AFRICAN CONSOLIDATED RESOURCES PRIVATE LIMITED
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSAKWA J WITH ASSESSORS
HARARE, 15 and 16 November 2010 and 10 May 2013

Criminal Trial

J. Samukange, for applicant
C. Mutangadura, for respondent

MUSAKWA J: Having been indicted on a charge of fraud or alternatively, contravening the Precious Stones Trade Act [*Cap 21:06*] the accused applied to quash the charges on the basis that they do not disclose an offence.

Having heard arguments from respective counsels I subsequently directed they file relevant authorities in support of their arguments. This is because they had simply made submissions which were not supported by any law.

In light of the argument advanced by the accused I had initially thought it prudent that the court awaits the outcome of the appeals the accused noted to the Supreme Court in respect of related litigation touching on the same subject matter. In view of the passage of time without the appeals having been determined I resolved to dispose of the matter without waiting for that outcome.

The indictment is framed as follows-

> 'That African Consolidated Resources Private Limited whose last know address is number 9 Birchenough Road, Alexandra Park, Harare (hereinafter called the accused) represented by Ian Harold Harris who is hereby cited in terms of s 385 (3) of the Criminal Procedure and Evidence Act [*Cap 9;07*] is guilty of the crime of: FRAUD
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> In that on a date unknown to the prosecutor but during the period extending from April 2006 and June 2006 and at the Mining Commissioner's Office in Mutare African Consolidated Resources Private Limited misrepresented to the Ministry of Mines and Mining Development, that Heavy Stuff Investments, Olibile Investments (Pvt) Ltd and Possession Investment Services Limited were companies qualified to obtain Mining Claims thereby causing prejudice to the Ministry of Mines and Mining Development by unlawfully obtaining Certificates of Registration in terms of the

attached schedule hereto referred to as Annexure "A" when in actual fact the accused person knew that the said purported companies had not yet been duly incorporated as companies.

Alternatively

POSSESSING PRECIOUS STONES WITHOUT A LICENCE OR PERMIT IN CONTRAVENTION OF SECTION 3 (1) AS READ WITH SECTION 3 (2) OF THE PRECIOUS STONES TRADE ACT [CHAPTER 21:06].

In that on the 15th January 2007 and at number 9 Birchenough Road, Alexander (sic) Park, Harare, the accused person, African Consolidated Resources unlawfully possessed 129 031.87 carats of diamonds without a valid licence or a permit.

Or Alternatively

UNLAWFULLY DEALING IN PRECIOUS STONES IN CONTRAVENTION OF SECTION 3 (1) AS READ WITH SECTION 3 (2) OF THE PRECIOUS STONES TRADE ACT [CHAPTER 21:06].

In that on a date to the prosecutor unknown but between April 2006 and 23 September 2006 the accused, African Consolidated Resources unlawfully dealt in precious stones. That is to say the accused person purchased diamonds from illegal artisanal miners in Marange South near the village of Chiyadzwa in Mutare.

Or Alternatively

CONTRAVENING SECTIO 6 (1) AS READ WITH SECTION 6 (2a) (a) OF THE PRECIOUS STONES TRADE ACT [CHAPTER 21:06].

In that between the period extending from April 2006 and January 2007 the accused person failed to enter in respect of diamonds recovered from its mining location such details relating to the amount of diamonds recovered during each preceding month and the amount of diamonds held by it at the end of each preceding month in contravention of the Act."

At the hearing the accused's counsel filed an exception to the charge, the basis of which I will revert to shortly. In light of the arguments advanced in support of the exception, it is pertinent to summarise the facts alleged against the accused.

The summary of state case alleges that the accused is a mineral exploration company. Sometime in April 2006 the accused sought to obtain diamond mining claims in Marange in favour of non existing companies, namely Heavy Staff Investments Company, Olibile Investments (Pvt) Ltd. And Possession Investment Services Limited. These companies were only registered after they had obtained certificates of registration of mining claims from the Ministry of Mines and Mining Development. Possession Investment Services Limited obtained the certificates of registration of mining claims on 4th and 19th April 2006 as well as

on 1 June and 1 July 2006. As of those dates the company was non existent as it was only registered on 19 July 2006.

On the other hand Heavy Staff Investments Company obtained certificates of registration of mining claims on 19 April 2006 and 1 June 2006. The company was subsequently incorporated on 19 July 2006.

Olibile Investments (Pvt) Ltd obtained certificates of registration of mining claims on 10 April 2006. It was subsequently incorporated on 21 July 2006.

After securing mining licences through these misrepresentations of the legal status of the companies the accused is alleged to have failed to keep records of diamonds recovered from the mining claims. Following several enquiries from the Ministry of Mines and Mining Development concerning its activities at the mining location, the accused claimed that no mining was taking place. To the contrary, mining activities were taking place and the accused was also purchasing diamonds from illegal miners.

Upon cancellation of the mining permits the accused maintained that no mining activity ever took place. However, upon a search being conducted the accused was found in possession of diamonds that had been mined and purchased without being accounted for.

The state has lined up nine state witnesses to testify in the matter.

The accused filed a written application in which it excepted to the indictment in terms of s 178 of the Criminal Procedure and Evidence Act [*Cap 9 :07*]. It was contended that the indictment is likely to prejudice and embarrass the accused. This is because the accused is involved in civil litigation on the same subject matter that has been criminalised.

In support of the application the applicant annexed two judgments by HUNGWE J and another judgment by the Supreme Court. In HC 6411/07 the accused sought a declaratory order on the validity of mining claims that were issued to its subsidiaries, Heavy Staff Investments Company, Olibile Investments (Pvt) Limited and Possession Investment Services Limited. The order granted by HUNGWE J on 24 September was to the following effect-

1. "The African Consolidated Resources P/L claims issued to the third, fourth, fifth and sixth applicants within the area previously covered by Extension Prospecting Order 1523 held by Kimberlitic Searches P/L are valid and have remained valid since the date they were originally pegged.

2. The right granted to the third respondent by virtue of the Special Grant shall not apply in respect of the African Consolidated Resources P/L claims area as indicated on

annexure "B" to the papers. In that regard it is hereby ordered that third respondent cease its prospecting and diamond mining activities in the said area.

IT IS FURTHER ORDERED AS FOLLOWS

3. That second respondent return to the applicants' possession the 129 400 carats of diamonds seized from applicants' offices in Harare on 15 January 2007.

4. The second respondent return to the applicants all diamonds acquired by second respondent from the African Consolidated claims area using the register kept by the second respondent in compliance with the Kimberley Process Certification Scheme.

5. That fourth respondent be and is hereby ordered to direct Police to cease interfering with the applicants 'prospecting and mining activities.

6. That first, second and third respondents pay applicants' costs on a legal practitioner and client scale, the one paying the other to be absolved.

7. Any appeal noted against this order shall not suspend the operation of the order."

Zimbabwe Mining Development Corporation and Minerals Marketing Corporation filed a chamber application with the Supreme Court wherein they sought the setting aside of the order by HUNGWE J. In setting aside the order by HUNGWE J the Chief Justice in his judgment in SC 1/10 also ordered that the diamonds in contention be surrendered to the Reserve Bank of Zimbabwe for safekeeping pending the outcome of the appeal noted to the Supreme Court. Whilst allowing Zimbabwe Mining Development Corporation and Minerals Marketing Corporation to remain in occupation of the disputed claims the Chief Justice ordered that they cease all mining operations.

In a subsequent judgment delivered by HUNGWE J on 6 September 2010, the order granted on 24 September 2009 was set aside. In setting aside the earlier order HUNGWE J held that African Consolidated Resources and others never acquired any rights as , Heavy Staff Investments Company, Olibile Investments (Pvt) Limited and Possession Investment Services Limited did not exist when the Mining Commissioner purported to issue them mining rights. In addition, HUNGWE J also held that the applicants had misled the court when they claimed to have acquired mining rights. The effect of the order of 6 September 2010 was to dismiss the application by the applicants.

The accused noted an appeal against the decision of 6 September 2010 and the appeal is yet to be determined. In essence, the accused contends that by virtue of having noted an

appeal, the status quo ante was restored. Hence the earlier order of 24 September 2009 prevails.

It is the accused contention that until the appeals before the Supreme Court are determined, it will be prejudiced or embarrassed in its defence to the criminal charges as follows-

> "(a) If the appeal against the Recession Judgment is upheld then the Accused will be entitled to raise the defence of claim of right, the claim companies being the valid holders of the claims;
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> (b) If both the appeal against the Recession Judgment and the claim in case no. HC 6411/07 are dismissed, then the Accused will be entitled to raise the defence of lack of mensrea, in that at all times it had the bona fide belief that the claim companies had been validly incorporated at the time of registration of the claims, and that title to the claims was valid at the time of possession of the diamonds."

In its opposing submissions the State argued that a motion to quash an indictment can only be made where the charge preferred is imprecise and ambiguous, hence where it embarrasses or prejudices an accused person in the formulation of a defence. Reference was made to *S* v *Smith* 1975 (2) RLR 77 (A).

Mr *Mutangadura* also argued in his submissions that a charge can also be quashed where it fails to disclose an offence. He made an analogy of a civil claim which discloses no cause of action. Reference was also made to the cases of *R* v *Mahlatse* 1949 (4) S.A. 455 *R* v *Mlothswa* 1968 (2) RLR 172.

The State also contends that the multiplicity of counts is permissible in terms of s 145 of the Criminal Procedure and Evidence Act.

Section 178 of the Procedure and Evidence Act provides that-

> "(1) The accused may, before pleading, apply to the court to quash the indictment, summons or charge on the ground that it is calculated to prejudice or embarrass him in his defence.
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> (2) Upon an application in terms of subsection (1), the court may quash the indictment, summons or charge or may order it to be amended in such manner as the court thinks just or may refuse to make any order on the application.
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> (3) If the accused alleges that he is wrongly named in the indictment, summons or charge, the court may, on being satisfied by affidavit or otherwise of the error, order it to be amended."

The essential requirements of an indictment or charge are set out in s 146 as follows-

"(1) Subject to this Act and except as otherwise provided in any other enactment, each count of the indictment, summons or charge shall set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Subject to this Act and except as otherwise provided in any other enactment, the following provisions shall apply to criminal proceedings in any court, that is to say—

(a) the description of any offence in the words of any enactment creating the offence, or in similar words, shall be sufficient; and

(b) any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the enactment creating the offence, may be proved by the accused, but need not be specified or negatived in the indictment, summons or charge, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the prosecution.

(3) Where any of the particulars referred to in this section are unknown to the prosecutor, it shall be sufficient to state that fact in the indictment, summons or charge.

(4) Where a person is charged with a crime listed in the first column of the Second Schedule to the Criminal Law Code, it shall be sufficient to charge him or her with that crime by its name only.

(5) No indictment, summons or charge alleging the commission of a crime mentioned in subsection (4) shall be held to be defective on account of a failure to mention the section of the Criminal Law Code under which the crime is set forth."

It is clear from the application made on behalf of the accused that the issue is not about formal defects in the indictment. There is also no question about the indictment not disclosing any offences. It is about the accused contending that it will not properly plead to the charges because it awaits the Supreme Court's determination of its appeal relating to the same subject matter.

In this respect, some of the authorities cited by respective counsel are not germane to the issue at hand. In my view, the first issue to determine is what is excepiable under s 178. In my respectful view, an exception can be raised when a charge discloses no offence or when there are imperfections in the way the charge is drafted. That is why, in terms of s 178 (2) the court may order that the charge be amended.

The crucial question before me is whether a criminal prosecution can be instituted from the same facts giving rise to a civil suit. In other words, is it impermissible to have a parallel process where the conduct of an accused person gives rise to both criminal prosecution and civil litigation?

It is trite that the burden of proof in a civil case rests on a balance of probabilities and is lower than that in a criminal trial. In respect of a criminal trial the degree of proof is beyond a reasonable doubt. In this respect see s 18 of the Code.

The Code also provides for various defences and mitigating factors which an accused may raise. These are provided for under Chapter XIV. The important thing to note is that these are general defences as s 214 states that-

> "The defences and mitigating factors which an accused may successfully raise are not limited to those set outin this Chapter."

In the present matter I do not see how the applicant is prejudiced or embarrassed in the conduct of its defence to the charges. There is no question of the charges lacking clarity by way of omission of some essential averments. There is no question of the accused being charged with a non-existent offence. The accused, in challenging the indictment has postulated on what may or may not be its possible defences. From the argument raised by the accused, it seems to raise a claim of right and lack of intention. That means that the accused is able to plead to the indictment. In my view, prejudice or embarrassment must relate to an accused's inability to formulate a defence on account of imperfections in the charge and accompanying facts. If the indictment and facts are well understood there can be no prejudice or embarrassment. In this respect see *R* v *Van Meerdervoort* 1957 (2) S.A. 23 (SR).

That out of the same set of facts civil litigation and criminal prosecution has arisen cannot be a ground for excepting to an indictment. By way of analogy, out of the same conduct may arise a criminal charge and disciplinary/misconduct proceedings. The same conduct may further spawn a delictual suit. In the event that an accused in such a situation faces a delictual suit or disciplinary proceedings first and is subsequently charged with a crime arising from the same conduct, can they claim they are unable to defend themselves because a decision is awaited in the other matters?

The remedy for the accused may well have been to seek a stay of proceedings whilst awaiting the outcome of the appeals. However, that is not the issue before me. Accordingly, the exception is hereby dismissed.

Venturas & Samukange, accused's legal practitioners
Attorney-General's Office, legal practitioners for the state