REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 16354/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
_____	_____
DATE	SIGNATURE

In the matter between:

LIFE DIAMOND CUTTING WORKS (PTY) LTD Applicant

(**Registration Number 1997/019539/07)**

And

ASTRA DIAMOND MANUFACTURING LTD Respondent

JUDGMENT

NOCHUMSOHN (AJ)

1. This is an application brought by the Respondent for the setting aside of an *ex parte* attachment order obtained by the Applicant *ad fundandum* alternatively *ad confirmandum jurisdictionem* in which the Applicant obtained an edictal citation authorising service of the papers upon the Respondent, a periginus, in Israel. On 13 May 2015, her Ladyship Modiba J, granted to the Applicant, *ex parte,* an Order directing the sheriff to attach certain movable property, allegedly belonging to the Respondent, presently in the possession of the Applicant in Johannesburg, comprising 1090.847 carats of diamonds, in order to found jurisdiction in respect of intended *rei vindicatio* legal proceedings to be instituted on Notice of Motion for an order directing the Respondent to return to the Applicant, six diamonds, alternatively to pay their value in the sum of US$4.702 584.50.

2. As part of the *ex parte* attachment order, this court directed that service of the Applicant's intended Notice of Motion for the aforesaid relief be effected at the Respondent's principal place of business in Tel Aviv by the empowered and authorised process server in the State of Israel, the Respondent being a company registered with limited liability in accordance with the company laws of the State of Israel, having its principal place of business in Tel Aviv.

3. Finally, in granting the *ex parte* Order, this court directed that the costs of the application be costs in the legal proceedings to be instituted, save in the event of opposition.

4. At the commencement of the hearing, Mr Bhana SC for the Applicant argued that the main vindicatory proceedings were before me. This was hotly contested by Mr Peter SC for the Respondent, who argued that the only issue before me was the Respondent's application to have the *ex parte* order set aside. After argument on this point, I ruled that indeed the only issue before me was the Respondent's application for the setting aside of the order obtained *ex parte*. The intended notice of motion had not been issued in terms of Rule 5(1) and served, but was merely attached as Annexure X to the noticed of motion for the granting of the *ex parte* relief in which the edictal citation and the attachment were authorised.

5. On 27 July 2015, the Respondent filed an Answering Affidavit deposed to in English by certain Shimon Dassa, setting out all the respects in which the Applicant's case was lacking for the grant of the *ex parte* order and in which the Respondent sought the setting aside of such Order. The Applicant signed a replying affidavit on 26 August 2015 but as a result of an e-mail error on the part of its attorneys, same was only delivered in December 2015.

6. The Respondent launched an Application in terms of Rule 30 for the striking out of the Applicant's Replying Affidavit, as a result of it having been delivered out of time. The Applicant launched an application for a postponement of these proceedings, seeking leave to supplement its papers. Such applications were enrolled for hearing on 3 February 2016 before his Lordship Norman AJ, who postponed the strike out and application to set aside *sine die* and granted to the Applicant leave to supplement its Founding Affidavit, within thirty days. In so making such order, costs for such application were awarded against the Applicant on the scale as between attorney and client.

7. On 16 March 2016, the Applicant filed an extensive Supplementary Affidavit to which the Respondent has not filed a reply.

8. On 31 May 2016, an Application on Notice of Motion was delivered by the Applicant, in which it seeks the condonation of the late filing of its Replying Affidavit. It is apparent from such application that the reasons for the failure to have delivered the Replying Affidavit were attributable to an email error on the part of a candidate attorney in the employ of the Applicant's then attorneys. The error was understandable and there is no prejudice to the Respondent in condoning the late filing. However the Respondent should not be visited with any prejudice in relation to such error. Accordingly, I am inclined to grant the condonation sought and dismiss the application under Rule 30A, albeit on the basis that the Applicant ought to bear the costs of both interlocutory skirmishes.

9. The Applicant was initially represented by Hirschowitz Flionis, whose mandate was terminated on 14 January 2016 and who was replaced on the following day by the Applicant's current attorneys of record, Fairbridges Wertheim Becker.

10. On 19 January 2016 the Respondent challenged the authority of Fairbridges to act as the attorneys of record for the Applicant. The Respondent also challenged the authority of one Chelchinskey, who deposed to the Applicant's Replying Affidavit, which was signed on 26 August 2015. These challenges came about by way of service of a notice by the Respondent upon the Applicant in terms of Rule 7(1). Whereas the Applicant's initial founding affidavit was deposed to by certain Levy, its replying affidavit was deposed to by Chelchinskey, as was its supplementary affidavit.

11. Counsel for the Applicant, in his Heads of Argument filed for the hearing on 03 February 2016, set out that:

11.1. the deponent to the Founding Affidavit, Shalom Levy, was the sole director of the Applicant, who had been removed and replaced by Chelchinskey, appointed on 30 July 2015.

11.2. arising out of this change of directorship, litigation had commenced between the Applicant and Levy.

11.3. the litigation between the Applicant and Levy addressed the question of composition of the Applicant's shareholding and the lawfulness of Levy's removal as a director as well as the appointment of Chelchinskey.

11.4. as a consequence, it was necessary for the Applicant to consider pursuing relief in a form of a derivative action in terms of Section 165 of the Companies Act 71 of 2008 in order to continue with the current application, in the light of the Respondent's Rule 7(1) notice.

12. In the Applicant's Supplementary Affidavit of 16 March 2016, the Applicant avers that:

12.1. Levy had caused the removal of Chelchinskey's name as a director on CIPC, after he, Levy, had been removed as a director; and

12.2. CIPC subsequently rectified Levy's unlawful change by way of the registration of a COR.39 form showing that Chelchinskey was a director with effect from 21 July 2015.

13. There is no further evidence in the Supplementary Affidavit in connection with the aforesaid submissions which were made in the Applicant's Heads of Argument filed for the February hearing. I am left in the dark as to the true status of the Applicant's intended proceedings under Section 165 of the Companies Act 71 of 2008, or its true status relating to the identity of its directors, shareholders, or authority of the Applicant to deal with and convey meaningful instructions for the prosecution of these proceedings.

14. When I raised these concerns with Mr Bhana for the Applicant, in argument, the terse response was that in Chelchinskey's replying affidavit to the postponement application, deposed to on 02 February 2015, he says the summons was withdrawn but the Applicant's attorneys have been advised that it will be re-served imminently.

15. In the light of the prior revelation of the Levy litigation, one would have expected a very detailed explanation in the Supplementary Affidavit informing the court of the basis of such litigation, in order to satisfy the court on a balance of probabilities that Chelchinskey is now the authorised director of the Applicant and can speak to the facts and circumstances of the case. Not only does the Supplementary Affidavit severely lack in such detail, but it further lacks any form of corroboration by Levy, who has not deposed to a Confirmatory Affidavit, in circumstances where Levy clearly refuses to lend his assistance to this litigation.

16. On Chelchinskey's own version in the Supplementary Affidavit, he was a director of the Applicant with effect from July 2015. Yet, the detailed historical background set out in the Supplementary Affidavit, in which the Applicant endeavours to plug the gaping holes left in the Founding Affidavit, speaks to the history and events in 2014, preceding Chelchinskey's directorship. For example, such Affidavit speaks *inter alia* to:

16.1. the approach in May 2014 by Dassa, the deponent to the Respondent's Answering Affidavit, to Levy, with a view to convincing the Applicant to permit Dalior Diamonds to cut and polish certain of the Applicant's diamonds;

16.2. the provision by the Applicant of rough diamonds to the entity named 3-Diam, for measuring and assessment by way of a Galaxy machine;

16.3. the agreement by Dassa, Levy and one Daleyot to send the diamonds to Israel for cutting and polishing;

16.4. the dispatch of the diamonds to Israel in June 2014;

16.5. the invoicing by the Applicant to Dalior and the error reflected thereon by the use of the term, "Tax Invoice" in lieu of the term "Consignment";

16.6. the running accounts between Dalior and the Applicant;

16.7. the insistence by the Applicant that the contract with the Respondent was one for cutting and polishing;

16.8. the request by Dassa in June 2014 to vary the transaction and the provision to Levy with the requisite approval to vary the transaction with the regulator for the substitution of Dalior with the name of the Respondent who would attend to the cutting and polishing of the stones;

16.9. the adjusting of the invoice in June 2014 to correct the transaction as one of "Consignment";

16.10. the visit by Levy to Israel, shortly after the diamonds were dispatched, in order to observe the cutting and polishing at the Respondent's premises during or about July to August 2014;

16.11. The Applicant's original intention to sell and deliver the diamonds to Dalior and the change in such intention after payment by the Respondent, in that the diamonds were to be retained by the Applicant in South Africa for on-sale on behalf of the Applicant.

17. The filing of a Confirmatory Affidavit by Daleyot does not cure the completely hearsay nature of the Affidavit, which for the most part speaks to events prior to Chelchinskey's directorship and more importantly events decided upon by Levy, who has not signed a Confirmatory Affidavit. The purpose of this Supplementary Affidavit was to plug the holes left in the initial Founding Affidavit, in circumstances where Levy had become uncooperative with the Applicant, was in litigation with the Applicant over its true directorship and shareholding and was clearly no longer prepared to lend his assistance to this litigation. Having regards to both the majority and minority judgements in ***President of the Republic of South Africa and Others v M & G Media Ltd 2012 (2) SA 50 (CC)***, a deponent's assertion that information is within his personal knowledge is of little value, without some indication of how that knowledge was acquired. Mr Chelchinskey does not say how he acquired knowledge of any of these facts, did not personally experience any of the events and does not say how he deduces such knowledge. Without confirmation by Levy of the extensive events set out in the Supplementary Affidavit, I can have little regard to its contents.

18. In the Answering Affidavit, the Respondent objected to the jurisdiction of this court and specifically pointed out that by participating in the proceedings because a response was necessary, it was not capitulating to the court's jurisdiction.

19. The Respondent takes issue with the service of the Application inasmuch as they had not been translated into Hebrew, being the official language of the State of Israel, for which reason it disputes that there was compliance with the *ex parte* Order. Nothing turns on this point, as the Answering Affidavit of Dassa is deposed to in English, without any translation having been necessary for the deponent.

20. The Respondent's senior counsel, Mr Peter, raised the following legal arguments to justify the setting aside of the *ex parte* order:

20.1. An order granted *ex parte* is by its nature provisional and there is no reason why the Applicant ought to have been in a better position purely as a result of the defendant having been unaware that it had been called upon to submit to the court's jurisdiction. Moreover, a party's right to a hearing cannot be lost by the failure to have provided for a return day in an *ex parte* Order, ***Pretoria Portland Cement Co Ltd & another v Competition Commission & others 2003 (2) SA 385 (SCA) at 404 paragraphs 45 and 47***, ***Ghomeshi-Bozorg v Yousefi 1998 (1) SA 692 (W) at 696 D***.

20.2. An applicant cannot be placed in a better position that he would have been, if the respondent had been given an opportunity of opposing the relief. ***Weissglass N.O. v Savonnerie Establishment 1992 (3) SA 928 (A) at 936 G; Cargo Laden & Lately Laden on Board the MV Thalassini AVGI v M V Dimitris 1989 (3) SA 820 (A) at 834 D - E***.

20.3. Notwithstanding that an *ex parte* order may be final in form, it is provisional in substance and in any *ex parte* application, all of the facts must be disclosed, which may influence the court in deciding, and the failure to make full disclosure could be met by the setting aside of the Order, ***Hassan & another vs Berrange N.O. 2012 (6) SA 329 (SCA) at 335 paragraph 14.***

20.4. There are two requirements to be met on a balance of probabilities, in an application to found jurisdiction:

20.4.1. First, there must be evidence of a *prima facie* case ***Thalassini at 834 (C);*** and

20.4.2. Secondly the goods sought to be attached must be those of the respondent, ***Lendalease Finance Ltd v Corp De Mercadeo Agricola & others 1976 (4) SA 464 A at 489 B - C; The Shipping Corporation of India v Evdomon Corporation & another 1994 (1) SA 550 (A) at 556 F***.

20.5. Where a *peregrines* has not taken delivery of property, an application to attach such property to found or confirm jurisdiction is not competent. This was held in the Southern Rhodesian High Court in *ex parte* ***Smith 1956 (1) SA 272 (SR***), where per **Beadle J**, an applicant had applied *ex parte* for an order authorising him to sue by edictal citation for some £750 and to attach three trucks in order to confirm the court's jurisdiction. There was a lengthy debate about whether or not delivery had been passed fictitiously by way of *traditio longa manu* and it was held that the mental element of the transferee at the time of delivery is

just as vital in delivery *longa manu* as with any other form of delivery and that it is clear that if the transferee refuses to accept delivery, however unlawful that refusal might be, the ownership of the thing delivered does not pass. Thus it would not be competent to attach something belonging to a *peregrines* in order to found a court's jurisdiction, where the *peregrines* had not taken delivery.

20.6. Where delivery has taken place to a *peregrines* pursuant to a cash sale but the purchase price has not been paid, pending payment, the *peregrines* purchaser does not become the owner and an attachment to found jurisdiction is likewise not competent, ***Drive Control Services (Pty) Ltd v Troycom Systems (Pty) Ltd (N-Trigue Trade CC Intervening) 2000 (2) SA 722 W;*** ***Bominflot Ltd v Kien Hung Shipping Co Ltd (Central Leasing Corporation & another Intervening) 2004 (2) SA 556 (C).***

20.7. A South African court will not grant an order to which it cannot give effect, ***Steytler N.O. v Fitzgerald 1911 AD 295 at 346;*** ***Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A) at 307;*** ***Ewing McDonald & Co Ltd v M & M Products Company & others 1991 (1) SA 252 (AD) at 259 D - J;***

20.8. A court cannot grant an order for the performance or the restraint of an act in a foreign jurisdiction against a foreign defendant. Only if the respondent is an *incola*, may the court assume jurisdiction to grant an interdict in *personam*, if the act in question is to be performed or restrained outside the court's area of jurisdiction,

Metlika Trading Ltd & others v Commissioner South African Revenue Service 2005 (3) SA 1 (SCA) at 19 D.

20.9. Motion proceedings are not appropriate for the bringing of an illiquid claim for damages, ***Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1161.***

20.10. The two requirements for a *rei vindicatio* are, the applicant must show that he is the owner of the item and secondly that the respondent is in possession thereof, ***Graham v Ridley 1931 TPD 476.***

20.11. Where a plaintiff in vindicatory proceedings has conceded a right to lawful possession on the part of the defendant, the plaintiff bears the onus to allege and prove a valid termination of that right, failing which the defendant is vested with the right to hold and the claim would therefore fail to disclose a cause of action, ***Chetty v Naidoo 1974 (3) SA 13 (A) at 20 E - G***.

20.12. Where goods are sold on consignment or delivered to a consignee, the consignee is authorised to on-sell the goods, ***Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd 1994 (3) SA 188 (A) at 199.***

20.13. Where work is done on material creating something new, then, if that material can no longer be restored to its original form, ownership may be acquired by its maker, as distinct from ownership of another in the materials, subject to the terms of an agreement between the owner of the material and the maker, ***Aldine Timber Co v Hlatswayo 1932 TPD 337 at 341.***

21. In the application of the above legal principles to the facts of this case:

21.1. The primary relief sought by the Applicant in the main proceedings is vindicatory against the Respondent, a *peregrines* Israeli company that has no presence in South Africa, for the delivery of movable property situated in Israel.

21.2. Even if there is an attachment of property belonging to the Respondent in South Africa, this court has no jurisdiction to grant such order to found jurisdiction for the main claim, which it is not capable of enforcing. The attachment order to found jurisdiction was thus not properly granted, nor was it competent for the Applicant to seek leave to serve process out of South Africa, as this court cannot enforce the delivery of property situated in Israel to the Applicant.

21.3. The alternative relief in the intended main motion, is for payment of unliquidated damages equating to US$4.700 000 alleged to represent the value of the property sought to be vindicated. It is not competent to launch a claim for unliquidated damages on notice of motion. For this reason, the relief sought and granted, to serve papers outside of the Republic, was not properly granted.

21.4. The Applicant's case is that the Respondent paid for the diamonds to be attached, but there has been no delivery. At best for the Applicant, it endeavours to establish the delivery by means of *constitutum possessorium* in paragraph 30 of the supplementary affidavit where Chelchinskey speaks of a change of intention after payment by the Respondent, in that the diamonds were to be retained by the Applicant

on behalf of the Respondent, for on-sale. However, I am stuck with the fact that I can have little or no regard to these averments for the reasons already mentioned. Thus, on the Applicant's version it has failed to prove that the diamonds forming the attachment order were the property of the Respondent, for want of delivery, rendering the attachment illegitimate which would leave this court without jurisdiction to hear the intended proceedings.

21.5. The Applicant has not made out a *prima facie* case. It baldly alleges to be the owner of rough diamonds, unsupported by any evidence as to how, when and where it acquired same.

21.6. There are three versions portrayed by the Applicant in its own Founding papers, the first being that the diamonds were sent to Dalior Diamonds for cutting and polishing, the second being that reflected in the export documentation attached to the Founding papers reflecting a “COD” sale to Dalior, with the third version lying in the amended export document, reflecting a “consignment” sale to the Respondent.

21.7. If the diamonds sought to be vindicated had been dispatched to the Respondent on consignment, that would give rise to lawful possession in the hands of the Respondent. If the Applicant seeks vindicatory relief, it needs to demonstrate a cancellation of the Consignment Agreement, which it has not done, failing which there is no cause of action.

21.8. Moreover, there is no clear evidence that the Respondent, as opposed to Dalior is in possession of the diamonds to be vindicated. Thus on the Applicant's own version the diamonds were sent to Dalior for cutting and polishing and it is hard to see how the diamonds ended up in the possession of the Respondent, absent confirmation by Levy of the explanations set out in the Supplementary Affidavit.

21.9. On the Applicant's papers, the items to be vindicated in the intended Notice of Motion may no longer exist. What is claimed are rough diamonds, but on the Applicant's version the rough diamonds were to have been cut and polished by Dalior. The diamonds may have been converted into two or more cut and polished stones which would create a separate identity from the raw material. By reason of *specificatio,* the old materials may no longer exist and would be incapable of being restored to their original form leaving vindicatory relief in respect of the rough diamonds no longer possible.

22. I raised with both counsel that in paragraph 27 and 28 of the Applicant's supplementary affidavit, Chelchinskey says out of the 2065-64 carats of diamonds, 1159-73 carats remained in the Applicant's possession and 905-91 carats were couriered to Israel. Chelchinskey says that the 1159-73 carats referred to in "FA9" at page 77 are the very diamonds which were attached in the *ex parte* order. However, this cannot be so, as the notice of motion and the *ex parte* order granted speaks to the attachment of 1090-847 carats, which inconsistency is dramatic and could not be explained by Mr Bhana. I am thus left in the dark as to whether the 1090-847 carats which were attached are in fact the same diamonds to which Chelchinskey speaks.

23. Mr Bhana asserted in argument that I must overlook all of the above points and deal with the Application on the basis that the Respondent has failed to place a version before the court, where it could and should have done so. I cannot agree with this supposition in circumstances where the Applicant, on its own papers, has failed to make out a *prima facie* case.

24. The Respondent seeks costs on the scale as between attorney and client. The Applicant approached this Court *ex parte*, with inconsistent versions, without a cause of action and continued to pursue its resistance to the counter-relief without merit to its case, exacerbated by its own in-house dilemma, which was not properly ventilated and addressed in its supplementary papers, which was uncorroborated. Such conduct in my view should be met with a punitive costs order.

25. Accordingly, I order the following:

25.1. The application under Rule 30 is dismissed with the Applicant, Life Diamond Cutting Works (Pty) Ltd, to bear the costs of the Respondent, Astra Diamond Manufacturing Ltd;

25.2. The application for the condonation of the late filing of the Replying Affidavit is granted with the Applicant, Life Diamond Cutting Works (Pty) Ltd, to bear the costs of the Respondent, Astra Diamond Manufacturing Ltd;

25.3. The *ex parte* Order granted on 13 May 2015 and all process issued pursuant thereto be and is hereby set aside;

25.4. In respect of these proceedings, the Applicant, Life Diamond Cutting Works (Pty) Ltd, is ordered to bear the costs of the Respondent, Astra Diamond Manufacturing Ltd, on the scale as between attorney and own client, including the costs of senior counsel;

25.5. All of the costs orders granted above are so granted on the scale as between attorney and client.

NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant:	Mr R Bhana S.C.
With him:	Mr I Gioia
Instructed by:	Fairbridges Wertheim Becker
	(incorporating Nathanson Bowman & Nathan)
On behalf of the Respondent:	Mr J Peter S.C.
Instructed by:	Shapiro-Aarons Inc
Date of Hearing:	06 June 2016
Date of Judgment:	10 June 2016