GLOBAL PARENTAGE SERVICES (PVT) LTD
t/a GLOBAL DNA ZIMBABWE
versus
HEALTH PROFESSIONS AUTHORITY OF ZIMBABWE
and
MEDICAL LABORATORY & CLINICAL SCIENTISTS COUNCIL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 29 May 2022

Date of judgment: 19 October 2022

Opposed application

Mr *T. Maanda*, for the applicant
Mr *F. Manyuchi*, for the first respondent
Ms *C. Tsikira*, for the second respondent

MAFUSIRE J

[1] Tinashe Mugabe, through the applicant, has commanded attention in the recent past. His name has been synonymous with paternity results from DNA testing. Accounts or videos of couples in dispute or doubt about the parentage of some offspring have been posted in the media. DNA results from some paternity tests would invariably put to rest any such disputes or doubts. Docudramas, commentaries, sketches, jokes, anecdotes and the like have been made about Tinashe Mugabe's activities, invariably generating much controversy and occasionally ruffling some feathers. The respondents stopped him. They first suspended his operations and then went on to cancel the applicant's certificates of registration.

[2] In this application the applicant seeks inter-related declaratory orders. It wants it declared that it is not a health institution as defined by the Act; that it does not fall under the regulation of the respondents and that the purported cancellation of the certificates of registration and the suspension of its operations are void. In the alternative, the applicant seeks the setting aside of the suspension of its certificate of registration and operations on the

basis that due legal process was not followed. Costs are sought on the scale of legal practitioner and client.

[3] The material facts are common cause or undisputed. In fact, out of expediency following some distressful development affecting one of the counsel to this case just before the start of oral argument, it was agreed that the matter would be determined on the basis of the papers filed of record. This was on the understanding that all the relevant background facts had been sufficiently laid before the court. I agreed, but on condition that counsel could be recalled if I felt oral argument on any aspect was necessary. The undisputed facts are these. The applicant is a duly registered company. It is Tinashe Mugabe's *alter ego*. He is a director. The respondents are, colloquially, the watchdog of the various health professions in this country. Both are corporate bodies set up by the Health Professions Act [*Chapter 27:19*] ("***the Act***"): the first respondent in terms of s 4, and the second respondent, in terms of s 49. The first respondent has the power and mandate, among other things, to co-ordinate and integrate the functions and operations of the health professions. The second respondent's remit is, among other things, to regulate, control and supervise all matters affecting, among others, the manner of the exercise of such professions and callings as medical laboratory scientists, medical scientists and State certified blood transfusion technicians, among others.

[4] The parties say the applicant is in the business of DNA testing. According to the respondents, this involves the collection of human samples such as blood, tissue, hair, fingernails or teeth. DNA testing is a scientific process that, among other things, identifies the chromosome structure in tissue. But apparently the applicant does not itself do the actual testing. It is done in laboratories elsewhere. The applicant is a mere collection site. After the applicant had started its operations, the first respondent instructed it to get registered as a health institution so that it could continue to operate procedurally. The applicant was also informed that it had to employ a medical laboratory scientist. A medical laboratory scientist falls in one of the professions which, among other things, have to be registered with the second respondent for control and supervision purposes. The applicant was sceptical that its business required such registration as demanded by the respondents. It did not believe it was such a health institution as would be required to be registered in terms of the Act and to employ a medical laboratory scientist. Nonetheless, in order to avoid problems, it registered

with the first respondent as a collection site. To be compliant, it employed or engaged one Mercy Chimhundu ("***Chimhundu***") as the medical laboratory scientist. Chimhundu was registered with the second respondent and was issued a practising certificate as a general medical laboratory scientist in November 2020. The applicant was registered with the first respondent and was issued with a registration certificate as a health institution in February 2021.

[5] Problems soon arose. The second respondent took issue with the way the applicant was delivering to its clients the results of their DNA tests. Most of those results were being delivered and published in the public domain, including the print media, radio and television services as well as the applicant's own YouTube channel. The applicant actually ran a television show for live DNA results. The respondents considered such conduct unethical and in violation of the respondents' patient charter that protects client confidentiality. The charter, under the heading 'Confidentiality', provides that all communication and other records relating to a patient's care are to be treated as confidential unless the release is authorised by the patient himself / herself, or is done on medical grounds in the patient's own interests, or by due legal process. One major bone of contention by the respondents was an article in the press, attributed to the applicant, alleging that 80% of the men in Zimbabwe were not the biological fathers of their children. The respondents considered such statistics as inaccurate and an incorrect reflection of the paternity patterns in the country. Furthermore, without the services of a biostatistician the respondents considered the applicant disqualified from issuing such statements to the press. They voiced concern with Tinashe Mugabe. They also approached Chimhundu as the registered covering practitioner. Tinashe Mugabe distanced himself as being the source of such a statement in the press. He wrote to the newspaper concerned demanding that the article be retracted. Chimhundu promptly tendered her resignation as the applicant's covering practitioner, citing the continued violation by the applicant of her own professional ethics.

[6] On the basis of Chimhundu's resignation, and relying on s 104(1)(a) of the Act which provides that the registration of a health institution remains in force until the occurrence of any material change in regards to the prescribed particulars of that institution, the second respondent wrote to the applicant on 20 September 2021 suspending its registration as a

collection site with immediate effect. In line with s 105 of the Act, the applicant was invited to make any representations it might wish to make on the matter. On the same day, the first respondent wrote to the police to inform of the immediate suspension of the applicant's registration and requesting that the police should ensure that the suspension of the applicant's operations would remain in force until it had secured a new registration certificate. The applicant reacted by practically disowning its status as a health institution. It rejected the notion that it had to register with the respondents in the first place or that it had to employ or utilise the services of a medical laboratory scientist. It accused the respondents of having unnecessarily compelled it to register in the first place. It proceeded to institute this application.

[7] In summary, the applicant's case is this. It is not a health institution as defined by the Act, or at all. It does not do any of the things that health institutions do, or are required to do. It registered with the respondents merely to stay out of trouble. Even if it was a health institution as contemplated by the Act, the closure of its business by the respondents was unlawful in that it was never afforded the chance to be heard before action was taken against it. Before its operations were suspended, it was never given the one-month notice period required in terms of s 105 of the Act. As such, a number of rights afforded to a person in its position by the Constitution and some pieces of legislation under it, were violated. These include the right to the rules of natural justice as prescribed by s 136 of the Act. In terms of this provision, before the respondents can exercise any function with an adverse effect on the practice or rights of any health practitioner, it must observe the rules of natural justice by affording the affected party the opportunity to make representations. The other rights or freedoms that the applicant alleges were breached are the right to administrative justice in terms of s 68 of the Constitution, as read with s 3 of the Administrative Justice Act [*Chapter 10:28*], and the freedom to choose and practice any profession, trade or occupation as guaranteed by s 64 of the Constitution.

[8] The respondents vigorously oppose the application. Distilled, their main ground of opposition is that the applicant is a health institution within the meaning of the Act. It is one required to be registered with the first respondent and one which ought to have a covering health practitioner who himself / herself must be registered with the second respondent. The

collection of human DNA samples must be done by a health practitioner. It requires specialised skills. It involves the drawing of blood, hair, teeth, fingernails and tissue from internal organs. Chimhundu was resident in Mutoko. In her absence, the applicant usually called a medical doctor or nurse to collect the samples. This shows the applicant's awareness of the need to employ properly qualified medical personnel for its business. The Act tasks the respondents with the responsibility to assist in the promotion of the health of the population of the country. They should safeguard the public against unethical practice and unsafe methods of collection of specimen by non-medical practitioners. The resignation of Chimhundu constituted such a material change in the registration particulars of the applicant as to warrant the suspension of the applicant's operations and the subsequent cancellation of its registration following its failure or refusal to regularise its position.

[9] The respondents further argue that none of the applicant's rights to administrative justice was violated. The Act prescribes a one-month notice period for the making of representations, if any, before the cancellation of the registration of any health institution or the variation of any condition of registration. This notice was duly given. The applicant's registration was subsequently cancelled because it did not follow up on its rights. The Act does not provide for any notice period before a suspension of the operations of a health institution. The respondents have the power to suspend. The situation is akin to that which obtains in labour matters. An employer can suspend pending dismissal. At any rate, in s 86 the Constitution permits limitations on the fundamental rights and freedoms given by it in terms of a law of general application in the interests of, among other things, public health.

[10] The first respondent has raised a technical objection that a declaratory order as sought by the applicant is incompetent because none of the averments in the founding affidavit meets the requirements for such a relief. It is further argued that the applicant has not demonstrated that the right it is seeking to have determined exists in the present circumstances. On this basis the first respondent prays for the dismissal of the application. But it has been difficult to understand this objection. Plainly, it should not be one to detain the court. With respect, it is manifestly one of those frivolous objections lawyers are wont to raise as a matter of fashion: see *Telecel Zimbabwe (Pvt) Ltd v Postal & Telecommunications Regulatory Authority of Zimbabwe & Ors* 2015 (1) ZLR 651 (H), at p 659, or as a mandatory ritual: see *Rufasha v*

Bindura University & Ors 2016 (2) ZLR 668 (H), at p 669. The applicant says it seeks the *declaratur* in terms of s 14 of the High Court [*Chapter 7:06*]. Obviously, an application for relief under this provision must demonstrate more than mere academic interest. The court does not decide abstract or hypothetical questions: see *Adbro Investments Co Ltd v Minister of the Interior & Ors* 1961 (3) SA 283 (T) at p 285D, and *Johnsen v Agricultural Finance Corp* 1995 (1) ZLR 65 (S). The application must show the existence of some tangible and justifiable advantage to the applicant. It must demonstrate an interest in having the applicant's existing, future or contingent right or obligation determined, even if consequential relief may not be claimed upon such determination. In the present case, the applicant wants it declared that it is not a health institution as contemplated by the Act. It wants to resume its operations unhindered by the respondents. It further seeks relief consequent upon such determination. The application seems such a classical case for a *declaratur*. I dismiss this objection for lack of merit.

[11] The applicant has an objection of its own. It alleges that the second respondent is improperly before the court because its purported opposing affidavit is simply dated but not sworn to. It is also said that the certificate by the commissioner of oaths mentions that the affidavit was only signed but not sworn to. It is necessary to examine this. The second respondent's opposing affidavit begins thus:

> "I the undersigned **Agnes Chigora** do hereby make oath and swear as follows:"

After responding *seriatim* to the averments in the founding affidavit, the opposing affidavit ends thus:

> "THUS, DATED ON THIS 19TH DAY OF NOVEMBER 2021
>
> SIGNED ____[*Signed*]_____
>
> BEFORE ME ____[*Signed*]_____
> COMMISSIONER OF OATHS"

[12] It should amaze that such a layout should form the foundation of an objection in the regards mentioned by the applicant. The second respondent argues as much. In all earnestness, legal practitioners are exhorted to treat litigation as serious business and should

refrain from majoring in pettiness. Litigation is not a game of wits. It is a serious legal process that is designed to solve serious social disputes. Whilst lacking in precision in the formalities of signing such a sworn statement as an affidavit, nevertheless, the second respondent's opposing affidavit is not fatally defective. The applicant's own objection is also dismissed for lack of merit.

[13] On the merits, the matter turns on what the Act says about health institutions and health practitioners regarding the manner of their operation. It defines a "health institution" as:

> "(a) any hospital, clinic, medical laboratory, consulting room or other premises or part thereof which is used by a health practitioner for any purpose connected with the diagnosis, treatment, mitigation or prevention of any illness, injury or disability or abnormal physical or mental state or the symptoms thereof in human beings; or
>
> (b) any premises in or which a pharmacist practices or carries on business as such; or;
>
> (c) any premises in or on which any medicine, as defined in the Medicines and Allied Substances Control Act [Chapter 15: 03] is manufactured;" [*underlining for emphasis*]

[14] Plainly, the applicant and its activities cannot have been the focus of this Act. The applicant is not a hospital. It is not a clinic. It is not a medical laboratory. It is none of all those listed institutions. Furthermore, all the listed institutions are said to be health institutions, not merely because they are a hospital, a clinic, a medical laboratory and the like, but also if they are used by a health practitioner, not for any purpose, but for a purpose connected with the diagnosis, treatment, mitigation and prevention of any illness and other ailments as might afflict persons. The applicant does none of all these. It merely collects DNA specimen for testing elsewhere. The respondents registered it as a mere collection site. The respondents argue that the applicant is a health institution because it deals with human tissue. They say it must be collected by properly trained health personnel who employ their skill and expertise to avoid contamination by germs or bacteria which may influence the outcome of the result. In counter, the applicant argues that there is no such requirement in the Act and that, at any rate, in this day and age, DNA sampling and testing is now so commonplace and easy that there are even self-testing DNA kits which enable anyone to do it by themselves. The applicant's position is the more plausible and persuasive. I agree with it. There is simply nothing in the Act that supports the respondents' argument that the collection

of human specimen for DNA testing has to be done by a medically trained person or a laboratory technician. It just does not sound correct that one needs a doctor or a scientist to trim one's toenails or fingernails, pull one's strand of hair or eyelash, peel off one's skin, or spit one's saliva in a container to send for DNA sampling. The applicant is merely a collection site.

[15] The respondents urge the court to adopt a purposive approach to interpretation so as to find that the intention of the legislature was that such matters should not be left to untrained persons in the interests of public health. However, this would be stretching the rules of statutory construction to absurd proportions. A court may resort to guides to statutory interpretation, or 'canons of construction' if there is an ambiguity in the piece of legislation under consideration. The law may not yet have authoritatively established any complete hierarchy among such canons of construction: see *Tzu-Tsai Cheng v Governor of Pentonville Prison* [1973] 2 All ER 204, at 212h. However, the 'golden rule' of statutory interpretation is universally the first and most elementary rule of construction. Words in a statute are to be understood in their ordinary and natural meaning. Nothing is to be added unless the words are at variance with the clear intention of the legislature as gathered from the statute itself, or they render a manifest absurdity or some repugnance: see *Endevour Foundation & Anor v Commissioner of Taxes* 1995 (1) ZLR 339 (S); at p 356F – G and *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S), at p 264E. Otherwise it is a *strong* thing to read into a piece of legislation words which are not there, and in the absence of clear necessity, it is a *wrong* thing to do: see *Thompson v Goold & CO* [1910] AC 409, at 420. Nothing in the Act justifies the stretching of the definition of "health institution" to include the applicant's premises or activities.

[16] The respondents further argue that having seen or accepted the need to register as a "health institution" and to employ a covering practitioner in the first place, the applicant cannot now turn around and purport to disown such status. It cannot approbate and reprobate. To approbate and reprobate is to take up two positions which are inconsistent with each other, to blow hot and cold: see *Hlatshwayo v Mare & Deas* 1912 AD 243, at p 259. However, from the facts, the applicant has not been approbating and reprobating. Plainly, it has been a case of father hyena and mother hyena accusing their offspring of smelling like sheep and

proceeding to eating it. The applicant did not register as a health institution or employ Chimhundu out of its own volition. The respondents forced it to do so. That conduct cannot bind the court.

[17] The conclusion reached in this judgment, that the applicant is not a health institution within the meaning of that term in the Act, puts paid to any other point of contention in this matter. It becomes unnecessary to render a determination on them. The respondents simply exercised powers that the Act does not give them. It may well be that the applicant's activities require proper regulation. But if there should exist some other law providing for such regulation, it has not been pointed out to the court. The Act is certainly no such law. The applicant is entitled to the main relief prayed for, namely that it is not a health institution within the meaning of the Act. However, it would be manifestly contradictory to grant the first leg of the second prayer, namely that the cancellation of the applicant's certificates of registration was void. If it is not a health institution, then none of the requirements for health institutions as prescribed by the Act, including the need to register with the respondents, applies to it. On the question of costs on the higher scale of legal practitioner and client, there has been no proper justification laid out for this special order of costs.

[18] In the result, the following orders are hereby granted:

i/ The applicant is not a health institution as defined by the Health Professions Act [*Chapter 27:19*].

ii/ The applicant does not fall under the control of the respondents in terms of the Act aforesaid.

iii/ The suspension of the applicant's operations by the respondents in September 2021 is hereby set aside.

iv/ The respondents shall pay the costs of suit jointly and severally, the one paying, the other to be absolved.

19 October 2022

Maunga Maanda & Associates, applicant's legal practitioners
Scanlen & Holderness, first respondent's legal practitioners
Muvirimi Law Chambers, second respondent's legal practitioners