NEWMAN CHIADZWA Applicant
and
COMMISSIONER GENERAL POLICE 1st Respondent
and
OFFICER COMMANDING C.I.D. MINERALS 2nd Respondent
and
OFFICER IN CHARGE C.I.D. MINERALS 3rd Respondent

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 28 September 2011 & 11 October 2011

Motion Proceedings

P Chiutsi, for the applicant

BERE J: Under case number Mutare court CRB 1253/09 the applicant was convicted of the offence of unlawfully possessing 8,61 kgs of pieces of diamonds. Pursuant to the applicant's conviction and sentence the diamonds in question were declared forfeited to the State.

Dissatisfied with his conviction the applicant filed a review application in this court leading to my brother MUTEMA J making the following order:

"IT IS ORDERED THAT:

1. The proceedings in case number Mutare's court CRB 1253/09 be and are hereby quashed.

2. The conviction and sentence be and are hereby set aside".

I have no wish to debate the correctness or otherwise of the decision arrived at by my brother, MUTEMA J, who sat as a single judge in upsetting the decision of the court *a quo*. I believe this could be done at a different forum. Suffice it to say that in dealing with this case I am proceeding on the basis of the decision made by the Honourable judge.
Following the decision of this court in setting aside the conviction and sentence of the applicant, the applicant has now lodged before me an application against the respondents seeking the following relief:

"IT IS ORDERED THAT:

The respondents be and are hereby ordered to deposit all the diamonds confiscated from the applicant to the Registrar of the High Court within forty (48) hours of being served with this order.

The diamonds held exhibits in case Mutare magistrates court CRB 1253/09 shall be returned to the applicant in terms of s 61 (3) of the Criminal Procedure and Evidence Act.

The Registrar be and is hereby ordered to release the diamonds to the Minerals Marketing Corporation of Zimbabwe on behalf of the applicant.
The respondents shall bear the costs of suit jointly and severally the one paying the others to be absolved."

During the court proceedings I *inter alia* questioned Mr *Chiutsi*, counsel for the applicant, the appropriateness of the order sought by his client. The applicant's counsel was adamant it was appropriate for the applicant to lodge the application he made.

In the hearing I also drew counsel's attention to the need to have cited the Attorney General who would have initiated the order for forfeiture of the diamonds in question in the first place and would therefore naturally have a vested interest in the fate of those diamonds. Through counsel's heads of argument filed upon my request, counsel was adamant this was not necessary because of among other things his reading of some sections of the State Liabilities Act.

Since the administration of the Precious Stones Trade Act *Chapter 21:06* falls under the Ministry of Mines and Mining Development which is sought to be bound by the order desired by the applicant, I queried the non-citation of the relevant Ministry, and the applicant's counsel felt this was not necessary.

I have not been satisfied by the stance taken by the applicant's counsel in failing to cite the Attorney General and the Ministry of Mines and Mining Development, more so given the two's vested interest in the fate of the diamonds.

The Ministry of Mines and Mining Development administers the act which the applicant, is alleged to have violated and the relief sought by the applicant seeks to rope in the same Ministry.

Be that as it may, and in the light of the clear provisions of order 13 r 87 I do not think I am handicapped in determining this matter by reason of the non-joinder of the Attorney General and the Ministry of Mines and Mining Development. For clarity's sake r 87 (1) reads as follows:

> "87 (1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interest of the persons who are parties to the cause or matter"[1]

In any event, it would also appear to me, and as rightly argued by the applicant's counsel that the provisions of s 8 of the State Liabilities Act disable me from *mero motu* raising issues to do with non-compliance with s 6 of the same Act.

For the avoidance of doubt the relevant section is couched as follows:

> "8. Court not to take notice of failure to comply with s 6.
> No court of its own motion shall take notice of any failure to comply with section six."[2]

Perhaps before proceeding to consider the applicant's application, I need to comment on the other notable development that has taken place in this matter.

On the day that followed the initial hearing of the instant application the Attorney General's Office, through the Criminal Registrar wrote a letter for my attention as follows:

> "Can you please cause this letter to be placed before the Honourable Judge Justice Bere who is handling the above matter. After learning about the above case through the press, the Herald dated 29 September 2011 please note our interest.
>
> We are concerned with the manner the applicant has resorted to in dealing with this matter. Firstly it is apparent that the matter is improperly before the honourable court.
>
> Applicant clearly departed from the rules of the court by setting down the case after citing only the three respondents without citing the Civil Division of the Attorney General.
>
> Order number 5A r 4B of the High Court Rules 1971 provides: 'Persons upon whom notice and process to be served". In terms of that rule the Attorney General Civil Division, in the instant case ought to have been served.
>
> The applicant's deliberate display of lack of knowledge cannot be condoned.
>
> In any case the applicant is quite aware that the Attorney General is challenging the applicant's acquittal. The manner and circumstances under which applicant was acquitted in case number HC 3069/11 was unclear. The Attorney General in case number HC 7370/11 has challenged that acquittal through an application for Rescission of Judgment. The application is pending. Given the above background it is

[1] Order 13 r 87(1) of High Court of Zimbabwe Rules, 1971
[2] Section 8 of STATE LIABILITIES ACT, Chapter 8:14

> quite surprising and unethical why appellant is by passing us in such a matter where we clearly have an interest.
>
> It is our hope and belief that the Honourable Judge will understand our concern and treat this matter in a deserving manner".

I am extremely concerned with the approach adopted by the office of the Attorney General's in its effort to register its concerns or positions in this matter.

In my view, once a matter has been argued before a court and is awaiting judgment or determination, there can be no direct communication with the presiding judge who is seized with the matter over the merits or demerits of that case. Doing so would be an attempt to influence the decision of the court using unorthodox and unprofessional means. The Attorney General's office's approach is a desperate attempt to influence the decision of the court by addressing the court through the back door. It is both unethical and unprofessional to do so.

If the Attorney General felt the applicant had unfairly treated its office or that the office had an interest in this matter (which point I have touched on elsewhere in this judgment) the proper cause of action would have been not to write to the presiding judge but to formerly apply for joinder in these proceedings in order for the Attorney General's office to create a proper platform for it to be heard.

Fortunately in this case, I have not allowed the letter from the Attorney General's office to influence my objective determination of this matter.

It is clear from the application that the applicant is concerned about the fate of the diamonds that he was originally convicted of unlawfully possessing at Mutare Magistrates' court whose decision was subsequently upset by this court on 29 June 2011.

Through this application, the applicant has made pointed and very serious allegations against the respondents who were properly served with the instant application as evidenced by the returns of service filed of record.

None of the respondents has bothered to defend this action. The court is naturally concerned with the casual approach adopted by the respondents, more so, given the seriousness of the allegations made against them individually and collectively. The carefree attitude exhibited by the respondents does not help the department at all.

Let me at this juncture proceed to determine the application before me. In doing so I am quite conscious that the applicant, having elected to proceed by way of application must

have entertained the firm view that the matter was capable of being determined on the strength of the papers as filed.

Having made this observation I now propose to consider the nature of the order sought by the applicant in *seratium*.

The applicant has sought in paragraph one of his prayer that the respondents be ordered to deposit the diamonds with the Registrar of this court.

It is clear to me that given the security risk associated with the diamonds in question the Registrar of this court cannot assume their custody given that hitherto, he never enjoyed such custody.

In any event, even if he had enjoyed such custody, he would have become *functus officio* the moment the order for forfeiture was pronounced. It would therefore not be competent for the Registrar to accept such sensitive exhibits merely to pave way for the applicant to lay his claim on the diamonds.

Secondly the applicant has sought to have the diamonds surrendered to him in terms of s 61(3) of the Criminal Procedure and Evidence Act.

I am unable to follow this request in the light of s 3 of the Precious Stones Trade Act *Chapter 21:06* which *inter alia* criminalises possession of these diamonds. This becomes abundantly clear if one remains alive to the definition of precious stones as provided by s 2 of the same Act.

To ask me to return the diamonds to the applicant would be to ask me to sanction the commission of yet another act of illegality on the part of the applicant, and such an order would not be competent. In any case, the papers filed do not convince me of applicant's and entitlement to the diamonds.

Finally, the Ministry of Mines and Mining Development is the sole ministry in this country which is mandated to administer *inter alia* the Precious Stones Trade Act, a section of which the applicant was alleged to have violated when he initially appeared and was convicted in the criminal court.

It is the same Ministry which is charged with the task of possessing the diamonds in question at the conclusion of the trial and it is up to it to track the movement of such diamonds if they are not accounted for. In doing so it does not require to be assisted by the applicant because the applicant would have no *locus standi* to initiate that process.

The Ministry of Mines and Mining Development has the capacity to initiate proceedings to follow the movement of its minerals which must naturally end up in its

coffers. It is this Ministry which is mandated to initiate legal processes to demand accountability of its precious minerals like in this case. The Ministry does not share that mandate with the applicant.

For these reasons the applicant's application is dismissed.

P Chiutsi Legal Practitioners, applicant's legal practitioners