in that matter. In any event that matter deals with the same issues which are being raised here.

Finally, Mr *Samukange* took the point that since this application is premised on an allegation of fraud, the first respondent adopted the wrong procedure. He ought to have realized that there would be a serious dispute of fact requiring proper ventilation through action rather than motion proceedings.

On behalf of the first respondent Mr *Mutamangira* argued that the points *in limine* really amount to arguments directed to the merits of the matter.

As for the first point taken *in limine*, that the respondents are in contempt of court and as such must not be heard, in view of their failure to comply with the order of 25 January 2010 by the Chief Justice, Mr *Mutamangira* pointed out that the judgment will show that only the second and third respondents appealed to the Supreme Court. The first respondent did not. As he was not before the Supreme Court, the order made thereat does not in any way bind him. In the circumstances therefore the first respondent cannot, by any stretch of imagination, be said to be in contempt of that order. The dirty hands principle cannot preclude the first respondent against whom there is no order requiring him to do or to refrain restraining him from doing anything from approaching the court for relief.

As to whether the fact that the matter is pending in the Supreme Court, Mr *Mutamangira* argued that the present proceedings are not the same as the matters under appeal. In any event there is nothing preventing this court from entertaining an application of this nature as it is completely different from that with which the Supreme Court is seized.

Mr *Muchada*, for the second respondent, added that the Supreme Court, in effect, struck down paragraph 7 of the 24 September judgment. The result was that the judgment under appeal was now suspended by operation of law not by the interim relief granted to the applicants therein. It will be seen, he went on, that the second respondent does not carry out mining operations. As such since the interim relief was directed at maintaining a standstill position at the mining site, the dirty hands principle does not affect any of the parties now before this court.

Mr *Tsivama*, for the third respondent, took this point a step further. He reminded the court that the second and third respondents did not file any application in the present proceedings nor do they seek any relief out of these proceedings. In the circumstances therefore, the dirty hands principle cannot affect the respondents. Second and third respondents are in court as interested parties not as petitioners seeking relief.

After hearing submissions regarding the points raised *in limine,* I directed that I be addressed on the merits so that a composite judgment is rendered.

This is an application for rescission by the first respondent of a judgment granted in favour of the applicant. The present application is premised on allegations that the applicant procured judgment in its favour by willfully suppressing evidence relevant for the determination of the

issues before the court. Had the court been appraised of the true facts, it would not have granted judgment favourable to the applicant. Put differently, the first respondent alleges that the applicants obtained and secured judgment in their favour by fraud. The allegation of fraud relates to two points. First, it is alleged that the applicants did not disclose that at the time they registered the claims under the names of the subsidiaries, those subsidiaries were not yet incorporated. Second, it is alleged that the applicants did not disclose that the area under which the claims in issue fell were part of an area reserved against prospecting and pegging.

In his founding affidavit the first respondent avers that it was discovered, after judgment, that all ACR subsidiaries were incorporated well after they had registered claims in their respective names. As an example, Certificates of Registration of claims numbered G1402 to G1419 and G 1704 to G1722 issued to Dashaloo are dated between 4 April and 1 June 2006. Dashaloo was only incorporated on 29 June 2006. The same can be said in respect of each of the ACR subsidiaries. The subsidiaries fraudulently misrepresented to the Chief Mining Commissioner that each of them was incorporated at the time when Certificates of Registration were issued.

However this was not the case at the time. As the subsidiaries were not by then incorporated, they did not in fact exist. By falsely misrepresenting to the Mining Commissioner that they were incorporated and thus entitled to take title to the claims, the subsidiaries are guilty of fraudulent misrepresentation. That disentitles them to the order which this court granted in applicants' favour.

Section 20 of the Mines and Minerals Act, *[Chapter 31:05]* provides that only a person can be granted a prospecting licence. A juristic person is created by an act of incorporation. Since none of the subsidiaries were incorporated, then there was no "person" to whom the Certificates of Registration could be validly issued, first respondent argued.

Armed with the fraudulently acquired Certificates of Registration, the subsidiaries then embarked on a slew of litigation asserting that the subsidiaries had lawfully and validly acquired the Certificates of Registration. The first respondent asserts that the applicants fraudulently concealed the true facts from this court and as a result obtained a judgment in their favour on the basis of this fraud.

In an affidavit deposed to by Ian Harris on behalf of the applicants, the deponent denies that any fraud was committed. He avers that the companies were bought as shelf companies. It was believed that they were already registered and were used to register claims to be held by them. He claims that since the companies were registered soon thereafter no-one suffered any prejudice.

In any event, any attack on applicants' title is saved by the provisions of section 58 of the Mines and Minerals Act aforesaid.

The applicant counter-applies for an order declaring illegal all mining carried out by anyone else other than the applicant upon the area covered by Special Grants and a further order declaring as expired the said Special Grants.

The first issue to resolve is whether this court is properly seized with this matter.

As I pointed out in my directive to the first respondent's legal practitioners, the allegation of fraud was directed at the judgment obtained before me. It is a serious matter for one party to make against another, especially where both parties are represented by counsel. Can this court rescind its own judgment without falling foul of the Rules of Court? In other words when can a court grant rescission of a judgment?

Mr *Samukange*, for the applicants, submitted that once this court pronounced itself on the matters before it on 24 September 2009, it became *functus officio*. As such there is no basis at law upon which it could consider itself properly seized with the matter. Mr *Samukange* needed no authority for this trite position. It is well established in our law that once a court has duly pronounced a final judgment, it becomes *functus officio*; its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ceases. *Firestone SA (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 at 306F; *Chirambasukwa v Minister of Justice, Legal and Parliamentary Affairs* 1998 (2) ZLR 567 (SC)**.**

On the other hand, Mr *Mutamangira*, for the first respondent, urged the court to find that there is ample basis under common law permitting the court to exercise its inherent jurisdiction in addition to the Rules. Rule 449(1) of the High Court Rules provides:

> "449 (1) The court or a judge may, **in addition to any other power it or he may have**, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order-

(a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or

(b) in which there is an ambiguity or patent error or omission, but only to the extent of such ambiguity, error or omission; or

(c) that was granted as the result of a mistake common to the parties." (my own emphasis)

In terms of the common law, the court has power to rescind a judgment obtained by default of appearance provided that sufficient cause has been shown. In respect of rescission of judgment in terms of the rules, it has been held that this is a matter for the discretion of the court, which discretion should be exercised judicially. Where willful default was found it has been held that there was no room for the exercise of this discretion but this approach has been questioned and the better view seems to be that willful default or gross negligence on the part of the applicant constitutes no absolute bar to the grant of the indulgence of rescission but that it is a factor, although a weighty one, to be considered in the broad conspectus of the application which is to be taken into account together with the merits of the defence raised to the plaintiff's claim, in the determination of whether good cause for rescission has been shown. *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co* Ltd 1994 (4) SA 705 at page 708F to 709H**.** *Hebstein* & Van Winsen 4th Edition at p 691-2.

In *De Wet & Others v Western Bank Ltd* 1977 (4) 770 (T) it was held (@ p776) inter alia that:

> "Before a judgment would be set aside under the common law, an applicant would have to establish a ground on which *restitutio in integrum* would be granted by our law such as fraud or *justus error* in circumstances.; *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 at pp 166-168; *Semme v Incorporated Law Society* 1933 (1) TPD 213 at p 215; *Makins v Makins* 1958 (1) SA 338 (AD) at p 343 *Athanassiou v Schultz* 1956 (4) SA 357 (W). It would appear that the procedure to set aside a judgment on grounds justifying *restitutio in integrum* is by way of action".

The position set out above recognizes the finality of a judgment once delivered or issued (vide, *Estate Garlick v The Commissioner of Inland Revenue* 1934 AD 499 at pp 502-503)

Under the common law, a judgment can be altered or set aside only under limited circumstances.

In *Stumbles & Rowe v Mattinson; Mattinson v Stephens & Others* 1989 (1) ZLR 172 GREENLAND J had occasion to consider whether this court can set aside its own interlocutory

orders. He held that while the court normally does not have jurisdiction to temper or interfere with its own judgments, because in relation thereto, it is *functus officio*, it does have jurisdiction over orders made in interlocutory and procedural matters. He held further that in terms of this jurisdiction, the court has powers to set aside such orders on good and sufficient reasons, including the fact that the basis of the order has been destroyed or shown to be non-existent. At page 178 he stated;

> "This is particularly so when the matter is interlocutory, (per SQUIRES J in *Sayprint Textiles v Girdlestone* 1983 (2) ZLR 322). It is also so where the matter is procedural; (per STRATFORD JA in **Ex parte Barclays Bank 1936 AD 431).** I support the propositions that the court is entitled to regulate its own rules. It is trite that the rules are intended to expedite procedure and relief. To insist that the court is bound by a procedural order which it knows to be fatally defective is to insist on the court conducting a sham trial. It is illogical, senseless unjust and unreasonable to say to a litigant, "We will proceed with this expensive and protracted exercise, which is a trial and you can start all over again when the Supreme Court rightly sets aside the proceedings because of this fatal procedural defect."

He goes on to make a very clear distinction between interlocutory matters and those in which final orders are made and observed that the distinguishing feature is that in final orders and judgments, the matter takes on the character of *res judicata*, the essence of which is that the issue, having been **fairly contested** by the parties, is finally resolved. It seems to me that, by extension, it cannot be said that a matter was fairly contested when the party resorted to concealing relevant information from the court in what may amount to fraud. Where therefore a party could show such fraudulent concealment of information relevant to the determination of the issue to be decided then the court should under its common law discretion, exercise its powers and grant rescission.

In *Harare Sports Club & Another v United Bottlers Ltd* 2000 (1) ZLR 264 @ p268 GILLESPIE J took up the discussion on the discretionary powers of court in respect of rescission at common law thus:

> "The perceived strictures of this common law were seen as abated by rules of court. These permit the rescission of default judgment 'on good and sufficient cause'; the rescission, variation or correction of judgments or orders for error and the rescission of judgments entered in terms of a written consent for 'good and sufficient cause'. The rules (especially rr 56 and 63) were seen as relaxing the common law.
>
> Our law, however, is not aptly a casuistic set of rules and exceptions but rather a just and logical application of principle. It is therefore not surprising, and most to be welcomed,

> that this rigid and brittle view of this area of the law has been reconsidered. It is now recognised that the complicated rules may be explained in principle and that the principle is by no means as intractable as was defined earlier in the last century.
>
> Thus, where the judgment sought to be rescinded was given in default, no question of a final judgment having been given on the merits can arise. Hence, no considerations of functus officio or *res judicata* apply to thwart an application for rescission. In such a case, even at common law, it is recognised that the court has a very broad discretion to rescind (on sufficient cause shown) a judgment given by default.
>
> Even where judgment is given in the presence of the parties, and where the merits of the cause are considered, the court still retains a power to rescind that judgment. The power in this case would be more sparingly exercised since final judgment would be *res judicata* as between the parties and would appear to be a complete discharge of the court's office. **On principle, however, justice demands that a final discharge tainted by fraud should not be permitted to stand.** The other traditionally recognised exceptions are also explained on the basis that policy prefers to regard a judgment procured in some circumstances of ignorance of relevant documents to the contrary (for example) as not constituting a final discharge of the court's function. Further instances where the court is not held to be *functus officio* are those specified in r 449. As has been said in connection with the counterpart in South Africa of this rule, this rule -
>
> *"sets out exceptions to the general principle that a final order, correctly expressing the true decision of the court cannot be altered by the court ... the court has a general discretion whether or not to grant an application for rescission under r 42(1)."*
>
> The apparently ill-assorted, eclectic instances gathered under that rule do share the common thread that in each case there are sound policy reasons, counteracting any suggestion of *functus officio*, for recognising a court's discretion to revisit its order. The rule does not provide statutory exceptions to, but has been said to codify (or perhaps better consolidate) the common law."
>
> I respectfully associate myself with these sentiments.

Whilst the common law rule regarding rescission of orders in interlocutory matters is settled as having been trammeled by the rules, the position regarding rescission of final judgments is that it can only be permissible in circumstances where a party could establish a ground *for restitution in integrum* such as fraud or *justus error.* I am satisfied that *in casu* the first respondent has discharged the onus in that regard. Consequently I find that this matter is properly before me. The line of authorities which caution against revisiting one's judgment proceed on the basis that the final judgment has been fairly obtained. I doubt whether in cases where there is strong

evidence that judgment was not properly procured theses authorities would maintain the same position. I express no views on this but leave the question open as to what constitute a fairly procured judgment. One that was obtained by fraud or some such malfeasance cannot qualify to be treated as having been fairly obtained.

Having decided that this court is properly seized with the matter the next issue to decide is whether by reason of contempt, the first respondent should not be heard.

I have set out in detail the basis upon which this point was raised on behalf of the applicant. It is that the respondents have failed to comply with the order of the Supreme Court of 25 January 2010 therefore they have approached the court with dirty hands. I must decide first whether the first respondent should be considered as having shut himself out of the doors of this court by virtue of lack of clean hands. What qualifies a litigant for the title of dirty hands? Is this some immutable principle of our law or is it just a moral precept aimed at compliance with court orders? If it's a rule of law, what is its content?

In ***Mulligan** v **Mulligan*** **1925 WLD 164** the following appears;

> "…Before a person seeks to establish his rights in a court of law, he must approach the court with clean hands; where he himself, through his own conduct, makes it impossible for the process of the court (whether criminal or civil) to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interests. …were the court to entertain a suit at the instance of such a litigant, it would be stultifying its own processes and it would, moreover, be conniving at and condoning the conduct of a person, who….sets the law and order in defiance,"

Mulligan, admitting that he was a fugitive from justice, approached the Court for certain relief in civil proceedings against his wife. DE WAAL J held that, as a fugitive from justice Mulligan was not entitled to invoke the process of the Court.

In *Escom v Rademeyer* 1985 (2) SA 654 (T) at 662 dealing with a fugitive from justice the STEGMANN J held:

> "I do not wish to be understood to hold that the principle in question can never be invoked against a defendant or respondent who happens to be a fugitive from justice. It may very well be that a fugitive who is a defendant does not enjoy the right ordinarily enjoyed by a defendant to institute a claim-in-reconvention. He may suffer other disadvantages in respect of procedural, and even substantive, rights ordinarily enjoyed by a litigant. It is not

> necessary for me to deal with the question on so broad a basis. I hold only that whatever the disadvantages that may be suffered by a fugitive from justice seeking to answer process of the court issued against him, they do not deprive him of the right to ask for such time as the Court may deem fit in the circumstances to enable him to provide the answer he has been called upon to give. I hold that the respondent, although a fugitive from justice, has *locus standi* at least to approach the Court for an extension of time in which to comply with the requirements of the rule nisi."

In *Sabawu v Harare West Rural Council* 1989 (1) 47 at p 49 GREENLAND J observed that the duty of every person to obey an order of court give rise to two consequences.

The first is that anyone who disobeys an order of the court ...is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to court by such person will be entertained until he has purged himself of his contempt.

It is clear to me from the above cited authorities that the Court has discretion in the matter. In exercising that discretion a Court will not lightly deprive a party of his right to be heard.

As DENNING LJ (as he then was) said in *Hadkinson v Hadkinson* (1952) 2 ALL ER 567 (CA)

> "It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave consideration of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and where there is no other effective means of securing his compliance."

This approach was adopted by GREENFIELD J in *Jackman v Jackman* 1969 (2) RLR 534 (GD), who proceeded to hear a party still in contempt because of the particular facts of the case.

In *Minister of Home Affairs v Bickle* 1983 (1) ZLR 99 @ p106 per FIELDSEND CJ

> "If the Courts are to fulfil the obligations put upon them by the Constitution they cannot, save in most exceptional circumstances, deny an aggrieved person access to them. Section 18(1) of the Constitution provides that every person is entitled to the protection of the law and s 18(9) provides that every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial Court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."

It must not be forgotten that what we are dealing with in the present matter is the impact of administrative action by Government upon the individual. In this area the Courts should not be astute to find reasons for abdicating their responsibility. The Chief Justice went on to counsel (@

p107) that Courts should not deny a person an opportunity to seek their protection unless he has by his conduct put himself outside the processes of the Court. It is not part of the Courts' function to deny a person access to them in order, for example, to assist some administrative process.

The public policy consideration in this case appears to me to be governed by s 24 of the Constitution. This grants to any person who alleges that the Declaration of Rights has been or is likely to be contravened in relation to him the right to apply to the Supreme Court for relief. This constitutional right of access should prevail unless it is plain that the contempt of which the applicant may be guilty itself impedes the course of justice.

In *Garfield v Minister of Defence* 1986 (2) ZLR 116 MFALILA J had occasion to consider the question whether a litigant should be denied access to court where he stood to be regarded as a fugitive from justice. He said;

> “The decision in *Maluleke v Du Pont NO & Anor* 1966 RLR 620 dealt with the rights of a fugitive from justice or of one who had definitely placed himself beyond the reach of the law. The court held per QUENET JP that ‘the law will deny its protection to those who place themselves beyond its reach’. The present case concerns a party who is within reach of the law but in contempt of court. The difference between a fugitive from justice and one who is merely in contempt was highlighted by this court in *Neill v S* 1982 (1) ZLR 142. In his judgment with which McNALLY J (as he then was) concurred, SQUIRES J stated:
>
> > "Despite the concession made by Mr Deeks, I am not at all sure that there is a discretion in the court where a litigant is a fugitive from justice. The matter after all is one of *locus standi in judicio*, the right and basis to approach the court for relief. And in our law it seems to be clear that the only category of person who has absolutely no right to institute proceedings at law is the fugitive from justice or outlaw."

These cases clearly spell out the consequences of being either in contempt of court or a fugitive from justice. However, unlike a fugitive from justice or an outlaw, a party in contempt is not absolutely barred from being heard in a court of law. The court can still hear him even before he has purged his contempt if the interests of justice demand it. This is because unlike a fugitive from justice who has placed himself beyond the reach of the law by leaving the jurisdiction, the person in contempt is within its reach, thus the weight of the law can descend on him at any time.

An analysis of the above cases leads me to conclude that the first respondent has not disqualified himself from seeking the assistance of this court in asserting his rights. This must be

so firstly, because he was not party to the order given by the Supreme Court. Secondly because he cannot be characterized as a fugitive from justice in the sense that he has put himself beyond the physical reach of the courts. Even if I be wrong in holding this view, I still come to the same conclusion that the principle of dirty hands cannot apply to first respondent because even assuming that he is in contempt of court, he is not a fugitive from justice by virtue of which he would suffer from an absolute incapacity to be heard.

First respondent is still amenable to justice. There are several steps open to the court to ensure that he purges any contempt if any is found against him. In my view the same reasoning applies to the second respondent and third respondent but for different reasons. Firstly, the two State enterprises are in court by virtue of the directive of this court. It will be an absurdity if this court were to order that a party appears before it and then turn around and refuse to hear it on the basis of the dirty hands doctrine. Secondly, in the exercise of the discretion vested in this court I am of the view that justice would not be served if these two entities are not permitted to argue their case. In any event they do not seek any order from the court.

The other two points *in limine* taken *by* Mr *Samukange* both raise the issue of jurisdiction. First was that the matter is currently pending before the Supreme Court and therefore this court has no jurisdiction to entertain it. No authority was cited for this proposition but reliance was placed on the words of the Chief Justice @ p9 where he stated that the effect of his order was to suspend the 24 September judgment of this court. He urged this court to find that it cannot rescind an express order of a superior court. Second was that there is another pending matter before this court where the same issues are raised by applicants.

With respect to Mr *Samukange*, I do not see how an inquiry into whether or not this court was willfully mislead into giving the judgment which it gave could be said to overturn the judgment of the superior court. In any event there is ample authority for the proposition that there is nothing in principle preventing a party from pursuing an application for rescission while an appeal of the same judgment is pending. (See Herbstein and Van Winsen 4th Ed at p 700)

The learned authors express the view that the pursuit of an appeal is no bar to the success of an application for rescission. (See also *Tshivhase Royal Council & Another v Tshivhase &*

Another, Tshivhase & Another v Tshivhase & Another 1992 (4) SA 852 @ p865) where NESTADT J pointed out;

> "Mr Zeiss made one further submission, namely that the first appeal was a bar to the application for rescission. I disagree. In principle, I can see no reason why Kennedy and Ligege were not entitled to pursue this quite separate and independent remedy, irrespective of the pending first appeal. Rule 42(1)(c) does not (unlike s 36(c) of Act 32 of 1944) require that no appeal should be pending. Nor, as counsel suggested, were the appellants put to any election between pursuing the appeal and applying for rescission. They could do both."

I am in respectful agreement with the opinion of that court which is highly persuasive on the point if regard is had to the similarities between the rule under interpretation in that matter and our very similarly worded equivalent. It was on the basis of the above that I declined to uphold the points raised *in limine* on behalf of the applicants.

The question remaining for decision is whether on the basis of the papers before me, a case has been made for the rescission of judgment on account of it having been obtained or procured by fraud. Applicants urged the court to refuse to hear the first respondent as an action was more suited for proof of fraud than motion. In my view any matter that can be brought by action if the circumstances indicate it, can be brought by motion. This is particularly so, when, as in the present case, the initial proceedings were commenced by motion proceedings.

As I pointed out above, the matter before me in September 2009 proceeded on the following basis and assumption; that the ACR subsidiaries were by the time they obtained registration of certain claims in their names, duly incorporated in terms of the laws of Zimbabwe, and as such, had the capacity to contract; that when they pegged their claims in the Chiadzwa mining area, there was no reservation in force but that a company called Kimberlitic Searches held certain rights in the form of Exclusive Prospecting Orders (EPO's) for which an application for extension had been lodged with the Mining Affairs Board but that before a decision had been made the EPO's expired. Upon expiration of such EPO's the land was then open for prospecting but not before since this other company held the said rights; that the registration of the said rights by the Assistant Mining Commissioner was therefore right and proper in those circumstances. It is the subsequent cancellation by the Minister which failed to adhere to the peremptory requirements of section 50 of the Mining Act which prompted the application in HC 6411/07.

Indeed so straightforward was the case for the applicant that counsel for the first respondent in the initial application, one Mr *Maposa*, conceded in his Heads of Argument that the cancellation was wrongful. I agreed with him. Although now with hindsight I am able to question the aptitude of the officers in the Civil Division of the Attorney-General, at the time of the previous hearing I had no reason to question their probity. It seems to me now quiet a lot of information was kept away from the court in order to ensure a certain outcome. The judgment of 25 September was quite clearly a desirable outcome for the applicants although I am not sure who else desired it. The question I must now determine is whether that judgment is liable to be rescinded on the basis that it was obtained by fraud.

A judgment obtained by fraud of one of the parties, whether by perjury, forgery or in any other way such as the fraudulent withholding of documents, cannot be allowed to stand. There is no doubt that a court can amend, alter or set aside a judgment obtained by fraud, but only under limited circumstances.

The view I took of the matter is that one of the parties having brought it to my attention that judgment may have been procured by fraud, in the exercise of my inherent powers at common law and having been seeped in the facts upon which I based my earlier judgment it appeared to me that in all the circumstances of this case that the ends of justice will be served taking into account the convenience to the parties and to avoid a multiplicity of litigation at the same time ensuring finality to litigation that I hear the respondent’s application. (See Stumbles & Rowe supra per Greenland @ p 178).

The applicants sought to downplay the consequences of non-incorporation by averring that since no-one was prejudiced therefore no finding of fraud could possibly arise. I disagree. The allegation of fraud emanating from the office of the first respondent arises from the fact that the rights in issue relate to mining. Section 2 of the Mines and Minerals Act vests all rights to minerals in the President of the Republic of Zimbabwe subject to the provisions of the Act. It recites thus:

> “ **2 Rights to minerals vested in President**
> The dominium in and the right of searching and mining for and disposing of all minerals, mineral oils and natural gases, notwithstanding the dominium or right which any person may possess in and to the soil on or under which such minerals, mineral oils and natural gases are found or situated, is vested in the President, subject to this Act.”

The President holds these rights in trust and on behalf of the citizens. The public therefore has a vested interest in who is registered to extract this national resource; how transparently was the registration of such rights conducted; who stands to benefit from the manner the rights in question are dealt with and so on. The list of such points of interest is not exhaustive. Suffice it to say that whatever the intention of the applicants may have been, the court is entitled to draw any reasonable inference that is supported by facts. If therefore applicants chose to rely on a method of registration that fell foul of the law they only have themselves to blame. It is difficult to appreciate how the submission that public interest was not prejudice is made. Fair competition by investors require that they all follow same rules regarding registration of rights.

Serious consequences follow failure to comply with the legal requirements set out in the Companies Act *[Cap 24:03]*. As an example, where a company was not duly incorporated, it could not lawfully carry out any juristic act unless there existed a pre-incorporation contract by virtue of which mandated natural persons could lawfully carry out such acts for subsequent ratification by the company.

Without incorporation such a company could not pass any resolution to authorize anyone, even its own promoters, to act for it in any lawful transaction. Section 20 of the Mines and Minerals Act provides:

> **“20 Prospecting licences**
> (1) Subject to this section and section *twenty-four*, any person who is a permanent resident of Zimbabwe or any duly appointed agent of such person may take out at the office of any mining commissioner one or more prospecting licences on payment of the appropriate fee prescribed in respect of each such licence.
> (2) On making application for a prospecting licence the applicant shall furnish to the mining commissioner his full name and permanent postal address, which shall appear on the licence issued to him, and such other information as the mining commissioner may require.
> (3) The mining commissioner may refuse to issue a prospecting licence, but shall forthwith report each refusal to the Secretary.
> (4) Upon receipt of a report in terms of subsection (3), the Secretary shall refer the report to the Minister and shall, if so instructed by the Minister, direct the mining commissioner to issue a prospecting licence.”

In respect of the Mines and Minerals Act, such a company could not apply for, let alone accept, any mining rights without contravening the law. It could not therefore nominate an agent

in terms of the provisions of s.20 of the Act. First applicant is a London Stock Exchange listed company. I take judicial notice of the fact that it is manned by personnel who are highly acquainted with the requirements of operating in foreign environments. What haste then could have prompted such an international company to overlook such basic requirements of the law? It could be that they were anxious to lay their hands on the claims, like any investor would be anxious to do, but if they did so without regard to the law, they could hardly cry foul if someone pointed to the lack of legal personality at the relevant time.

The act of securing "rights" without following the laid down procedure evinces an intention to mislead. That to my mind is self-evident. What this act signifies is that applicants were able to put up a ruse upon which the relevant officials in the Mines Ministry acted. When they had the certificates at hand they then launched a legal onslaught against the Ministry of Mines for "unlawful" cancellation of "claims".

I therefore cannot accept the bare denial that no prejudice, actual or potential, could have been occasioned by the act of entering into a mining venture without first acquainting itself with the legal requirements of the Zimbabwean law. The first respondent sets out quite exhaustively the prejudice suffered by the action of applicant's promoters. It appears from the voluminous affidavits filed in the present and others cases before the courts that applicants cut several corners in order to secure "rights" to certain mining claims in Chiadzwa. The applicants had successfully wood-winked this court into granting it a favourable judgment in the process.

Mr *Samukange* for the applicants relied on the authority of *Rajah & Rajah (Pty) Ltd and Others v Ventersdorp Municipality and Others* 1961 (4) SA 402 (A) for the proposition that the courts will not interfere on review with the decision of a quasi-judicial tribunal where there has been an irregularity, if it is satisfied that the complaining party suffered no prejudice by the grant of a licence to an incorporated body. The answer to that is to be found in the wise words of MOSENEKE J writing for the majority decision in South African Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) BCLR 300 (CC) at p 322 where he says:

> "It is trite that a company, prior to incorporation, has no corporate personality. Even so the applicant did not rely on any pre-incorporation agreement under section 35 of the Companies Act. The cases the applicant cites are plainly distinguishable. They relate to

> licensing procedures, which are markedly different from the tender process which compels strict and equal compliance by all competing tenderers on the closing day for submission of tenders,"

In that case, as in the present, Balraz, a black-owned company, was found to have breached the terms of section 172 of the Companies Act because it commenced business by entering into initial tender agreements with the tender board prior to being issued with a certificate to do so.

In *casu* Mr *Samukange* argued that because applicants have held title to the claims for a period in excess of two years applicants' title is now protected by virtue of section 58 of the Mines and Minerals Act. I disagree. Applicants never acquired any rights in the first place since they did not exist when the Assistant Mining Commissioner purported to issue such "rights" to them. In any event in order to benefit from s.58, the applicants should have held the title to the mining rights for two years. It is not disputed that the applicants acquired the "rights" in 2006. By the end of that year the first respondent had effected the initial cancellation. To my mind that juristic act interrupted the running of the two year prescriptive period. What is worse, they have now been found to have misled this court and everyone else that they had acquires such "rights".

A more damning piece of evidence which was not placed before me in September 2009 is reservation order 1518 made in terms of s.35(1) of the Minerals Act.

Section 35 provides thus:

> **"35 Reservations against prospecting and pegging**
> (1) The mining commissioner may, and, if so instructed by the Secretary on the authority of the Minister, shall, reserve by notice posted at his office any area against prospecting and pegging, and all rights possessed by the holder of any prospecting licence or exclusive prospecting order to prospect for and peg minerals shall cease and may not be exercised within such area as from the date and hour of the posting of such notice or such later hour or later date and hour as may be specified in such notice:
> Provided that the holder of a mining location, other than an exclusive prospecting reservation, within any such area shall retain and may exercise all rights lawfully held by him which existed at the date and hour as from which such notice takes effect in terms of this subsection."

The effect of declaring an area reserved is plain no-one, can prospect or peg. All

rights possessed by holders of any prospecting licence or exclusive prospective orders to prospect for or peg minerals cease. Only the rights of a holder of a mining location within the area which existed at the time of the pegging are saved.

I have already adverted to the evidence placed before me in respect of the reservation according to the applicants. The truth of the matter is that the applicants knew when they appeared in September before me that there had been reservation of the area in dispute as far back as 2004. The impression they created in September 2009 was that this reservation did not cover the area in which their claims lay. Indeed they swore affidavit to this effect in other proceedings arguing that an extension of the initial reservation 1518 was surreptitiously undertaken in order to disentitle them of their already existing claims. Presently Mr *Samukange* still argues that this issue was placed before me. I am at a loss as to how he can say this. Had this been placed before me I do not see how Mr Maposa would have made the concession he did or how I could have missed the effects of such clear prohibition.

Had he been forthright with the court in September 2009, one would have expected him to clearly state that there is a dispute as to the nature and extent of the original reservation area 1518. One would have expected him to argue that certain of the applicants' claims are saved from the effect of a reservation since they pre-existed the declaration of reservation. He would have in other words confessed and avoided the issue. He did not. To my mind his clients knew back then the effect a disclosure of this aspect of the matter would have on their case. They chose to selectively place certain information before me at the exclusion of this aspect of it. I am convinced that applicants knew that had this court's attention been drawn to the section 35 reservation, the court would not have granted the order it did.

In order for this court to set aside the judgment of 25 September 2009, the first respondent must prove three items namely:

(a) That the evidence upon which the judgment was given was in fact incorrect;

(b) That it was made fraudulently and with intent to mislead; and

(c) That it diverged to such an extent from the true facts that the court would, if the true facts had been placed before it, have given a judgment other than what it was induced by the incorrect evidence to give.

Having regard to the above analysis I am satisfied that the first respondent has met the above requirements. He is entitled to the order for rescission.

In light of the above I see no need to express myself in respect of the counter-application. Should a result of the counter-application be required for what it is worth, I find that applicants have no *locus standi in judicio* to seek the order that they seek in the counter-application on the basis that they do not have any title to any claims in the Marange diamond fields.

In any event the counter-application suffers from a fatal deficiency for non-joinder in these proceedings of other parties whose rights would be adversely affected by the order which they are seeking.

Further, a counter-application must, in the very least, in order to qualify as such in terms of the Rules, be an answer to the main claim by the first respondent. Put differently it must seek to counter in a similar vein, the application brought by the first respondent. Instead applicants want via these proceedings, the court to make a *declaratuur* whose effect would be to jeopardize parties who are not before me. It is not.

In the result therefore, I make the following order. It is ordered that:

1. The judgment of this court dated 24 September 2009 in HC 6411/07 be and is hereby set aside.
2. The counter-application is dismissed with costs.
3. Applicants are to pay the respondents' costs.

Venturas & Samkange, applicant's legal practitioners

Mutamangira & Associates, 1st respondent's legal practitioners

Dube, Manikai & Hwacha, 2nd respondent's legal practitioners

Sawyer & Mkushi, 3rd respondent's legal practitioners