THE STATE

versus

LOVEMORE KUROTWI

and

DOMINIC MUBAIWA

*Mr.Mutangadura* with Mr. Mpofu, for the State*.*

*Mrs. B Mtetwa,* for the 1st Accused.

*Mr. L Uriri,* for the 2nd Accused.

HIGH COURT OF ZIMBABWE

BHUNU J

Harare, 11 September 2012 and 9 October 2012

BHUNU J: On 31 July 2012 counsel for the defense wrote to the State counsel requesting to be provided with the following documents:

1. The board resolution appointing GRNT THORNTON as auditors for CANADILE MINES (PVT) LTD.
2. Copies of FORM CR 14 appointing Directors to CANADILE MINERS Board.
3. All source documents from which the financial statements were prepared.
4. Monthly diamond production statistics to date.
5. Sales statistics to date.
6. Diamond valuation reports for all diamonds produced.
7. Board resolution declaring dividend and proof of dividend distribution.
8. Minute book entries for all board deliberations to date.
9. All bank statements to date.
10. Mine to market records of all mined documents for movement of stock signed by all four authorized parties.

On August 2012 I granted the order remarking that the state was only obliged to produce those documents in its possession. This is what I had to say in the final paragraph of my judgment.

“In this case the prosecutor has indicated that he is not in possession of certain documents requested by the state. The prosecutor will obviously not be required to produce documents not in his possession. He is however legally obliged to produce documents in his possession which he considers relevant to the proceedings at hand. The prosecutor is accordingly ordered to avail the defense with documents in his possession that he considers relevant and essential to these proceedings.”

When the trial resumed on 11 September 2012 counsel for the state pronounced that he had complied with the Court order as directed by the Court. Counsel for the defense countered that there had been only partial compliance in that they had not been provided with all the requested documents.

Counsel for the state conceded that indeed there had been only partial compliance and explained item by item why there had been no full compliance. His explanation was as follows:

1. The board resolution appointing GRANT THORNTON as auditors for CANADILE MINES (PVT) LTD.

The company known as Canadile Mines (Pvt) Ltd was now defunct and at the time of its dissolution there was no board of directors as such the requested document is nonexistent.

1. Copies of FORM CR 14 appointing Directors to CANADILE MINERS Board.

Counsel for the state provided the defense with an incomplete document. He apologized and undertook to provide the defense with a complete document.

1. All source documents from which the financial statements were prepared.

The current State witness was reading from a cash flow document. He has been directed to avail all the documents in his possession and to explain the non availability of missing documents.

The remaining documents being:

1. Monthly diamond production statistics to date.
2. Sales statistics to date.
3. Diamond valuation reports for all diamonds produced.
4. Board resolution declaring dividend and proof of dividend distribution.
5. Minute book entries for all board deliberations to date.
6. All bank statements to date and
7. Mine to market records of all mined documents for movement of stock signed by all four authorized parties.

Have not been produced because State counsel considers them to be considers them to be irrelevant and in any case are not available.

In terms of my order and legal precedent the State was only obliged to provide the defense with copies of available documents. They had no obligation to investigate and acquire documents on behalf of the defense. See *Smyth* v *Ushewokunze and Another* 1997 (2) ZLR 544. In the absence of any suggestion that the state are in possession of documents which they say are not in their custody this Court cannot be order them to furnish the defense with copies of such documents. My original order directing the State to furnish the defense with all copies of relevant documents in their possession still stands.

*The Attorney General’s Office,* the State’s Legal Practitioners.

 *Mtetwa & Nyambirai,* the 1st defendant’s Legal Practitioners.

*Kantor and Immerman,* the 2nd Defendant’s Legal Practitioners.