EVERISTO PFUMVUTI
versus
ZIMBABWE NATIONAL WATER AUTHORITY
and
UPPER SUB-CATCHMENT COUNCIL
and
THE MINISTER OF EVIRONMENT WATWER AND CLIMATE N.O

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 14 March 2017 and 31 May 2017 & 21 June 2017

Opposed Matter

D. Drury, for the applicant
J. Dondo, for the 1st respondents
W.P Zhongazha, for the 2nd respondent
F. Chafungama, for the 3rd respondent

MATANDA-MOYO J: The applicant seeks a declaratur that;

1) The Water (Permits) Amendment Regulations, 2015 (No. 5) published under Statutory Instrument 52/2015 on 24 April 2015 by the third respondent is ultra vires the Water Act [*Chapter 20:24*] and is accordingly invalid and of no force and effect.
2) The Ground Water use – bulk Monitoring- fee or levy charges as provided for under the Water (permits) Amendment Regulation No 52 of 2015 are invalid as the quantum for the charges are irrational and/or manifestly excessive and unreasonable in their effect and implementation and offend s 77 of the Constitution.

The applicant also seeks that;

3) Any fees charged prior to 29 September 2014 before the promulgation of SI 52 of 2015 are unlawful.

4) The respondents claim for capital sum of $282 062-40 arising out of SI 52/2015 be declared of no force and effect. Also the purported appointment of the applicant as the respondent's collecting agent be declared invalid.
5) It be declared that the second respondent's refusal to process the applicant's ground bulk water extraction permit for 2016 is unlawful and that the court directs the second respondent to so issue the permit.
6) The second respondent's order directing the applicant to cease extracting ground water from Evergreen Farm is invalid.
7) That the respondents or their agents be interdicted from entering Evergreen farm or interfering with the applicant's ground water extraction business save in accordance with the law, and
8) That the respondents jointly and severally, the one paying the other to be absolved – pay the applicant's costs.

The applicant is a businessman, in the business of extracting water for bulk selling. He operators from Plot 3 Glen Forest, Domboshava. On 26 September 2014 selected bulk water operates and Transporters were invited to attend a meeting at the first respondent's offices. They were advised of government's decision to levy a charge of $3.00 per 1000 per cubic metre of water extracted. A CBZ account number was availed to the attendees wherein they would deposit such levies. At that meeting a letter written by the Secretary of Environment, Water and Climate Services dated 23 September 2014 to that effect was handed to the attendees. Thereafter officials from the first respondent were deployed to sites, including those of the applicant's, to enforce compliance with the directive. Some operators paid the levies. The applicant did not pay the levies on the basis that they were unlawful.

The Minister later sought to regularise the collection of the levies by publishing S.I 52/15. In publishing such Statutory Instrument applicant alleged that the Minister did not follow laid down procedures. No consultation between the Minister, ZINWA and other stakeholders took place before the promulgation of S.I 52/15. There is no evidence on how the figure of $3.00 was arrived at. As such the Minister violated s 119 of the Water Act [*Chapter 20:24*].

Statutory Instrument 52/15 does not provide for method of collection nor whether remittances were to be done weekly, monthly or yearly.

It is applicant's case that whilst the Minister is empowered under S.I 206/2001 to charge levies, such levies must be reasonable and fair. The $3.00 levy was arbitrarily imposed in violation of S.I 206/2001. The respondents suffer no costs in the extraction of water by the applicant and are not entitled to any levy. Every cost of extracting water from the ground is met by the operators. The applicant therefore submitted that the $3.00 levy charged is *ultra vires* the Principal Regulations (S.I 206/2001).

The applicant submitted that he has no legal obligation to act as the first respondent's agent in collecting such levies and submitting same to ZINWA.

The applicant also claimed that the introduction of the levy offends s 6 (1) of the Water Act and violates constitutional rights of members of the public to safe, clean and potable water in contravention of s 77 of the Constitution.

The municipality is currently charging 40c per cubic metre up to 10 cubic metres in a month. The charge rises to 80c per cubic metre for water consumed between 10 and 20 cubic metre bracket. Above that the charge is $1.29 per cubic metre. The charge of $3.00 levied by the respondents is thus disproportionate to those charged by the City Council. The applicant prayed for the striking down of S.I 52/15 for the above reasons.

On 12 February 2016 the applicant was advised to cease his operations with immediate effect. The applicant challenged the figure of $282 062-40. It is his submission that no statements were being sent to him. He became aware of the figure when applying for a permit. He complained that he was denied an opportunity to be heard or to make any representations before being denied the permit. It is also his case that he was not obligated in terms of the law to collect any levies from customers on behalf of the respondents. He also complained that the amount of $282 062-40 above included the period between 29 September 2014 and 24 April 2015 when SI 52/2015 had not been promulgated and was not in force. The figure is therefore incorrect.

The applicant also challenged the first respondent's order to stop his operations. He submitted that failure to process his application for renewal of a permit was irrational and manifestly unreasonable.

The respondents opposed the granting of the order sought on various grounds. The respondents firstly submitted that the applicant has not exhausted domestic remedies before

approaching this court. The respondents submitted that the applicant should have appealed to the Administrative Court in terms of s 114 (1) of the Water Act [*Chapter 20:24*].

The first respondent denied that the levies imposed were illegal. The third respondent had powers under s 119 of the Water Act to impose levies, and that the third respondent after consultations with the first respondent caused the publication of SI 52/2015. The provisions of s 119 were fully complied with. In any case SI 52/2015 is only an amendment to SI 26/2001. That particular SI 206/2001 places an obligation on the applicant to pay such levies. The first respondent averred that without paying those levies the applicant's permit could not be renewed. The first respondent denied that the levy charged was irrational or manifestly unreasonable. In a nutshell, the first respondent denied having violated any of the applicant's rights.

The second respondent also submitted that the levies were agreed upon by all stakeholders. It is the applicant who is behaving unlawfully. The second respondent alleged that the applicant chased away the second respondent's officials from his site despite the fact that second respondent has legal obligations to monitor abstraction of water so as to prevent over-abstraction. Permits allow operators to abstract specified quantities of water. The applicant is simply trying to run away from being monitored.

The second respondent conceded that the applicant may have a case on the quantum of levies charged.

On the permit renewal it is the second respondent's case that once the applicant complies with the conditions of the previous permit, only then can his permit for 2016/17 be processed. Overally the second respondent submitted that the levy is reasonable and urged this court to dismiss the application.

The third respondent raised a point in *limine* that the applicant has approached this court with dirty hands. The statutory Instrument he challenges is in place but he has decided to disregard same. Citizens must subject themselves to the law first and complain afterwards.

Underground water is a finitive resource which requires monitoring for the benefit of the citizens of this country. Monitoring bulk abstraction of water require resources hence the introduction of the $3-00 levy.

Over abstraction of water if not monitored may result in structural movements and cracks in the ground, whose effects may be felt later in life. Therefore there is need to balance the need to avail water with the necessity of environmental protection.

The third respondent submitted that she acted in terms of the law, followed all procedures in enacting statutory instrument 52/15.

The applicant raised a point *in limine* that the third respondent served her notice and opposition on the applicant out of time. Applicant argued that the third respondent is therefore barred. The third respondent filed her notice of opposition on 23 March 2016 but served such application upon the applicant on 5 April 2016. Rule 233 (2) of the High Court rules provide;

> "As soon as possible after filing a notice of opposition and opposing affidavit in terms of subrule (1), the respondent shall serve copies of them upon the applicant and as soon as possible thereafter, shall file with the registrar proof of such service in accordance with r 42B."

Whilst it is true that service must be done as soon as possible after filing, failure to so serve is not fatal. The applicant filed an answering affidavit to the third respondent's opposition. No prejudice had been suffered by the applicant. In the premise I hereby condone the late serving of the notice of opposition.

The third respondent also raised a point in *limine* that the applicant should not be heard, as he has approached the court with dirty hands. The applicant continued to abstract water without a permit in terms of s 119 of the water Act. The applicant has also failed to observe the provisions of statutory instrument 52/15. To date he has failed to pay the $3-00 levy as provided for in the statutory instrument. The applicant submitted that the levies charged predated the statutory instrument. He could therefore not be expected to pay levies which are not legitimate. He denies having approached the court with dirty hands.

The doctrine of dirty hands provides the legal principle that a participant in a wrongful act may not sue the other participants in the wrongful act. In order to succeed a party must demonstrate that its opponent engaged in inequitable behaviour that is related to the subject matter of the litigation.

In *Associated Newspapers of Zimbabwe (Pvt) Limited* v *The Minister of State for Information and Publicity and Others* SC 111/04 CHIDYAUSIKU CJ (as he then was) had this to say;

> "This court is a court of law and, as such, cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination by this court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt the applicant is not being barred from approaching this court. All that the applicant is required to do is to submit itself to the law and approach this court with clean hands on the same papers.
> ….."

Before the decision in J*agibhay* v *Camim* 1939 AD 537, a party seeking court's assistance had to demonstrate that he had come to court with clean hands. The clean hands doctrine is similar in effect to the Roman law maxim in *pari delicto potior est conditio defendentis,* which operated as an absolute bar to the plaintiff's claim. See *Brandt* v *Bergestedt* 1917 CPD 344. In *Jijbhay* v *Cassin* case (s*upra*) it was found that whilst courts must discourage illegal transactions, the strict application of the clean hands doctrine sometimes cause in equitable results between parties to an illegal contract. It was held that the rule should be relaxed where it was necessary to prevent an injustice or to promote public policy, for example where the defendant would be unjustly enriched at plaintiff's expense.

It is common cause that the applicant is owing levies from 29 September 2014. The amount of such levies was pegged at $282 062.40 but the respondents have since admitted that the amount could be incorrect. The amount is inclusive of $3 levy which only came into operation after S.I 52/15.

It is also not in issue that the Borrowdale Rate Payers and Residents Association wrote to the first respondent complaining of the lawfulness of such levies. The applicant is not part of Borrowdale Rates payers and Residents Association.

The applicant has also been abstracting water without a permit, until stopped by first respondent. It is also true that the applicant has not been paying for levies as provided by S.I. 52/15. It is against that background that the third respondent urged this court not to hear the applicant until he has purged his contempt.

The applicant denied that he approached this court with dirty hands. It is the applicant's submission that the figure as calculated by the first respondent was incorrect.

In fact the first respondent has since reduced the figure to $159 459.00. The new figure was calculated after the commencement of these proceedings. The applicant submitted therefore

that he could not be expected to pay a figure he was not aware of. He can therefore not to be said to have approached the court with dirty hands. The applicant also submitted that because S.I 52/15 is a nullity, he could not be expected to comply with it first.

In *Mulligan* v *Mulligan* 1925 WLD 164 the court said:

"Before a person seeks to establish his right in a court of law, he must approach the court with clean hands, where he himself, through his own conduct makes it impossible for the process of the court (whether criminal or civil) to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interests, were the court to entertain a suit at the instance of such a litigant, it would be stultifying its own processes and it would moreover, be conniving and condoning the conduct of the person who sets the law and order in defiance."

In *Hendkinson* v *Hendkinson* (1952) 2 ALL ER 567 (CA) the court said:

"It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave consideration of public policy. It is a step which a court will only take when the contempt impedes the course of justice and where there is no other effective means of securing his compliance."

In *Minister of Home Affairs* v *Bickle* 1983 (1) ZLR 99 @ p 106 the court said:

"If the courts are to fulfil the obligations put upon them by the Constitution they cannot, save in exceptional circumstances, deny an aggrieved person access to them. Section 18 (1) of the construction provides that every person is entitled to the protection of the law and s 18 (9) provides that every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations".

Section 85 (2) of the Constitution provides that:

"The fact that a person has contravened a law does not debar them from approaching a court for relief under subs (1)."

The applicant has approached this court for relief under sub (1) which provides:

"(1) Any of the following persons namely

(a) Any person acting in their own interests

(b) …..

(c) …..

(d) Any person acting in the public interest;

(e) …..

Is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this chapter has been, or is likely to be infringed, and that the court may grant appropriate relief, including a declaration of rights and an award of compensation."

The applicant alleges that the levy as introduced by the respondents contravenes rights of members of the public to be provided portable water in violation of s 77 of the Constitution. It is apparent that the applicant has approached the court in terms of s 85 (1) of the Constitution. The fact that the applicant has not complied with any law is therefore not or bar for a relief being claimed by the applicant. Applying the above principles to the matter *in casu* it is clear that the doctrine of dirty hands has therefore no relevance in this matter.

The respondents submitted that this court should refuse to exercise its jurisdiction in the matter on the basis that the applicant has failed to exhaust domestic remedies. In particular respondents argued that the applicant has adequate remedy in terms of s 114 (1) of the Water Act [*Chapter 20:24*]. Such argument would only succeed if the relief provided under the above section is adequate. It is common cause the applicant had a right to appeal against the decision of the respondents in terms of s 114 (1) of the Water Act. He did not do so. The applicant must show good reasons for approaching this court before exhausting domestic remedies. See *Girjact Services (Pvt Ltd* v *Mudzingwa* 1999 (1) ZLR 243 (S) *Olivine Industries (Pvt) Ltd* v *Gwekwerere* SC 63/05, *Musanhu* v *Chairperson of Cresta Lodge Disciplinary and Grievance Committee*.

The applicant has not provided any reasons for approaching this court especially on the issue of the permit and amounts owing. I agree that without any good cause having been shown this court is obliged not to hear the applicant on those matters.

I have perused applicant's application and I am satisfied that although it is couched as a declaratory what the applicant is seeking before this court is an appeal or review against the decision of the respondents to refuse him renewal of a permit. He is challenging the amount said to be owing by the respondent. I am satisfied that the domestic remedies provided can adequately deal with the issues. This court cannot at this stage assume jurisdiction moreso where no reasons have been advanced of failure to exhaust domestic remedies.

That leaves this court with the issues pertaining to the validity of S.I 52/15 and whether the levies charged are in contravention of the Water Act and s 77 of the Constitution.

The applicant argued that because the respondents failed to follow the procedures as laid out under the law in enacting S.I 52/15 such Statutory Instrument should be declared void and a nullity. In support of this submission the applicant relied on a letter written by Borrowdale Rate Payers and Resident's Association's lawyers to the first respondent. The applicant has not

alleged that he is a member of that Association. Such association validly raised the issue of right to water as provided for under s 77 of the Constitution. Section 77 provides:

> "Every person has the right to –
> (a) Safe, clean and portable water,
> and
> (b) …….
> And the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right."

The applicant has access to water and I have not read in his papers that he does not. At this stage I cannot say the applicant has a right to bring an application on behalf of the Borrowdale rates payers and Residents Association moreso in the face of a pending challenge by the Association. I am of the view that the applicant has failed to show that he has *locus standi* to bring the complaint on behalf of the Association. The applicant has failed to demonstrate how his right to water has been violated in terms of s 77 of the Constitution. Again the right to provide water is legislated to the state and not to applicant. Applicant cannot purport to take over the state responsibility to provide clean water to its citizens.

The applicant has challenged the legality of S.I 52/15 on the basis that stakeholders were not consulted before its enactment. The respondents on the other hand insisted that all procedures were followed in enacting the statutory Instrument. The letters attached by the applicant to the application constitute hearsay. There is need to ventilate the correct facts by way of trial. There is no evidence before me that procedures were not followed. I am also of the view that this was apparent to the applicant at the time of instituting the application. The applicant should have realized that this was not a matter where he could have proceeded without calling *viva voce* evidence. Therefore on that basis the court has no option but dismiss the point.

A court can declare a Statutory Instrument void on the basis that it was not within the authority delegated by Parliament. See PS Atiyah in his work *Law and Modern Society* at P 131. Non-compliance with the provisions of the Act also renders a Statutory Instrument invalid. The applicant argued that S.I 52/15 is invalid as it failed to comply with s 119 of the Water Act. Section 119 (1) provides:

> "1. The Minister may, in consultation with the National Water Authority, make regulations providing for all matters which by this Act are required or permitted to be prescribed or which, in his opinion, are necessary or convenient to be prescribed for carrying out, or giving effect to, this Act.
>
> 2. Regulations made in terms of subs (1) may provide for –
>
> (a) the manner of issue, amendment or withdrawal … and the fees to be charged in connect therewith."

In terms of s 119 the Minister is required to consult with the National Water Authority. There is no obligation to consult with other stakeholders like the applicant. The National Water Authority admitted that it was consulted when S.I 52/06 was brought into effect. The applicant has thus failed to show that no consultation was done between the Minister and the National Water Authority.

Consequently I am of the view that the applicant has failed to lay a basis for the challenge.

Accordingly the application is dismissed with costs.

Honey & Blanckenberg, applicant's legal practitioners