COME AGAIN MINES (PVT) LTD
versus
PARKS AND WILDLIFE MANAGEMENT AUTHORITY
and
THE MINISTER OF ENVIRONMENT AND NATURAL RESOURCES AND THE MINISTER OF MINES

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 25 November 2013, 17, 22 July 2014, 30 July 2014

Opposed Application

E. T. Moyo, for applicant
S Bhebhe for 1st respondent
Ms. C. T. Kasere for 2nd and 3rd respondents

CHIGUMBA J: The mining sector in this country has since time immemorial provided a source of livelihood for many. It has gained notoriety in recent memory for the rising propensity, amongst its patrons and practitioners, to engage in illegal mining activities, with news reports of one mining town where illegal gold panners known as "makorokoza", are alleged to have dug tunnels underneath the town's buildings and compromised the buildings' structural integrity, all in the name of mining. It is therefore important that the correct message be sent to all mining practitioners, that the courts will not countenance, condone, or sanction self-help, or defiance of Acts of Parliament designed to regulate this industry, for whatever reason.

This is an application for a declaratur, made in terms of s 14 of the High Court Act [*Cap 7; 06*]. The relief that the applicant is seeking is as follows:

1. It be and is hereby declared that the fees fixed by the 1st respondent under part IX of the Parks and Wildlife Management Authority (Tariff of Fees) By-Laws S.I. 05/13 are ultra vires the enabling legislation to the extent that they are inconsistent with the provisions of section 129(A) of the Parks and Wildlife Act [*Cap 20:14*] and are therefore unlawful, void, and unenforceable.

2. The applicant shall not be liable to pay the fees prescribed by the tariff fixed by the 1st Respondent in terms of Part IX of the Parks and Wildlife Authority (Tariff of fees) by-laws S.I. 05/13 for exploitation of products in the park area.
3. The 1st respondent be and is hereby ordered and directed to allow and permit the applicant unhindered access to its mining claims within the precincts of Mfurudzi Safari Area and to remove any ore mined therefrom.
4. The 1st respondent shall refrain from interfering with the lawful operations of the applicant upon its mining claims within the said Mfurudzi Safari Area.
5. The 1st respondent shall pay Applicant's costs of suit.

The applicant is in the business of mining and is a holder of certain rights title and interest in some mining claims known as Come Again Reefs 4, 5, 9,10,11,12 and Mzingwe 5 situated in the Mfurudzi Safari Area of Shamva District. The 1st respondent is a statutory body established in terms of the Parks and Wildlife Act [*Cap 20; 14*]. The second respondent is the minister responsible for the Department of Parks and Wildlife Authority. The third respondent is the Minister responsible for mines who, together with the second respondent has no direct or substantial interest in the matter, and has been cited in a nominal capacity.

The applicant averred, in its founding affidavit, that its abovementioned mining claims are located within the boundaries of land belonging to the first respondent, which land is secured and protected in terms of the Parks and Wildlife Act. Access to this land is restricted. The applicant averred that it produced fifty (50) tonnes of gold ore from its various mining claims and piled it up against Come Again Reef 4. It alleged that the first respondent's officers and personnel, particularly the warden of Mfurudzi Safari Area have unlawfully refused to allow the applicant to remove its ore from the mine, with threats of violence, on the basis that the applicant owes some levies to the warden.

The applicant averred further, that, the warden has failed or neglected to produce an assessment of what is due, or to indicate the basis for charging the fees. The applicant alleged that it had to litigate in case HC1696/13 before it was referred to Part IX of S.I. 5/13 as the basis of the claim for fees by the warden. The applicant alleged that, to date, it has not been advised of the amount due and owing to 1st respondent, and it has not been given an invoice for payment.

Applicant contends that S.I.5/13 is ultra vires the enabling legislation, the Parks and Wildlife Management Act [*Cap 20:14*], and is consequently void *ab initio*.

The applicant averred that in terms of the Parks and Wildlife Management Act, the first respondent is authorized to make regulations fixing fees payable by persons working on any mining location within the park area:

(a) For clearing of land, per hectare of land cleared,

(b) Backfilling on abandonment,

(c) forfeiture or cancellation of the mining location.

(c) Removal of rock from any quarry within the park area.

It contended that, in the tariff of fees, the first respondent exceeded the power conferred by statute and purported to charge fees for exploiting products within the park area and charging fees for prospecting permits per claim per month and undertaking mining activities. The applicant denied that it was involved with the clearing of land, or that it is liable for any backfilling fees, or that it has abandoned, forfeited or cancelled any mining claims. It disputed that it is liable to the first respondent for any fees that may lawfully be charged in terms of the Parks & Wildlife Management Act. The applicant denied that the first respondent is entitled to charge fees for "exploitation of products within the park area".

In its opposing affidavit, the first respondent raised a point *in limine* that the application for a declaratur and mandamus was defective because it was vague and embarrassing. This is because of applicant's reference to the Parks and Wildlife Management Act, which is nonexistent, the act is known as the Parks and Wildlife Act [*Cap 20; 14*]. The second point raised is that, applicant's alleged failure to quote the relevant section that it alleged to have been over broadened by the first respondent's by-laws S.I.5/2013, rendered the application incompetent. The third preliminary point raised is that, applicant has dirty hands and ought to purge that before it is allowed to bring this application. The first respondent contended that, until such time as applicant has paid the outstanding fees, it ought not to be heard.

In regards to the merits of the matter, the first respondent averred that Mufurudzi was designated a national park in terms of the Parks and Wildlife Act, which, in s 129A, authorized the use of by-laws to prescribe fees, resulting in the promulgation of S.I.5/2013 (Parks and Wildlife Management First Respondent (Tariff of Fees) by-Laws, on 18 January 2013. The first

respondent contended that, for as long as applicant carried out mining activities in this area, it was obliged to pay the prescribed fees in terms of S.I. 5/2013. It contended that payment of the prescribed fees was a prerequisite to carrying out mining activities in the national park area. The first respondent admitted that it has denied the applicant access to its mining claims until such time as the prescribed fees are paid. It attached a schedule marked 'F' which shows that applicant was charged a total US$28 000, 00 (twenty eight thousand dollars) in terms of S.I. 5/2013, as at 18 January 2013. The first respondent contended that it is entitled to charge fees for "…entering any area or part of the park area, doing anything within the park area or part of it, any authority, permit, licence, register or return granted, issued or supplied in terms of this act or any regulations made thereunder, as well as "the removal of rock from any quarry within the park area.".It denied that the fees which had been prescribed by S.I. 5/2013 were ultra vires s 129A of the Parks and Wildlife Act.

The issue that falls for determination is whether the fees charged by the 1st respondent in terms of Part IX of the Parks and Wildlife Management Authority (Tariff of fees) By-Laws statutory instrument 5/13 is ultra vires s 119 of the Parks and Wildlife Act, and if so, whether the applicant is entitled to the relief that it seeks.

The Law

At the hearing of the matter the first respondent persisted in its three points *in limine*, and abided by its heads of argument in support of its contention.

The first respondent submitted that the application is fatally defective because the founding affidavit does not state, with clarity and precision, that which the applicant alleges, and relies on the case of *Mangwiza* v *Ziumbe & Anor* [1]as authority for this proposition. The first respondent also relied on the case of *Jean Hiltunen* v *Osmo Juhani Hiltumen* [2] the first respondent's grievance is that applicant refers to a nonexistent Act and fails to particularise the

[1] 2000 (2) ZLR 489(S) @p492 "…in application proceedings the cause of action should be fully set out in the founding affidavit….that principle was laid down many years ago in cases such as Coffee, Tea and Chocolate Co Ltd v Cape Trading Company 1930 CPD 81".

[2] HH99-08 @p4 "…in application proceedings, it is to the founding affidavit that the court will look for the cause of action being alleged by the applicant and the evidence that the applicant has to sustain such a cause of action…an applicant must stand or fall by his founding affidavit and the facts alleged therein because those are the facts which the respondent is called upon either to affirm or deny".

relevant section of such Act, in the founding affidavit, a fact which embarrasses the respondent. The court must decide whether this omission renders the application fatally defective as submitted by the 1st respondent, which relies on the following case, to support its position. *Africa Resources Limited & Ors* v *Afras Mtausi Gwaradzimba & Ors* [3] Counsel for the applicant argued, correctly in my view, that in Gwaradzimba's case, the deficiencies in the founding affidavit were not held to render the application fatally defective. In fact the Chief Justice was of the view that the defects in the founding affidavit could attract an order for costs *de bonis propiis,* if an appropriate application for such costs is made, and the reference was to the inclusion of irrelevant material, by the legal practitioner, which made the affidavit unnecessarily voluminous. The applicant relied on the case of *Bevcorp (Pvt) Ltd* v *Nyoni & Ors*[4] and submitted that the founding affidavit was not so incomprehensible as to warrant dismissal of the application for that reason alone. The applicant cited the correct Chapter as 20:14, the relevant Act is identifiable. I found that argument persuasive.

The second point *in limine* raised by the first respondent, related to the dirty hands doctrine, the applicant's blatant admission that it had approached this court for relief without paying the prescribed fees, being the source of the first respondent's ire, or discontent. Both parties concurred in their mutual heads of arguments that one of the leading cases on this doctrine is the case of *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information & Publicity & Ors*[5] in which the applicant, the publisher of a newspaper, sought to

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[3] SC2-11 @p9 cyclostyled; "...The cause of action is very poorly defined in this application. The applicants did not set out the impugned sections of the Act in the founding affidavit..."

[4] 1992 (1) ZLR 352 (S) @p356; Korsah JA stated that "While I agree that the founding papers were in a confused mess, I prefer to leave the matter open as to whether that alone was enough to justify the dismissal of the instant application by way of motion proceedings. I accept, unreservedly, that there may be cases where the founding papers are so incomprehensible as to warrant dismissal of the application.

[5] 2004 (1) ZLR 538 @ 548B-C; Chief Justice Chidyausiku stated that: "…This court is a court of law, and as such, cannot connive at or condone the applicant's open defiance of the law…"

See also: Estate Late Elvis Cube & Anor v Catherine Mhlanga & Ors HB-43-08 @p3; "…Nobody is above the law. Once the applicant complies with the law, he will be afforded the same protection that is accorded to all law abiding citizens. The ball is in the applicant's court to submit to the law and thereafter approach the court with clean hands".

And The Registrar General of Elections V Combined Harare Residents association & Anor SC-7-02 @ p8: "…the statutory instrument is the law in force until such time as it shall have been struck down by a court of competent

challenge the constitutionality of several provisions of the Access to Information and protection of Privacy Act [*Cap 10; 27*], (AIPPA) and regulations made under that Act. It was held that the applicant had to obey the law first then challenge its constitutionality. It was held further, that "it was not correct to say that the principle of "dirty hands" only applies to those litigants whose conduct lacks probity or honesty and to those litigants whose conduct is tainted with moral obliquity, such as fraud or other forms of dishonesty. The mere fact that the applicant had disclosed to the court its defiance of the law was totally inadequate to purge the applicant's contempt of the law". The applicant's submission that the inference that it is disdainful of the law can be rebutted by a reasonable explanation as to why it failed to comply with the law, is, in my view to be taken with a pinch of salt, as it is not sustained by the *ratio decidendi* in the Associated Newspapers case. My reading of the Associated Newspapers, case is that it is distinguishable from the one under consideration because the applicant in that case had mounted a constitutional challenge at the Supreme Court where it sought an order to impugn the offending Act.

In any event the Chief Justice alluded to the fact that the applicant in that case could have exercised the option to challenge the constitutionality of AIPPA before the deadline for its registration in terms of the Act, and thus avoided the predicament, of being in open defiance of the law it sought to be impugned, while the Act was extant. With all due respect to counsel for the applicant, I do not read the Associated Newspapers case to be an authority for the proposition that, one can come to equity with dirty hands provided there is a reasonable explanation for the failure to purge one's contempt. The first respondent referred the court to the case of *F Hoffman-LA Rocheche & Co AG & Ors* v *Secretary of State for Trade & Industry*[6], and I am in wholehearted agreement with its submission that the applicant has dirty hands. The applicant must obey and argue afterwards.

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jurisdiction as being invalid…until such an adjudication there is a presumption in favor of the validity of the statutory instrument…".

[6] [1975] AC 295 (HC) B; [1974] All ER 1128: Lord Denning stated that: "They argue that the law is invalid, but unless and until these courts declare it to be so, they must obey it. They cannot stipulate to an undertaking as the price of their obedience. They must obey and argue afterwards".

I should have followed the approach taken by the court in the Associated Newspapers case, where the point *in limine,* relating to dirty hands succeeded and the court held that, since the applicant was operating outside the law it would decline to hear the applicant on the merits, and only do so once applicant had submitted itself to the law. However, applicant in this matter had already addressed this court on the merits, and in my view, the issue is so clear that it would be a waste of the court's time to have the matter before it again for disposition of the merits, at some date in the future. I will proceed to give my view on the merits of the matter, for that reason.

Turning to the merits of the matter, the applicant seeks a declaratory order, in terms of **section 14 of the High Court Act [*Cap 7: 06*]** which provides as follows:

"14 High Court may determine future or contingent rights

The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination".

Section 119 of the Parks and Wildlife Act provides for prospecting and mining activities carried out in safari areas. It reads:

"**Prospecting and mining**

(1) **No person shall prospect and mine in terms of the Mines and Minerals Act [Cap 21:05]** (my underlining for emphasis) within a national park, botanical reserve, botanical garden, sanctuary, safari area or recreational park except-
   (a) In terms of a permit issued by the Minister with the consent of the Minister of Mines; or
   (b) In accordance with any prospecting rights lawfully acquired in respect of the area of the national park, botanical garden, sanctuary safari area or recreational park before the date when such area became a national park, botanical reserve, botanical garden, sanctuary or recreational park.

(2) No person shall acquire or work any mining location in terms of the Mines and Minerals Act [*Cap 21:05*] within a national park, botanical reserve, botanical garden, sanctuary, safari area, or recreational park except-
   (a) In terms of a written agreement between the Minister and the person concerned which has been approved by the President; or
   (b) In accordance with any mining rights lawfully acquired in respect of the area of the national park, botanical reserve, botanical garden, sanctuary, safari area or recreational park before the date when such area became a national park, botanical reserve, botanical garden, sanctuary or recreational park.

(3) Notwithstanding this Act, a person prospecting or working any mining location in terms of sub-section (1) or (2) may do anything necessary for those purposes within the national park, botanical reserve, botanical garden, sanctuary, safari area or recreational park concerned, subject to the terms send conditions of the relevant permit or agreement or in accordance with the mining right, as the case may be.
(4) Notwithstanding this Act, a person may pick any specially protected indigenous plant or indigenous plant where the picking is necessary for the working of any mining location and in accordance with the exercise of mining rights lawfully acquired in terms of the Mines and Minerals Act [*Cap 21:05*]"

Section 129A of the Parks and Wildlife Act provides that:

"Subject to sub-sections (4) and (5), the authority may, on the recommendation of, or after consultation with, the Director General, make by-laws-

(a) Fixing appropriate fees to be paid for-
(i) Entering any area or part of the park area
(ii) Doing anything within the park area or part of it;
(iii)Using any article or facility provided within the park area or any part of it;
(iv) Any authority, permit, licence, register, or return granted, issued or supplied in terms of this act, or any regulations made thereunder.

(b) Fixing, subject to sub-section (5) a tariff of fees payable by persons prospecting, or working any mining location within the park area under a permit or agreement referred to in section one hundred and nineteen, in respect of-
(i) The clearing of land in connection with such activity, per hectare of land cleared
(ii) The backfilling, on abandonment, forfeiture or cancellation of the mining location, of shafts, open surface workings and excavations posing a danger to the safety of persons and wild life
(iii)The removal of rock quarry within the park area.
(c) …
(2)…"

The Parks and Wildlife Management Authority (Tariff of fees) By-Laws, S. I. 5/2013, Part IX provides that:

"*Note.*-

1. The fees fixed for each permit is chargeable regardless of whether any products to which the permit relates is collected.
2. …
3. …

Mining Permits
Notes.-

(a) Miners with established mines within Parks and Wildlife Estates will be charged US$15 000, 00 per claim per quarter to undertake such activities…"

According to **section 253 of the Mines and Mineral Act [Cap 21: 05]** (prohibition of disposal of minerals when royalty or returns, etc., have not been lodged)

"1. If the miner of a registered mining location fails to pay any royalty due in respect of such location the mining commissioner may issue an order prohibiting the disposal of any minerals or mineral-bearing products from such location or from any other location which is being worked by the miner, whether or not the miner has failed to pay any royalty due in respect of the other location, until all outstanding royalty has been paid or until arrangement has been made which is acceptable to the mining commissioner for the payment of such royalty".

The Law and the Facts

The applicant is the holder of seven mining claims through the vehicle of a company named Come Again Mines P/L. The claims were registered in September 1994 and February 1995. They were inspected on 28 February 2012 and an inspection fee of US2 800, 00 was levied by the acting assistant mining commissioner. In the founding affidavit, there is no averment as to the **nature** of the relevant permit or agreement that governs these mining claims. It is implied that applicant is working various mining locations within the Mfurudzi Park area. This should be done, subject to the terms and conditions of the relevant permit or agreement (see s119 (3) Parks and Wildlife Act). In its heads of argument applicant submits that it is lawfully working a mining location and holds rights conferred by a permit validly given by the third respondent. This brings the applicant squarely within the ambit of section 119(2) of the parent Act, whose terms are set out more fully above.

Section 119(2)(b), in my view, applies to applicant's mining permits which conferred mining rights on it and which were issued before the area was designated as a national park. The permits were issued in terms of the Mines and Minerals Act. What are the terms and conditions of the permits held by the applicant? In my view, that aspect was not addressed in the applicant's papers. The applicant seeks to rely on the provisions of s 119(3), as the basis for its averment that the regulations are ultra vires the parent Act. Section 119(3) states that:

"Notwithstanding this Act, a person prospecting or working any mining location in terms of subsection (1) or (2) may do anything necessary for those purposes within the national

park..subject to the terms and conditions of the relevant permit or agreement, or in accordance with the mining rights".

The applicant attached a letter dated 7 January 2013, to its papers, in which the acting assistant mining commissioner, a Mr. N. Chieza, confirmed, that it was the proud owner of seven registered mining claims. We are not told what the terms and conditions of these registered claims are, or what the fact of registration of the claims confers on the applicant in terms of mining rights.

We are not told what the terms and conditions of those mining rights are. Section 119(2) expressly prohibits the working of mining rights in a national park area, except in terms of agreement, or mining rights lawfully acquired. I will presume, based on the evidence that applicant acquired and registered seven mining claims, that the act of registration conferred certain mining rights on it. It is my finding, that there is nothing in applicant's papers, which constitutes prima facie evidence of the exact terms and conditions of applicant's mining rights. The importance of determining applicant's mining rights becomes clearer when one reads s 119(3), which confers power on a person working a mining location in a national park, to do anything necessary for those purposes, "subject to the terms and conditions of the relevant permit". What is clear from the provisions of s 119 is that the different rights to work a mining location in a national park area are conferred on miners, in terms of the Mines and Minerals Act. S.I. 5/2013 came into being because s 129(A) of the Parks and Wildlife Act provides for the powers of the authority to make by-laws for fixing of tariff fees payable by persons working within a national park area.

The applicant's contention is that only s 129(A) (b) is applicable to it. The reasoning appears to be that this is so because that is the subsection that expressly refers to fees payable by persons working a mining location. It is my view that this reading of s 129(A) is piecemeal, and erroneous. What is required is a wholesale reading of all the provisions of section 129(A). In my view, very wide discretion is placed in the hands of the authority in enacting the by-laws. The Authority may make by-laws fixing the appropriate fees to be paid for any authority, permit or licence issued or supplied in terms of the act (see 129(A)(1)(a)(iv). We have already established that applicant's mining rights were conferred in terms of the Mines and Minerals Act, as read with s 119 of the Parks and Wildlife Act. The fact that s 129(A)(b) refers specifically to s 119

does not mean that all mining rights provided for by s 119 should only be governed by the provisions of s 129(A)(b).

My reading of s 129 (A) (b) is that it provides for the making of by-laws that relate to permits or agreements or mining rights conferred in terms of s 119, when it comes to issues of clearing land, backfilling, and removal of rock. This is not to say that these permits, agreements, or mining rights conferred in terms of s 119 are exempt or excluded from being charged the appropriate fees for entering the park area or doing something there or using any facility there (as provided by s129(A)(i)-(iv) My reading of s 129(A)(1)(a)(i)-(iv) and s 129(A)(1)(b)(i)-(iii) is that they are not mutually exclusive. The Authority is given power to fix appropriate fees in relation to all those activities. It is not expressly stated that mining rights conferred in terms of s 119 are only subject to the fees which will have been fixed in terms of s 129 (A) (b). The Authority is given discretion to fix appropriate fees to be paid for anything and everything that happens in the national park area. The only fetter appears to be the requirement that the Authority seek the recommendation of, and consult the Director General.

The last issue for consideration is whether the first respondent entitled to bar the applicant from accessing the Mfurudzi National Park and exercising its rights in terms of its permit for the reason that applicant has failed to pay its prescribed fees for working mines in a safari area?

The applicant was charged US$4 000, 00 per claim, totaling US$28 000, 00 for his seven claims, in terms of S.I. 5/2013. The applicant's mining rights are subject to the Mines and Mineral Act, which provides, in s 253 (1), that:

(a) "If the miner of a registered mining location fails to pay any royalty due in respect of such location the mining commissioner may issue an order prohibiting the disposal of any minerals or mineral-bearing products from such location or from any other location which is being worked by the miner …until all outstanding royalty has been paid…"

The evidence before the court is that applicant was issued with various verbal orders prohibiting it from disposing of its mineral bearing products because of the nonpayment of outstanding fees and levies.

The applicant, in its letter dated 1 March 2012 to the Mining Commissioner, states that some of its claims have lapsed because the warden at Mfurudzi National Parks is charging an

enormous amount for illegal levies that it cannot afford. Reference was made to entrance fees. S.I.5/2013 set a fee for the conduct of mining activities by established mining companies US$15 000, 00 per claim per quarter to undertake such activities. It is my considered view that, nothing in those regulations prohibits the Authority from levying other fees or charges as well as or in conjunction with, the fixed fee per quarter, for undertaking mining activities.

I hold the further view, that, had applicant provided the terms and conditions of its mining rights which it acquired in terms of s 119, which were clearly acquired subject to the Mines and Mineral Act, then the court would have been better placed to determine whether applicant was being charged any "illegal levies". Based on the evidence before the court, applicant has not been charged any illegal levies. The applicant must pay. The first respondent is entitled to prohibit the applicant from disposing of mineral bearing product. If the terms and conditions of applicant's mining rights permit the first respondent to charge entrance fees, then in the absence of payment by the applicant of those fees, it is not entitled to demand entry.

For these reasons, applicant is not entitled to the relief that it seeks. Accordingly, the application is dismissed with costs.

Scanlen & Holderness, applicant's legal practitioners
Kantor & Immerman, 1st respondent's legal practitioners
Civil Division of the Attorney General's office, 2nd and 3rd respondent's legal practitioners