HAINGATE INVESTMENTS (PRIVATE) LIMITED
versus
THE MINISTER OF LANDS, AGRICULTURE AND RURAL SETTLEMENT N.O
and
THE PERMANENT SECRETARY (N.O) MINISTRY OF LANDS,
AGRICULTURE AND RURAL SETTLEMENT

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 2 October, 2019 & 1 November 2019

Opposed Application

M Ndlovu, for applicant
C Siqoza, for the respondents

CHIKOWERO J: This is an application for a declaratory order. The amended draft order reads:

"IT IS ORDERED THAT:

1. The communication sent by the respondents to the Brazilian Embassy deeming the applicant ineligible for appointment as an agent and registered Zimbabwean dealer in the International More Food Programme be and is hereby declared unlawful and irregular.
2. The 1st and 2nd respondents shall issue a written revocation of the written communication to the Brazilian Embassy and to all parties to whom they copied their unlawful and irregular communication within 5 days of this order.
3. 1st and 2nd respondents shall pay the applicant's costs."

I granted the application in terms of the amended draft order after listening to the parties' oral submissions.

These are the reasons for that decision.

THE APPLICANT'S CASE

It is a private limited company duly incorporated as such in terms of the laws of Zimbabwe.

Applicant complies with the tax laws of this country. The Tax Clearance Certificate for the year ended 31 December 2018, issued by the Zimbabwe Revenue Authority, was placed before me.

Applicant successfully went through a tender process run by the Zimbabwe Government through the respondents in respect of the More Food for Africa Programme.

The programme is a diplomatic arrangement between the Governments of Zimbabwe and Brazil. It entails the supply of agricultural equipment from Brazil to Zimbabwe.

In Zimbabwe the programme is run by the respondents.

Zimbabwean companies who win the tender to participate in the programme enter into individual contracts, as international dealers, with their Brazilian counterparts.

The latter supply agricultural equipment to Zimbabwe through the former. The Zimbabwean companies, as agents of the Brazilian suppliers, deliver the equipment to end users in this country as well as, among other responsibilities, servicing that equipment and empowering the locals with information on using the machinery.

Applicant entered into contracts with a number of Brazilian companies. It thus participated in the first phase or tranche of the programme. I was told that the Brazilian companies were pleased with applicant's performance.

More equipment was set to be sold and delivered to Zimbabwe under the second phase of the programme.

This was when applicant discovered, through its Brazilian counterparts, that the respondents had written a damning letter about applicant to the Brazilian Embassy. That Embassy had in turn communicated the respondent's position to the Brazilian companies.

Applicant attached the letter from the Brazilian Embassy, obtained though the Brazilian companies. It reads:

> "Republic Presidence
> Civil House
> SPECIAL SECRETARY FOR AGRO DEVELOPMENT PAC/INTERNATIONAL AND NATIONAL NOURISHMENT
>
> North Bank Sector (SBN), Square 1 block D
> 3rd Floor, Development Palace Building District ASA North, Brasilia/Dr CEP
> 700 57-900
> Telephone : (61) 2020-0140/2020 0096
>
> Trade No. 39/2018/PAC-PMAI/SEAD/CC-PR
> NUP: 55 000 0003045/2017-84
>
> To the Presidents of the entities Industry Representatives
>
> Subject: Programme More Nourishment International-Considerations Zimbabwe
>
> Esteemed,

> Greetings, I come through this to emphasise some points on relations to an official communication received from Zimbabwean Government, asking for continuation to the 2nd tranche process, Brazilian companies don't use one of the local dealers, in the case of HAINGATE Company, considered as unacceptable by the Government partner of Zimbabwe. The Zimbabwean Government suggest that the Brazilian Companies who have these distributors work with the following options to substitute: Bain New Holland, Farme, Case International, Radzim, John Deere and Hastt. The process of selecting these companies is not an obligation, at one time the companies can suggest other distributors as dealers.
>
> The SEAD ask if the entities maintain contacts with Brazilian Companies selected for the 2nd trance according to the annexe;
> So as to give a solution to this issue shown by the country, if the case is necessary, SEAD suggests that we have a meeting in Brazil to discuss the issue.
>
> This Secretariat is available for any other explanations, linked to the programme More Nutrition International, telephone: (61) 2020-0140.
>
> Annexes: 1. Selected Companies for the 2nd trance – Zimbabwe (SEL NO. 0313338)
>
> With regards from."

The applicant submitted that its right to administrative justice was violated by respondents. They wrote to the Brazilian Government without hearing applicant's side of the story.

The result of the respondents' letter to Brazil, so said the applicant, was that the latter was frozen out of participating in the 2nd tranche of the programme.

RESPONDENTS' CASE

They denied writing to the Brazilian Government as alleged or at all.

Applicant failed to furnish them with copy of the offending letter to enable them to respond meaningfully.

The letter whose contents I have set out above does not assist the applicant at all. It is neither dated, bears no official stamp, is incomplete and does not reflect the author. It could have been written by anyone.

However, in opposing the application, the second respondent (who deposed to the respondents' opposing affidavit) made some telling statements in his opposing affidavit. I highlight them:

> "24. As indicated above, the Government of Zimbabwe is entitled to convey any complaints and conditions under its contract with Brazilian government. It is its contractual right to do so which right cannot confer a cause of action upon applicant.
>
> 25…

26…
27. Applicant is still free to contract with whomever it chooses. However the More Food for Africa programme is a government programme and government is entitled to impose any conditions in the contract. It is not a question of natural justice."

On 7 June 2018 respondents wrote to applicants' then legal practitioners as follows:

"All Correspondence should be addressed to
"THE SECRETARY"

MINISTRY OF LANDS,
AGRICULTURE AND RURAL
RESETTLEMENT
Ngungunyana Building
1, Borrowdale Road
Private Bag 7701
Causeway
Harare

Telephone: 706081/9
Fax: 734646
Telex: ZIMAGRIC:
22455ZW

07 June 2018

Tendai Biti Law
HMB Chambers
28 Rowland Square
Milton Park
Harare

RE: HAINGATE INVESTMENTS (PVT) LTD: MORE FOOD BRAZIL – ZIMBABWE PROGRAMME 2ND TRANCHE

Your letter dated 28 May refers,

I note that you have neglected or failed to produce the documents you rely on that show l wrote to the Brazilian authorities or the extensive contracts you say your client has executed with Brazilian companies.

Be that as it may the Government of Zimbabwe has contracts with Brazilian Exporters and it is free to stipulate whatever conditions it chooses in those contracts. More specifically, government is entitled to make those contracts conditional upon the appointment of agents of its choice. In my view, your client has no cause of action against government. (underlining mine for emphasis)

R J Chitsiko
SECRETARY FOR LANDS, AGRICULTURE AND RURAL RESETTLEMENT"

FACTUAL FINDINGS

This is a civil case.

An applicant is required to prove its case on a balance of probabilities.

To require proof beyond reasonable doubt would be wrong.

The correct approach is not to zero in on each piece of evidence, assess it in isolation, and thereafter make a pronouncement on whether the applicant has proved its case.

Instead, I considered the totality of the evidence, on record. See *Attorney-General* v *Paweni Trading Corporation (Pvt) Ltd* 1990 (1) ZLR 24 (S). I was satisfied that the evidence spoke to the respondents having written the letter to the Brazilian authorities "blacklisting" the applicant and suggesting that the Brazilian companies deal with a number of named Zimbabwean Companies. That l did not have the letter before me changed nothing. The respondents' letter of 7 June 2018, the highlighted portions of second respondent's affidavit and the common cause fact that applicant was excluded from participating in the 2nd tranche of the programme suffice to prove the applicant's case.

Further, even if l were to treat the "Brazilian" letter I have reproduced in this judgment as an anonymous correspondence, one cannot help but notice that it mirrors the 2nd paragraph of respondents' letter of 7 June 2018. That means, to me, that these letters have a common parentage. I find that the parent is respondents' "missing" letter which triggered this application.

THE LAW

On the same day that l heard this matter I had on the same roll a court application for review which raised the same legal issue as fell for consideration in the present matter.

Judgment in that matter was handed down on 23 October 2019.

It is found under the name *Dags Trading (Private) Limited* v *Regional Manager of Beitbridge Zimbabwe Revenue Authority, Commissioner of Customs and Excise Zimbabwe Revenue Authority, Commissioner General Zimbabwe Revenue Authority and Minister of Finance and Economic Development* HH 685/19.

I still stand by the legal pronouncements I made in that matter. Here too, the respondents' conduct of writing a letter to the Brazilian authorities, which letter adversely affected applicant's right to administrative justice, was unlawful and irregular.

Section 68 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 provides that:

> "68. Right to administrative justice.
> (1) every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."

Section 68 (3) (b) makes provision for an Act of Parliament giving effect to the right to administrative justice. That Act must impose a duty on the state to give effect to the right to administrative justice.

The constitutional right to procedural fairness includes the right to be heard before an administrative authority acts. Mr *Ndlovu* properly referred me to *Telecel Zimbabwe (Pvt) Ltd* v *Postal and Telecommunications Regulatory Authority of Zimbabwe and Others* 2015 (1) ZLR 651 (H) and *Mabute* v *Women's University in Africa and 2 Others* HH 698/15. In the latter case, the Court stated:

> "…It therefore cannot be disputed that the provisions of the Act incorporate the traditional rules of natural justice including the rule that a party should be heard before a decision adversely affecting its rights is taken, the *audi alteram partem* rule."

The Act of Parliament envisaged in s 68 (3) (b) of the Constitution is the Administrative Justice Act [*Chapter 10:18*].

Section 3 of that Act reads:

> "3 Duty of administrative authority
> (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interest or legitimate expectations of any person shall—
> (a) act lawfully reasonably and in a fair manner…"

I agree that this approach to the High Court for declaratory relief is procedurally proper. Section 4 (1) of the Act is wide enough to cover the procedure adopted by the applicant. It provides:

> "4. Relief against administrative authorities.
> (1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section three may apply to the High Court for relief."

I am satisfied that the conditions precedent to the grant of a declaratory order were satisfied. Similarly, I am satisfied that this is a proper case for the exercise of my discretion in terms of s 14 of the High Court Act [*Chapter 7:06*].

PRELIMINARY POINTS

Since the resolution of the Board of Directors was attached to the applicant's Answering Affidavit, Ms *Siqoza* properly abandoned the point that no evidence was put before me in the Founding Affidavit that George Hotera had the authority to depose to that affidavit on behalf of the applicant.

The second point taken *in limine* was not such at all. It was necessary that I analyse the merits of the matter in order to determine whether there was sufficient evidence to prove the applicant's case. It was not a preliminary point for respondents to argue that the non-production of the offending letter addressed to the Brazilian authorities meant that the applicant had no cause of action against the respondent. In the absence of that piece of evidence I was still required to determine whether the available evidence was sufficient to justify the relief sought. Indeed, Ms *Siqoza* was right, in my view, in abandoning this supposed second preliminary point as well.

THE SANCTITY OF CONTRACTS

The conclusion that I came to meant it became unnecessary for me to examine whether declaratory relief could also be availed on the basis of respondents' violation of the principle of sanctity of contract between applicant and the Brazilian companies relative to the 2nd tranche.

CONCLUSION

These are the reasons for the order that I made at the hearing.

Mutamangira & Associates, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners