

**DISTRIBUTABLE (100)**

(1) SPENCER TSHUMA  
v  
(1) KEVIN MAGWAZA (2) SEBASTIN MAGODO (3)  
MINISTER OF MINES AND MINING DEVELOPMENT N.O (4)  
HONOURABLE KUBONERA N.O (5) PROVINCIAL MINING  
DIRECTOR, MASHONALAND WEST N.O (6) THE SHERIFF FOR  
ZIMBABWE N.O

**SUPREME COURT OF ZIMBABWE  
HARARE: JULY 1 & 28, 2020**

*K. Madzoka*, for the applicant  
*M. Ndhlovu*, for the first respondent  
*T. Deme*, for the second respondent  
*V. Munyoro*, for third and fifth respondents  
No Appearance for fourth and sixth respondents.

**Judgment No. SC 108/20  
Civil Application No.SC 249/20**

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**CHAMBER APPLICATION**

**UCHENA JA:** The applicant filed an urgent chamber application for the setting aside of para 11 of the High Court’s order made after hearing consolidated opposed applications in H/C 6272/19, H/C 6630/19 and H/C 6692. In para 11 of its order the court *a quo* ordered that:

“Notwithstanding any appeal that the first respondent may file against this order, the operation of this order shall not be suspended by the filing of such an appeal.”

The court *a quo*’s order in para 11 was clearly intended to render the anticipated appeal by the applicant ineffective as regards the suspension of the orders it had granted.

## **BACKGROUND FACTS.**

The parties filed three opposed applications before the court *a quo*. The applications were consolidated and set-down for hearing by the court *a quo*. The parties had filed a statement of agreed facts which formed the basis of the court *a quo*'s judgment. The applicant and the first respondent were disputing over who should have the control and right to mine at Etna Mine. The applicant and the second respondent had entered into a partnership agreement through which second respondent who was the registered owner allowed the applicant to conduct mining operations at Etna Mine after which they would share profits at agreed percentages. The partnership agreement was for a five year period running from September 2016 to September 2021.

Subsequent to the partnership agreement and before the expiry of five years the second respondent who held a registration certificate over the mine sold it and the developments thereon to the first respondent. Thereafter the applicant and the first respondent disputed over control of the mine leading to the hearing of the consolidated opposed applications. The consolidated applications were heard by two judges sitting as the court *a quo*. The applicant appealed against their judgment to this Court. After successfully noting the appeal the applicant filed this urgent application.

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## **SUBMISSIONS BY THE PARTIES.**

Mr *Madzoka* for the applicant in his submissions correctly submitted that the general rule is that a judge sitting in chambers cannot set aside an order of the court *a quo*. He however further submitted that he filed this application because such an application was granted in the case of *Zimbabwe Mining Development Corporation and Another v African Consolidated Resources plc and Others* 2010 (1) ZLR 34 (S). A reading of that judgment

confirms that a judge sitting in chambers set aside an order which had been granted by the High Court.

Mr *Madzoka* did not rely on any other precedents or statute law to support his reliance on the Zimbabwe Mining Development case (*supra*). He instead eventually applied to amend the order sought by substituting it with one suspending the operation of para 11 of the court *a quo*'s order.

Mr *Ndhlovu* for the first respondent submitted that a judge sitting in chambers does not exercise appellate jurisdiction. He submitted that appellate jurisdiction in civil matters is exercised by the Supreme Court constituted in terms of s 3, and exercising its jurisdiction in terms of s 21 of the Supreme Court Act (*Chapter 7:13*). He further submitted that the power to set aside an order of the court *a quo* is exercised by the Supreme Court in terms of s 22 (1) (a). He cited the cases of *Blue Ranges Civil Application No. SC 249/20* and *Another 2009 (1) ZLR 368 (S)* and *Getrude P. S. Mutasa and Didymus N. E. Mutasa v The Registrar of the Supreme Court and Others SC 27/18* as authority for his submission that a judge sitting in chambers cannot set aside an order of the court *a quo*. He submitted that the *Blue Ranges* case (*supra*) clearly states that a judge sitting in chambers cannot make an order striking off the roll an appeal pending in the Supreme Court. In respect of the *Mutasa* case (*supra*) he submitted that it was held that:

“—once a matter has been filed with the registrar only that court can remove it from the roll on the basis that it does not comply either with the rules of the court or a statute.”

Mr *Ndhlovu* in opposing the proposed amendment from setting aside para 11 of the court *a quo*'s order to the suspension of its operation submitted that the suspension of the

operation of para 11 of the court *a quo*'s order suffers the same fate as it has the same effect of a determination being made on the court *a quo*'s order by a judge sitting in chambers.

Mr *Ndhlovu* in conclusion submitted that the Zimbabwe Mining Development case (*supra*) is not reliable authority for a judge sitting in chambers to set aside the court *a quo*'s order. He submitted that the decision in that case is not supported by statute law or precedents from this Court.

Mr *Deme* for the second respondent agreed with Mr *Ndhlovu*'s submissions. Mrs *Munyoro* for the third and fifth respondents submitted that the third and fifth respondents will abide by the decision of the court.

Mr *Madzoka* in his reply sought to motivate the application for an amendment of the order sought from the setting aside of para 11 to the suspension of the court *a quo*'s order. He did not respond to the effect of ss 3, 21, and 22 of the Supreme Court Act on the applicant's application.

The issue which falls for determination is whether or not a judge sitting in chambers has jurisdiction to set aside or suspend the court *a quo*'s order.

## **THE LAW**

Section 3 of the Supreme Court Act provides for the constitution of the Supreme Court.

It reads:

“For the purpose of exercising its jurisdiction in any matter the Supreme Court shall be duly constituted if it consists of not less than three judges of whom one shall be—  
(a) the Chief Justice; or  
(b) a judge of the Supreme Court other than an acting judge of the Supreme Court.”

Section 3 provides that for purposes of exercising appellate jurisdiction in any matter the Supreme Court shall be constituted by not less than three judges. This means a judge sitting in chambers cannot exercise the jurisdiction and powers conferred on the Supreme Court. Such jurisdiction or powers can only be exercised by the Supreme Court constituted by not less than three judges.

The jurisdiction of the Supreme Court in civil appeals is provided for in s 21 as follows:

- “(1) The Supreme Court shall have jurisdiction to hear and determine an appeal in any civil case from the judgment of any court or tribunal from which, in terms of any other enactment, an appeal lies to the Supreme Court.
- (2) Unless provision to the contrary is made in any other enactment, the Supreme Court shall hear and determine and shall exercise powers in respect of an appeal referred to in subsection (1) in accordance with this Act.”

It is apparent from a reading of s 21(1) that the Supreme Court has jurisdiction to hear and determine an appeal in any civil case from any **Judgment No. SC 108/20** **Civil Application No. SC 249/20A** single judge sitting in chambers does not sit as the Supreme Court, but as a single Supreme Court judge whose role is to hear applications in terms of the Supreme Court Rules 2018, intended to facilitate compliance with procedural requirements for noting appeals and other preparatory issues pending the eventual hearing of appeals by the Supreme Court.

Section 22 (1) (a) of the Supreme Court Act puts beyond doubt the fact that the power to set aside an order or judgment of the court appealed against was given to the Supreme Court properly constituted in terms of s 3. It provides as follows:

- “(1) Subject to any other enactment, **on the hearing of a civil appeal the Supreme Court—**
  - (a) **shall have power to confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require.”**  
(emphasis added)

It is clear that the Supreme Court on the hearing of an appeal can exercise the power to set aside an order of the court *a quo*. The Act does not give the same power to a judge sitting in chambers. A judge sitting in chambers does not hear appeals but hears applications intended to facilitate the hearing of appeals.

The jurisdiction of a judge sitting in chambers is provided for by the Rules of the Supreme Court S.I 37/18, which rules are made in terms of s 34 of the Supreme Court Act. Rule 5 provides for the hearing of chamber applications provided for by the rules as follows:

“An application made to a judge under these rules may be heard either in chambers or in open court and at such time as the judge may determine”.

Therefore the hearing of an appeal in terms of the Act by the Supreme Court and the hearing of a Chamber application by a judge in chambers in terms of the Supreme Court Rules cannot be equated or be mistaken to be one and the same thing. I therefore do not agree with the authority relied on by the applicant.

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I agree with the decision of this Court in *Blue Ranges (Pvt) Ltd v Muduviri (supra)* where MALABA DCJ (as he then was) at page 374 B to C said:

“I agree with Mr Mlotshwa that a single judge of the Supreme Court sitting in chambers has no power, derived from any provision of the relevant statutes, to make an order striking an appeal pending in the Supreme Court off the roll. The answer to the question whether a single judge sitting in chambers has power to hear and determine an application for an order striking an appeal off the roll lies in the relevant provisions of the statute in terms of which the Supreme Court was created and the rules regulating its proceedings.”

See also the Mutasa case (*supra*) where GUVAVA JA at pages 6-7 said:

“In my view once the second respondent filed the notice of appeal within the prescribed time, it ceased to be an issue upon which the registrar’s decision could be questioned or one where a single judge of the Supreme Court could declare a nullity. I was thus not convinced by the argument that there was a distinction between this case and the Blue Ranges Case (*supra*) as the net effect of such an order would be the same. If the matter were to be struck off the roll it would no longer be before the court.”

### **APPLYING THE LAW TO THE FACTS.**

In this case an appeal has been noted and is pending for hearing by the Supreme Court. It is at that hearing that the propriety of para 11 of the court *a quo*’s order will be determined. It is at that hearing by the Supreme Court when the applicant can seek the setting aside of that order.

I fully appreciate the urgency created by the effect of the court *a quo*’s order. I also appreciate the effect of the applicant’s allegation that the order was granted without following correct procedures. The applicant’s plea for an urgent resolution of the situation is noted, but he may seek the setting aside of para 11 of the court *a quo*’s order by the Supreme Court on an urgent basis.

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If the applicant can prove the need for the urgent resolution of the situation created by the court *a quo*’s order he can by court application, apply for the urgent hearing of the appeal by the Supreme Court or apply for the setting aside of para 11 by that court.

In the result the applicant’s application does not comply with the Rules. It is struck off the roll with costs.

*Ushewokunze Law Chambers*, applicant’s legal practitioners.

*Mutamangira and Associates*, 1st respondent's legal practitioners.

*Thoughts Deme Attorneys*, 2<sup>nd</sup> respondent's legal practitioners.

*The Attorney General (Civil Division)*, 3<sup>rd</sup> and 5<sup>th</sup> respondent's legal practitioners.