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HC 3744/05

ASSOCIATED NEWSPAPERS OF ZIMBABWE
versus
THE MEDIA INFORMATION COMMISSION

HIGH COURT OF ZIMBABWE
MAKARAU J
Harare, 28 November 2005 and 8 February 2006

Opposed Application

Mr *A.P deBourbon*, for applicant
Ms *Chizodza*, for respondent

MAKARAU J: On 28 July 2005, the applicant filed a court application in terms of Order 33 of the Rules of the High Court of Zimbabwe, 1971. The application was for a review of the proceedings and decision of the respondent, handed down on 18 July 2005, denying the respondent registration as a media service provider in terms of the Access to Information and Protection of Privacy Act, [*Chapter 10:27*]. The grounds given in the application for the review were procedural irregularity and bias on the part of the Chairperson of the respondent.

The application was opposed with the alleged procedural irregularities denied and bias on the part of the Chairperson of the respondent particularly denied.

BACKGROUND

The dispute between the parties has a drawn out history before these courts.

In September 2003 the applicant applied to the respondent for registration as a media service provider. The application was declined. An appeal against the decision declining registration was noted to the Administrative Court, which ruled against the respondent and gave certain directions in its order. The respondent in turn appealed to the Supreme Court against the decision of the Administrative Court. After considering the appeal, the Supreme Court set aside the decision of the

Administrative Court as well as the refusal by the respondent to register the applicant as a mass media service provider. In its order, the Supreme Court ordered the respondent to consider *de novo* the application for registration by the applicant.

In arriving at its decision to remit the application to the respondent for consideration *de novo,* the Supreme Court made a specific finding that the proceedings of the respondent were "voidable" (void"), on the grounds of bias on the part of the Chairperson of the respondent. It was the Superior Court's finding that the Chairperson of the respondent had made certain utterances and remarks about the applicant that were likely to make the applicant and all reasonable men apprehensive that the applicant would not receive a fair hearing from a commission chaired by him.

THE ISSUE

The dispute between the parties has regrettably been clouded by allegations of political machinations on the part of the respondent. The history of the litigation between the parties, the use of unfortunate language where the respondent alleges that it considered the applicant's application whilst still smarting from certain allegations leveled against by the applicant all raise unnecessary dust that tends to cloud the real dispute between the parties. Matters have not been helped by the manner in which the parties have proceeded to file papers in this matter, an issue that I shall revert to in detail shortly. The impression created by the litigation between the parties is that they are locked in a deadly legal battle in which no party will take prisoners. Shorn of the extraneous matters, the issue that falls for determination in this application is in my view relatively simple. It is whether, after the specific finding by the Supreme Court that the Chairperson of the respondent was biased against the applicant, the decision taken by the respondent under the guidance of its

Chairperson, denying the applicant registration, avoids the stain of his bias or is tainted by same.

LEAVE TO FILE ADDITIONAL AFFIDAVITS

Before dealing with the merits of the manner, as indicated above, I must rule on the applications by both parties to have admitted additional affidavits that were filed after the answering affidavit.

Rule 235 of the Rules of the High Court of Zimbabwe 1971, specifically provides that after an answering affidavit has been filed, no further affidavits may be filed without the leave of a court or a judge. Notwithstanding this clear pronouncement in the rules, the respondent filed on 9 October 2005, without prior leave, a supplementary affidavit deposed to by its Chairperson, introducing an averment that it alleged its erstwhile legal practitioners had omitted in the founding papers for no apparent reason. It was averred in the affidavit that the applicant had noted an appeal against the decision of the respondent of 18 July 2005 to the Administrative Court and as such, it was prematurely bringing the same decision under review in this court. In turn, the applicant responded to this supplementary affidavit by filing its own supplementary affidavit, again without leave having been sought or granted. In the affidavit, the applicant denies that the filing of the appeal precluded it from approaching this court on review. For good measure, the applicant filed an affidavit by one Jonathan Maphenduka without any preamble or explanation. Jonathan Maphenduka was apparently a member of the respondent at the time the decision to deny the applicant registration was made. He has since tendered a letter in which he resigns from the respondent. The purport of his affidavit was to suggest that during the proceedings of the respondent concerning the applicant's application for registration, members of the respondent were initially of the view that there was no

basis for denying the application. The respondent altered its position later to deny the application after persuasion by one of the commissioners; it is suggested in the affidavit.

Leave to admit the above three affidavits was applied for at the commencement of the hearing. I shall deal with each of the affidavits in turn.

Regarding the respondent's supplementary affidavit, no explanation is given for the omission of the averment made in the affidavit from the opposing affidavit. The respondent alleges that its erstwhile legal practitioners omitted the averment for no reason. No affidavit has been filed from the retiring legal practitioners explaining the alleged default. Further there is no explanation by the respondent's chairperson as to why he did not observe the omission at the time he deposed to the answering affidavit.

Leave to file additional affidavits cannot be had for the asking. The court will insist on the observance of its rules regarding the sequencing of affidavits to be filed in an application for uniformity of practice and certainty in the system, unless in the view of the court, justice will miscarry. In particular, the court will not readily grant leave to file an additional affidavit to deal with facts that were available to the parties at the time the permitted affidavits were drawn up and deposed to. Again the court will not readily grant leave to file additional affidavits that seek to bring in a new cause of action or defence where the facts giving rise to such was available to the parties at the time of the filing of the traditionally recognized affidavits.

The reason given for leave to file the supplementary affidavit by the respondent is far from impressive. The alleged omission by its retiring legal practitioners may have carried weight with me if some prejudice would be occasioned the *respondent* if the facts in the supplementary affidavit were not before me.

It is my view that the respondent will not be prejudiced by the exclusion of the supplementary affidavit as *lis pendens*, or more correctly, the obligation to exhaust domestic remedies that it seeks to raise in the affidavit is not an ouster of this court's jurisdiction. The common law position recognizing that this court has inherent jurisdiction to withhold or exercise its jurisdiction where the matter is pending before another tribunal is restated in section 7 of the Administration of Justice Act [*Chapter 10:28*].

The factors taken into account by this court in withholding its jurisdiction to allow domestic remedies to expend themselves have been discussed by this court in several cases. A number of authorities discussing the issue are to be found in the judgment by Gillespie J in *Zikiti v United Bottlers* 1998 (1) ZLR 389 (H), which judgment I find clearest on the issue to date.

In *casu,* in view of the long drawn out litigation between the parties, and the fact that the application is in essence not opposed on the merits, it appears to me remiss of this court to entertain withholding its jurisdiction merely because some other relief is available to the parties. That has not presented to me to be the basis upon which this court has in previous decisions withheld jurisdiction.

Thus, it is my finding that even if I had admitted the respondent's supplementary affidavit, I would not have withheld my jurisdiction in the circumstances of this matter.

In my view, insufficient grounds have been laid for the admission of the supplementary affidavit by the respondent and further that the exclusion of the facts raised therein will not occasion any prejudice to the respondent due to my explained attitude to the issue of jurisdiction in this matter.

The supplementary affidavit filed by the applicant meets the same fate as the respondent's supplementary affidavit since it was filed to respond to issues raised by the respondent after the answering affidavit.

The affidavit by Jonathan Maphenduka is not relevant to the issue before me. To his credit, Mr *de Bourbon* who appeared for the applicant did not push for the admission of the affidavit nor did he seek to rely on the allegations raised in it. I will accordingly refuse leave to have it filed.

AD THE MERITS

It is common cause that the Supreme Court did find that the Chairperson of the respondent made utterances and remarks that were likely to raise reasonable apprehension that the applicant would not receive a fair hearing form the respondent with the participation of the chairperson in its proceedings. Thus, the Supreme Court did not find actual bias on the part of the respondent's chairperson but voided the decision of the respondent on the basis of perceived bias. That a finding of perceived bias is sufficient at law to void a decision taken by the affected legal persona is not open to debate in this court not only because the Supreme Court made a pronouncement on it but because it is the correct position at law and is unassailable in any *fora*.

The above in my view ends the inquiry before me. The finding by the Supreme Court on the question of bias is not open to further debate or argument in this court or in any other court. Both parties to the dispute are issue estopped by the pronouncement of the Superior Court on the issue. This is trite. Ms *Chizodza* for the respondent conceded the point and in my view, her concession was well made. Her concession in this regard had the effect of withdrawing the opposition to the

application on the merits and as observed elsewhere above, the application in essence because unopposed on the merits.

Thus, the only conclusion I can come to in the circumstances of this matter is that the decision of the respondent cannot stand as it was rendered void by the participation of the Chairperson in its making after he had been found to be biased against the applicant for the purposes of the law.

It must be set aside.

In view of the decision I have come to above, and especially in light of the properly made concession by Ms *Chizodza*, it appears to me unnecessary that I deal with the other two grounds of review raised by the applicant.

The applicant however submitted in addition that in view of the fact that the Chairperson of the respondent sat and considered the applicant's application with the other members of the respondent, I must order that the commission as presently constituted is now disabled from validly considering the applicant's application as their decision will be tainted by the bias of the chairperson as found by the Supreme Court. There is merit in the submission of the applicant in this regard and the respondent is well advised to take this on board when next dealing with the applicant's application. I however do not have the power to order the appointment of a new commission as that issue is not before me and the appointing authority is not before me. I cannot make an order binding a party that is not before me without first affording that party the right to be heard. I further decline to give directions to any panel that will be put in place to determine the application, as this will in my view amount to judicial interference in an administrative function.

In the result, I make the following orders:

1 The decision by the respondent of 18 July 2005 is herby set aside.

2 The respondent is to consider the applicant's application *de novo.*

3 The respondent is to bear the applicant's costs.

Gill Godlonton & Gerrans, applicant's legal practitioners
MV Chizodza-Chineunye, respondent's legal practitioners