

LYDIA MUTANDAVARI
and
CONWAY ZENGEYA
and
ELLIOT TAVASHURE
and
HENRY MADZORERA
and
PORAI SAMKANGE
and
ALEXANDER MUTSAI
and
EVE AGGOSSO
And
ALVA SENDERAYI
and
TAKUNDA MADZIVA
and
KENNETH RUONA
and
THOMAS LIBERTY MUPFUWAHUKU
and
PARMENUS TSANGA
and
AGNES CHOGA
and
TONDERAI MAPANZURE
and
TAKAYEDZA BONDERA
and
TAKAWIRA MUCHINERIPI CHIPAMAUNGA
versus
CITY OF KWEKWE
and
HEALTH PROFESSIONS AUTHORITY OF ZIMBABWE
and
MEDICAL AND DENTAL PRACTITIONERS COUNCIL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 2 January 2020 & 7 January 2020

Urgent Chamber Application

R. Mabwe with S.T. Farai, for the applicants
G.R.J. Sithole with C. Chigomere, for the 1st respondent
N. Tiyago, for the 2nd and 3rd respondents

MUSITHU J: This urgent chamber application was filed on 27 December 2019, with applicants, all registered medical practitioners seeking relief in the following terms:

“TERMS OF THE FINAL RELIEF

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. First Respondent be and is hereby prohibited from enforcing the resolution/by law requiring that Applicants pay RTGS29 400 for 2020 licences pending the determination of the application for a declaratory order under HC10368/19.
2. First Respondent is prohibited from interfering in whatsoever nature with the practice of the first to the 16th Applicants or ordering the stoppage of their work pending the determination of HC10368/19.
3. The first Respondent’s actions of pegging business licence practice fees against the Applicants without affording them administrative justice rights enshrined under s68(1) and (20) of the constitution of Zimbabwe is unconstitutional.
4. The first Respondent’s actions by law and/resolution requiring Applicants to pay RTGS 29 400 business fees is illegal, void and thus unenforceable.
5. The first Respondent shall pay costs of this suit on a legal practitioner client scale.

INTERIM RELIEF GRANTED

Pending the determination of this matter on the return date, the applicants are granted the following relief:-

- i) First Respondent be and is hereby prohibited from enforcing the resolution/by law requiring that Applicants pay RTGS29 400 for 2020 licences pending the return date.
- ii) First Respondent is prohibited from interfering in whatsoever nature with the practice of the first to the 16th Applicants.
- iii) First Respondent shall pay costs of suit”

The parties first appeared before me on 2 January 2020. *Mrs Tiyago* for second and third respondents asked to be excused from taking further part in the proceedings seeing as no substantive relief was sought against her clients. She was excused with the concurrence of the other two counsels. I postponed the matter to 7 January 2020 to allow the first respondent to engage counsel of choice, and to give parties an opportunity to discuss a settlement.

At the resumption of the hearing, the parties were still poles apart and opted to proceed to argument. The respondent raised five preliminary points which are, lack of urgency; relief sought based on misapprehension of imaginary harm; court cannot interdict a lawful process; failure to exhaust domestic remedies and that the relief sought was fatally defective. I shall revert to these after a brief exposition of the factual background.

On 19 December 2019, the applicants became aware that with effect from 1 January 2020 they were required to pay annual business licence fees of \$29 400 up from the \$300 in the past year. One such notification, dated 19 December 2019 was issued by first respondent to Dr Mupfuwahuku, the eleventh applicant herein. The notification requires payment to be made within thirty days. The applicants felt that the increase, determined by the first respondent without consulting them was ridiculously high and unreasonable. What made it more preposterous was that fellow professionals such as accountants were required to pay amounts as low as \$3 600 for the same period.

The applicants consulted with their lawyers who proceeded to challenge the decision of the first respondent through an application for a *declaratur*. The application was filed with this court on 27 December 2019 under case Number HC10368/19. The relief sought therein is couched as follows:

- “1. The Respondent’s actions of pegging business licence practice fees against the Applicants is an affront of the Applicants constitutional right to fair and prompt administrative justice as enshrined under s68(1) and (2) of the Constitution of Zimbabwe.
2. Any resolution and or by laws enacted at the behest of the respondent requiring applicants to pay business licences in order to provide medical services, dental services and or surgical services is

ultra vires the Urban Councils Act [Chapter 29:15], specifically s219 therefore and of no force and effect.

3. any resolution and or by laws referred to in paragraph 2 herein being thus of no force or effect is invalid, unlawful and thus null and void.
4. The first respondent shall bear costs of this application.”

Accompanying the urgent chamber application is a certificate of urgency which in paragraphs 3, 5 and 7 sets out the basis of urgency as follows:

- “3. First Respondent has the tendency of closing businesses for people who trade without such licences and there is a real likelihood that if Applicants fail to pay the said monies, their businesses will be closed effective 1 January 2020.
5. Applicants have swiftly protected their rights and there appears to be no other effective remedy in protecting their rights pending the determination of the application for declaratory.
7. The relief which the applicants seek, to have the 1st Respondent prohibited from requesting the 2020 business fees at RTGS 29 400 will be rendered hollow if this application is steered towards the ordinary roll”

I now proceed to deal with the preliminary points raised by first respondent.

URGENCY

Mr Sithole for first respondent submitted that the application was not urgent as the need to act arose as far back as 10 October 2019, when the first respondent placed a notice in a newspaper informing ratepayers of the proposed review of rates, fees service charges and tariffs for 2020. Another notice is alleged to have been placed in another newspaper on 27 October 2019. The notices further advised ratepayers that a copy of the schedule showing details of the proposed charges was available for inspection during normal office hours at the civic centre. As of the 11th October 2019, the applicants therefore had constructive knowledge of the proposed reviews and they ought to have raised their objections on that occasion. *Mr Sithole* sought to tender in evidence two extracts of the notices, but *Ms Mabwe* for the applicants challenged their authenticity. She argued that they did not show the issue dates and the respective newspapers from which they had been extracted. That threw their authenticity into doubt. The dates had been inserted in long hand. *Mr Sithole* undertook to avail the original newspapers from which the notices had been extracted. The originals had not been furnished as at the date of writing this judgment. *Mr Sithole* submitted that on 29 November 2019, the applicants had, through a representative made written

representations to the first respondent appealing for a downward review of the proposed fee. That letter made reference to a fee of \$27 000. *Mr Sithole* further submitted that as at 29 November the applicants were therefore aware of the applicant's position to review the business licence fees upwards. The applicants did not need to wait until 27 December 2019 to file both the present application and the application for a *declaratur*.

For the applicants *Ms Mabwe* argued that the need to act could not have arisen on 11 October or 29 November 2019, seeing as the first respondent had not yet complied with section 219 of the Urban Councils Act¹ (the Act) at that stage. The need to act could not have been triggered by the alleged notices of 10 and 28 October which were essentially proposals for the review of the business licence fees. Section 219 states that:

“219 Charges by resolution

(1) A council may, by resolution passed by a majority of the total membership of the council—

(a) fix tariffs or charges for—

(i) the supply of electricity or water or of refuse removal services; or

(ii) the conveyance of sewage or trade effluent in public sewers and its treatment at a sewage treatment works; or

(iii) any other services which a council may provide in terms of this Act;

(b) fix charges to be payable in respect of certificates, licences or permits issued, inspections carried out, services rendered or any act, matter or thing done by the council in terms of this Act;

(c) fix deposits to be paid in connection with any services provided by the council in terms of this Act:

Provided that in any local government area administered by a council or in such part of a council area as may be prescribed or as may be notified to the council by the Minister—

(a) notwithstanding anything to the contrary contained in this Act, no rents, charges, fees or deposits or any kind, other than charges, fees or deposits in connection with the supply of electricity, shall be raised or levied by a council in respect of any residential accommodation or services provided specifically to or in connection with any residential accommodation otherwise than by by-laws made or in force in terms of this Act;

(b) a council may, subject to the approval of the Minister, fix in any lease or agreement entered into by it the rents, charges, fees or deposits which shall be payable by the lessee in respect of the occupation of any premises.

(2) Before any tariffs, charges or deposits fixed in terms of subsection (1) come into operation a statement setting out the proposed tariffs, charges or deposits and any existing tariffs, charges or deposits for the same matters shall—

(a) be advertised in two issues of a newspaper; and

(b) be posted at the office of the council for a period of not less than thirty days from the date of the first advertisement in the newspaper.

(3) If a statement has been advertised in terms of paragraph (a) of subsection (2) and within the period of thirty days referred to in that paragraph objections to the proposed tariffs, charges or deposits are lodged—

¹ [Chapter 29:15]

(a) by thirty or more persons who are voters or who are users of the service to which the tariff, charge or deposit relates; or

(b) where there are less than thirty such users of the service concerned, by not less than fifty *per centum* of the number of such users;

such tariffs, charges or deposits shall be reconsidered by the council, together with the objections so lodged, and they shall not come into operation unless the resolution is again passed by a majority of the total membership of the council:

Provided that the council may in these circumstances, by such resolution, fix lower tariffs, charges or deposits than those objected to without further advertising.

(4)

(5) A resolution in terms of this section relating to any tariffs, charges or deposits which are provided for in any by-law shall not have the effect of introducing new tariffs, charges or deposits until the by-law concerned has been repealed or amended, as the case may be:

Provided that this subsection shall not apply in relation to the introduction of a special water tariff which is introduced to have effect during a period of a water shortage (underlining for emphasis).

Ms Mabwe argued that the first respondent ought to have complied with section 219 (2) of the Act which required it to prepare a statement setting out the proposed fees. Such a statement had to be advertised in two issues of a newspaper and posted at the offices of first respondent for a period of not less than thirty days from the date of the first advertisement. There was no proof of that having been done. Counsel further submitted that a resolution of the first respondent will not have the effect of introducing a new tariff until the by-law concerned has been repealed or amended in terms of section 219 (5). That, she further submitted, was not done in the present matter. She further submitted that the applicants objected to the proposed review of business licence fees as evidenced by the letter of 29 November 2019. First respondent did not respond to the letter. What prompted the applicants to approach the court on an urgent basis was first respondent's decision to send an invoice of \$29 400 to the 11th applicant, notwithstanding the pendency of the applicants' representations. *Mr Sithole* countered by submitting that section 219 needed to be read together with paragraph 17 of the second schedule to the Act, which gave first respondent powers to implement new business licence fees once a resolution was passed. The second schedule deals with the powers of the council. Paragraph 17 reads as follows:

“17. (1) Subject to subsection (5) of section *two hundred and eighty-two*, to make charges in respect of certificates, licences or permits issued, inspections carried out, services provided or any act, matter or thing done by the council in terms of this Act, including the requiring of a deposit in connection with any services provided by the council.

(2) In making charges in the exercise of the powers conferred by subparagraph (1) different charges may be made in respect of different certificates, licences or permits, inspections, services or other acts or different classes thereof.

(3)

I do not agree with *Mr Sithole's* submission that paragraph 17 of the second schedule precludes first respondent from complying with the requirements of section 219 (2) and (5). The

second schedule deals broadly with general powers of council, and must be read together with section 198 of the Act. Section 198 states that:

“198 General powers

(1) Subject to compliance with this Act and any other law, a council shall have power to undertake, carry out or carry on any or all of the acts and things set out in the Second Schedule.

(2) The Minister may authorize a council to do, carry out or carry on any act or thing which, in his opinion, is necessary or desirable that the council should be able to do, carry out or carry on, whether or not the act or thing is an extension of any power set out in the Second Schedule or elsewhere in this Act.

(3) Subject to this Act, a council shall have power to do any act or thing which, in the opinion or the council, is necessary for administering or giving effect to any by-laws of the council.”(underlining for emphasis)

I do not construe paragraph 17 as giving first respondent the discretion to implement a resolution without complying with section 219 (2) and (5) of the Act. In any event, as is clear from a reading of section 198, the general powers of council must be exercised, subject to compliance with the provisions of the Act. In my view, business licence fees are encapsulated under paragraph (b) of section 219 (1). Subparagraph (b) allows council through a resolution to “fix charges to be payable in respect of certificates, licences or permits issued...” Section 219 (2) sets out conditions to be complied with before any tariffs, charges or deposits fixed through a resolution can come into operation. Similarly, section 219(5) provides that a resolution made in terms of section 219 relating to any tariffs, charges or deposits which are provided in any by-law shall not have the effect of introducing new tariffs, charges or deposits until the by-law concerned has been repealed or amended. To hold, as suggested by *Mr Sithole*, that section 219(2) and (5) only applies to tariffs or charges referred to under section 219(a), is in my view taking a too restrictive approach bearing in mind that paragraph (b) of section 219(1) specifically refers to certificates, licences or permits.

I note that in his very first submissions on urgency, *Mr Sithole* argued that the need to act was triggered by the notices of 10 and 27 October 2019, which would have been issued in terms of section 219(2) of the Act. He cannot in the same breath then argue that there was no need to comply with section 219(5), which specifies that a resolution relating to any tariff, charges or deposits shall not have the effect of introducing new tariffs, charges or deposits until the by-law concerned has been repealed or amended.

Whether or not a matter is urgent is an exercise of discretion on the part of the judge. In *Econet Wireless (Pvt) Limited v Trustco Mobile (Proprietary) Limited & Another*², GARWE JA makes the following point on urgency:

“It is clear that in terms of Rules 244 and 246 of the High Court Rules the decision whether to hear an application on the basis of urgency is that of a judge. The decision is one therefore that involves the exercise of a discretion....”

I am persuaded that the need to act could not have arisen earlier than 19 December 2019, being the date first respondent invoiced applicants with the revised business licence fees before fully complying with the provisions of section 219. I accordingly find that there is no merit in the preliminary objection and it is hereby dismissed.

RELIEF SOUGHT SPECULATIVE

It was submitted on behalf of the first respondent that the relief sought by the applicants was speculative as it was based on a misapprehension of harm that was imagined by the applicants. The first respondent’s argument is premised on the postulation that the law does not allow it to close premises of defaulters. The only remedy at its disposal is the imposition of a fine in terms of section 7(2) of the Kwekwe (Trading) By-laws³. For the applicants it was argued that there was no legal basis for the first respondent to implement the new business licence fees without having complied with the law. *Ms Mabwe* submitted that the applicants could not rely on first respondent word that it would not close their practices or penalize them for not complying with the new fee regime. First respondent had already violated the law. The applicants harboured a reasonable apprehension that some enforcement measures would be invoked against them seeing as the first respondent had already invoiced one of their members, for the revised fee. There is merit in this submission. Written representations were made to the first respondent through the letter of 29 November 2019, which was not acted on. First respondent proceeded to invoice 11th applicant for an amount slightly higher than the amount referred to in the written representations. It did not deal with the applicants’ representations as envisaged under section 219(3), assuming that it had complied with the requirements of section 219 (2).

I find no merit in this objection and it is accordingly dismissed.

² SC-43/13 at page 14 of the judgment.

³ Statutory Instrument 101 of 2005.

THAT A LAWFUL PROCESS CANNOT BE INTERDICTED

It was argued on behalf of the first respondent that a judge cannot interdict first respondent from carrying out a lawful exercise of powers conferred by statute. *Mr Sithole* cited the case of *Judicial Service Commission v Zibani*⁴, as authority for this legal proposition. In that matter, PATEL JA enunciated the legal position as follows:

“A court of law has no power to stop the lawful and diligent performance of a constitutional process or constitutional obligation imposed upon the appellant on the basis of an alleged intention of the executive to amend the Constitution.

Generally speaking, it is not permissible for a court to interdict the lawful exercise of powers conferred by statute. See *Gool v Minister of Justice & Anor* 1955 (2) SA 682 (CPD) at 688F-G. This approach applies *a fortiori* where a court is called upon to interdict the lawful and *bona fide* performance of a constitutional duty....”⁵

Ms Mabwe on the other hand argued that the present matter is distinguishable from the *Zibani* matter which was concerned with a lawful constitutional process that the upper court did not find fault with. Similarly, if the first respondent in *casu* was seeking to enforce the provisions of the Kwekwe Trading By-laws, then the court would be constrained from interfering with a lawful process. It was further submitted that the purported resolution that the first respondent seeks to foist on the applicants did not comply with the law. I have already alluded to the legality of the process that gave birth to the new business licence fee structure when dealing with the preliminary objection on urgency. I am persuaded by the submission that once a finding is made that the first respondent exercised its powers unlawfully, then a court or a judge can interfere with that process. I find no merit in this objection and it is hereby dismissed.

FAILURE TO EXHAUST DOMESTIC REMEDIES

It was submitted on behalf of the first respondent that the applicants should have utilized the domestic remedies at their disposal before rushing to this court. *Mr Sithole* argued that the applicants ought to have sought relief from the Minister in terms of section 314 of the Act. Section 314 states that:

“314 Minister may reverse, suspend, rescind resolutions, decisions, etc. of councils

(1) Where the Minister is of the view that any resolution, decision or action of a council is not in the interests of the inhabitants of the council area concerned or is not in the national or public

⁴ SC-68/17

⁵ Page 13 of the judgment

interest, the Minister may direct the council to reverse, suspend or rescind such resolution or decision or to reverse or suspend such action.

(2) Any direction of the Minister in terms of subsection (1) to a council shall be in writing.

(3) The council shall, with all due expedition, comply with any direction given to it in terms of subsection (1)”

For the applicants, *Ms Mabwe* argued that section 314 does not accord the applicants the right or prerogative to approach the Minister in the first instance. The section gives the Minister the right to act *mero motu*, if he formulates a standpoint on a resolution, decision or action taken by council. She further submitted that this was an issue to be argued on the return date, or in the main application for a *declaratur*. I agree with this submission. Section 314 does not in my view directly confer a right on the applicants to approach the Minister with a grievance. Domestic remedies, when available, must be clearly outlined and capable of providing effective redress to the complaint⁶. It must not be left to the court or the parties to try and decipher whether or not they have been provided for. I find no merit in this objection and it is hereby dismissed.

RELIEF SOUGHT FATALLY DEFECTIVE

Mr Sithole submitted that the relief sought is fatally defective as the terms of the interim and the final relief sought are similar. The offending paragraphs are 1 and 2 of both the interim and the final relief sought. Counsel further submitted that paragraph 2 was too broad to be granted in its present form assuming the court was so inclined to grant the order. *Ms Mabwe* argued that the court has discretion to grant the order sought with necessary modifications. She referred to rule 240 of the High Court rules.

Rule 240 (1) provides that:

“At the conclusion of the hearing or thereafter, the court may refuse the application or may grant the order applied for, including a provisional order, or any variation of such order or provisional order, whether or not general or other relief has been asked for, and may make such order as to costs as it thinks fit”

In *Qingsham Investments (Pvt) Ltd v ZIMRA*⁷, CHIGUMBA J said of rule 240:

“We accept that we have the discretion conferred in terms of r 240 of the rules of this court to change the terms of the relief sought so this preliminary point, although it is upheld, is not necessarily fatal to the application before us. It goes to the question of urgency, and not to the merits of the application⁸.”

⁶ Makarudze & Ano v Bungu & Ors 2015 (1) ZLR 15 (H)

⁷ HH-207/17

⁸ At page 5 of the judgment.

I agree that it is entirely within the discretion of the judge to grant an order with appropriate modifications should that be necessary⁹. The preliminary objection is accordingly dismissed.

I find that there is no merit in all the preliminary objections raised and the matter should proceed to be argued on the merits.

Farai & Associates, applicant's legal practitioners
Mutatu & Partners, 1st respondent's legal practitioners
Scanlen & Holderness, 3rd & 4th respondents' legal practitioners

⁹ See also *Econet Wireless (Pvt) Ltd v Trustco Mobile (Proprietary) Ltd & Another* SC-43/13 at page 16.