CONG YULING
versus
MR MUTSAMBIWA
(cited in his capacity as the Director General
of Parks and Wildlife Authority)
and
PARKS AND WILDLIFE MANAGEMENT AUTHORITY
and
DETECTIVE CHIEF INSPECTOR NCUBE
(cited in his capacity as the Officer in Charge Homicide,
Zimbabwe republic Police)
and
DETECTIVE SERGEANT MASHAVAVE
and
COMMISSIONER OF POLICE

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 31 MAY 2007

Ms. *N P Munangati* for the applicant
Mr. *W P Zhangazha* for 1st and 2nd respondent

KUDYA J: On 31 May 2007, after hearing counsel, I dismissed this application and indicated that my reasons would follow later. These are they:

The application was filed out of this Court on 6 December 2006, seeking the following relief:

IT IS ORDERED THAT:

1. the first and second respondents shall nominate and appoint a registered dealer to process at applicant's cost 72 pieces of ivory belonging to applicant held by them as exhibits under *State v Quinling Zhang and Another* AG Ref 5733/05 within 7 days of this order.
2. The authorized dealer so appointed shall work under the supervision of the first and second respondents who shall certify that the processing of the ivory has been done to their satisfaction and such process shall be finished within 30 days of the appointment of the authorized dealer.

3. The first and second respondents shall release the ivory to the applicant within 48 hours of certifying the authorized dealer's work.

ALTERNATIVELY

4. The third and fourth respondent are ordered to retrieve the exhibits under AG Ref 5733/05 being 72 pieces of ivory currently in the custody of first and second respondent and grant/render possession to applicant within 7 days of the order.
5. The first and second respondents shall bear the costs of this application jointly and severally the one paying the other to be absolved.

It was opposed by the first and second respondents on 20 December 2006. The attitude of the third to fifth respondents was to abide by the order of this Court.

THE FACTS

The applicant and her translator, one Quinling Zhang, were arrested on 4 July 2005 for possessing 72 pieces of raw ivory without the requisite permits, dealing in raw ivory and attempted export of the same without the necessary export documents. She had purchased the ivory from a dealer who was licensed by the second respondent, the responsible authority for managing inter alia wild life products, to manufacture and not to sell raw ivory.

The police seized the ivory and surrendered it to the responsible authority for storage purposes, pending the prosecution of the applicant and her translator. The prosecuting authority declined to prosecute them and wrote three memoranda to this effect on 28 November 2005, 4 January and 9 August 2006. It took the view that the two had acted, to their detriment, on the advice of the licensed dealer that the ivory was processed and felt that in line with the sentiments expressed in *S v Davy* 1988(1) ZLR 386(SC) at 387D-E, they lacked the essential *mens rea* to commit the offence. It recommended initially that the ivory be released to the "legitimate owners" and in the latter opinion that as the two could not lawfully possess the ivory in question, they negotiate with the responsible

authority with a view to regularize their future possession of the ivory in question but that if these failed, it be forfeited to the State.

It was common cause that these opinions were not binding on the responsible authority, which continues to hold the ivory in question.

The applicant and the responsible authority went into negotiations. They broke down after the parties were almost agreed on the resolution of the matter along the lines sought by the applicant in the main relief. The view of the first and second respondents was that the dealer had not processed the ivory to the required standard, which view the applicant, as can be discerned from its letter of 30 November 2006 marked as Annexure E, agreed with. The responsible authority was concerned by the effect the suggested compromise would have on Zimbabwe's compliance with the requirements of the Convention on International Trade in Endangered Species (CITES) whose provisions were domesticated through the Parks and Wild Life (Import and Export) (Wild Life) Regulations SI 76/1998 which were made in terms of section 129 of the Parks and Wild Life Act *[Chapter 20:24].* It also held the view that the ivory was needed as exhibits in the prosecution of the dealer.

THE APPLICANT'S CAUSE OF ACTION

The manner in which the applicants' founding affidavit, as read with the draft order, is couched suggests that her claim is based on ownership of the ivory. This ownership arose from the contract of purchase that she entered into with the dealer. The draft order, in clause 1, uses the phrase "72 pieces of ivory belonging to the applicant". Ms. *Munangati*, for the applicant, in her written supplementary heads of argument and in her oral submissions vehemently denied that her client's cause of action was based on ownership. It is not difficult to see why she adopted this stance, as in order to enforce her rights of ownership the applicant would need to bring a vindicatory action. She would need to establish that the law allows her to own the ivory in question. She also was very clear that her client's cause of action was not based on the prosecuting authority's opinion as expressed in his three letters. She was correct in this regard, as an opinion even of such an eminent public functionary as the Attorney-General would not suffice to found a cause of action. In any

event, even if it could, the opinion does not favour the applicant as regards her possessory rights and ownership.

Ms *Munangati* seemed to suggest, in her submissions, that the application was based on section 59(1)(a) of the Criminal Procedure and Evidence Act *[Chapter 9:07]*. All that this section does is to empower an investigating officer to dispose of exhibits in those cases such as the present where no criminal proceedings are instituted. It empowered the return of the exhibits to the applicant if she could legally possess them or to anyone who could legally possess them if the applicant could not do so or to forfeit them to the State if no person could legally possess them. Assuming that she could base her claim on this section, the applicant's main relief would have no foundation to stand on. Neither would the alternative relief which seeks the police to retrieve it from the first and second respondents have any foundation to stand on. The police voluntarily surrendered the exhibits to the responsible authority who are enjoined by law to possess ivory. They would have no basis to retrieve them. They, after all, did not surrender them to the responsible authority on the basis of section 59(1)(a) in question. More importantly, the section under consideration does not, in my view, create rights for the person from whom exhibits are seized but confers discretion on the investigating officer on how to dispose of such exhibits, as these, where no criminal proceedings are instituted. The applicant cannot found her cause of action by riding on the back of the police. She cannot substitute herself for the police and stand in their steed to found her claim. She simply has no authority from the police to do so.

In my view, therefore, section 59(1)(a) of the Criminal Procedure and Evidence Act provides no cause of action for the applicant. It seems to me that she could only base her claim on ownership or possession. She has strongly denied that she is approaching this Court on the basis of ownership. She also lost possession and does not have it. She cannot rely on section 59(1)(a) of the Criminal Procedure and Evidence Act. She clearly has no cause of action by which to approach this Court. I would accordingly dismiss the application on the basis that she lacks a cause of action.

OTHER ISSUES

It is however on the assumption that I am wrong that I proceed to consider the further submissions of the applicant.

She contended that she could lawfully possess the ivory in question because it was processed ivory and not raw ivory. Mr. *Zhangazha* for the first and second respondents submitted that the ivory in question was raw ivory. He based his submissions on the definition of raw ivory in Part IV of the Parks and Wildlife (General) Regulations SI362/1990. Raw ivory is "ivory that is not manufactured", while manufactured ivory is "ivory which, through a skilled process of manufacture, carving or embellishment in accordance with these regulations, has been transformed into a utensil, ornament or article of adornment."

It was common cause that the ivory had its roots removed and its ends evened out. In my view, this does not fall into the category of a skilled process of manufacture, nor transform it into a carving or embellishment as the ivory was not changed into a utensil, ornament or article of adornment. The applicant did not disclose the nature of the drawings on some of the ivory pieces. It is only after she had done so that the determination of whether they constituted a skilled process of manufacture, carving or embellishment which altered them to a utensil, ornament or article of adornment could be made. It was her duty to show on a balance of probabilities that that the ivory had changed its character in the manner contemplated by the regulations. She failed to do so. I, therefore agree with the respondents' submission that the nature of the main relief sought by the applicant is a concession that the ivory is not manufactured. Indeed on page 36 of the record, in paragraph 5(iii) of her answering affidavit the applicant concedes that she "can in fact lawfully possess the ivory after it has been worked on as per her proposal and indeed the proposal of the Attorney-General's office." She thus accepted that she could not lawfully possess the ivory before it was manufactured. The alternative relief is based on lawful possession. The police cannot be ordered to return the ivory to her, for to do so would amount to instructing them to break the law.

It is my considered view that the ivory in question therefore falls into the category of raw ivory. Her submission that it was manufactured ivory fails.

Lastly, the applicant submitted that even if the contract of sale were found to be contrary to legislation, this was a proper case for the court to exercise its discretion in her favour by invoking the exceptions to the *par delictum* rule. She referred to the following cases:

1. *Jajbhay v Cassim* 1939 AD 537,
2. *Petersen v Jajbhay* 1940 TPD 182
3. *Dube v Khumalo* 1986 (2) ZLR 531(SC)
4. *Logan v Sibiya* 2002 (1) ZLR 531 (H)
5. *Mikesome Investments (Pvt) Ltd v Silcocks Investments (Pvt) Ltd* HH 107/2003

In all these cases, the parties entered into contracts of various types, including those of sale, with one another, respectively, which were contrary to statutory provisions and in *Dube's* case, *supra,* to a municipal policy. In the present matter the first and second respondents were not parties to the contract of sale between the dealer and the applicant. The dealer was not the agent of these respondents but was an independent operator. Its actions cannot be attributed to the respondents. The *par delictum* rule has no application in the present case. The respondents, as contemplated by the rule, are not equally in the wrong with the applicant, so as to invoke it and trigger the applicable exceptions. But even if the exception were applicable, I would decline to exercise it in favour of the applicant for the simple reason that to do so would have catastrophic consequences for the continued enjoyment by Zimbabwe of the favourable terms of CITES as so ably demonstrated by the respondents in their opposing affidavit.

It was for these reasons that I dismissed the application, both in the main and alternative, with costs.

Munangati and Associates, applicant's legal practitioners

Chinamasa, Mudimu, Chinogwenya and Dondo, 1st and 2nd respondents' legal practitioners