REPORTABLE ZLR (5)

Judgment No. SC 6/08
Civil Appeal No 118/07

TRUST INSURANCE BROKERS v (1) THE MINISTER OF FINANCE (2) THE COMMISSIONER OF INSURANCE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, MALABA JA & GARWE JA
HARARE, JANUARY 15 & MAY 13, 2008

D M Campbell, for the appellant

No appearance for the respondents

ZIYAMBI JA: On 28 September 2005, the High Court sitting at Bulawayo issued (in favour of the appellant) a provisional order in the following terms:

> "TERMS OF FINAL ORDER SOUGHT
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:-
>
> 1. That section 14 of the Insurance (Amendment) Regulations 2005 (No.6) (Statutory Instrument 59/2005) be and is hereby declared to be null and void and of no force and effect.
>
> 2. That the respondents are to pay the costs of this application jointly and severally the one paying the other to be absolved.
>
> INTERIM RELIEF GRANTED
>
> Pending determination of this matter the applicant is granted the following relief:-
>
> 1. That the applicant is absolved from any obligation to register as an insurance broker under the provisions of section 14 of the Insurance (Amendment) Regulations 2005 (No.6) Statutory Instrument 59/2005).
>
> 2. That the second respondent is hereby interdicted from removing the name of the applicant from the register of Insurance Brokers as a consequence of any failure on the part of applicant to register itself as an insurance broker on or

before 1 October 2005 or from in any way treating the applicant as though it were no longer registered as a consequence of any such failure."

Thereafter, on 23 January 2007, the matter came before that Court for confirmation of the provisional order. This is an appeal against the order of the High Court discharging the provisional order.

The sole issue for determination by this Court is whether, in enacting s 14 of the Insurance (Amendment) Regulations 2005 (No 6) SI 59 of 2005 ("the Regulations"), the first respondent ("the Minister") exceeded the authority given to him by statute, namely, s 89 of the Insurance Act [Cap 24:07] ("the Act"). In other words, did the Act empower the Minister to enact s 14 of the Regulations?

Section 89 of the Act provides as follows:

"89 Regulations

(1) The Minister may make regulations prescribing anything which under this Act is to be prescribed or which, in his opinion, is necessary or convenient to be prescribed, for carrying out or giving effect to this Act.

(2) Regulations made in terms of subsection (1) may provide for -

(a) regulating the payment by registered insurance brokers in respect of insurance business placed with registered insurers;

(b) the information and returns to be supplied be registered insurance brokers to persons on whose behalf such insurance brokers have placed insurance business with registered insurers;

(c) the regulation and control of methods of obtaining or negotiating insurance business;

(d) the regulation, registration, licensing and control of insurance agents, the training and qualifications of such persons, the cancellations of licences issued to such persons or the withholding of the issue of licences to such persons;

(e) the fees to paid for registering persons, including societies, as insurers, for the inspection and copying of documents in terms of section seventy-seven, and for the registration and licensing of insurance agents;

(f) the establishment of advisory committees to advise the Commissioner on all matters relating to insurance and, in particular, to investigate and report to the Commissioner on any complaint or allegation in connection with insurance matters made in relation to an insurance agent, insurance broker, insurance company, society, co-operative insurance society or insurance association;

(g) the appointment of members to and the procedure at meetings of the advisory committee referred to in paragraph (f) and the functions, rights and privileges of such committees and their members, including the application, *mutatis mutandis*, of sections 9 to 13 and 15 to 19 of the Commissions of Inquiry Act (Cap 10:07) in relation to such committees and the rights and obligations of any person appearing or required to appear before any such committee;

(h) the form in which an insurer may inform an insured person, in terms of section eighty-three A, of his duty to disclose material facts and circumstances. (paragraph as substituted by Act 3 of 2004).

(3) Regulations made in terms of subsection (1) may provide for penalties for any breach thereof or non-compliance therewith:

Provided that no such penalty shall exceed a fine of level five or imprisonment for a period of six months or both such fine and such imprisonment."

The Regulations were enacted by the Minister acting in terms of s 89(1).

Sections 4 and 14 are set out below.

"Additional requirements relating to equity capital of insurers and insurance brokers.

4. An insurer or insurance broker, or applicant for registration as an insurer or insurance broker, shall comply with the following additional requirements for registration with respect to its equity capital –

(a) every insurer or insurance broker must have at least three shareholders;

(b) no individual or individual and his or her close relatives may own or control, directly or indirectly, more than forty *per centum* of the voting shares of the insurer, insurance broker or applicant;

(c) no part of –

(i) the minimum paid-up equity capital of the insurer or applicant insurer shall consist of borrowed funds;

(ii) the paid-up equity capital of the insurance broker or applicant insurance broker that is used to determine whether he or she qualifies for registration in terms of section 3(2) (iv) or (v) shall consist of borrowed funds."

"14. Every registered insurer, mutual society and insurance broker shall, no later than 1 October 2005, apply to be registered under the principal regulations as amended by these Regulations, and every such insurer, mutual society and insurance broker as fails to do so shall, with effect from that date, be deemed not to be registered".

It will be seen that section 4 imposes additional requirements for registration on insurance brokers already registered while section 14 obliges every registered insurance broker to apply for re-registration in terms of the Regulations. The penalty for failure to comply with section 14 is automatic de - registration.

Mr Campbell, on behalf of the appellant, contended that s 89(1) does not give the Minister the power to prescribe alterations to the qualifications and requirements laid down by Parliament in the Act for the registration of insurance brokers, nor does it confer on the Minister the power to de-register insurance brokers who are duly registered in compliance with the provisions of the Act.

There was no appearance on behalf of the respondents but the Minister's response, as expressed in his affidavit filed in the High Court as well as the heads of argument prepared on his behalf and filed of record, is that the Minister has, in effect, been

given unfettered powers to prescribe **anything** "which in his opinion is necessary to be prescribed" and that accordingly, the Minister acted within his powers when he enacted ss 4 and 14. The learned Judge in the court *a quo* was of the same view. He said at p 5 of the cyclostyled judgment:

> "In my view the provisions of s 89 enjoins (*sic*) the Minister with very wide powers. He may make regulations prescribing anything which needs to be prescribed under the Act or which, in his opinion, is necessary or convenient to be prescribed for carrying out or giving effect to the Act. Although what the Minister did was not one of the things listed in section 89(2) I do not believe that that list is exhaustive otherwise the legislature would not have reposed in him the power to prescribe anything which in his opinion was necessary to prescribe … since the Minister is enjoined (*sic*) with wide powers and discretion to prescribe anything which in his opinion is necessary or convenient to be prescribed it was within his powers, in my view, to act as he did."

Mr Campbell, however, submitted that despite the general nature of its terms the power given to the Minister in s 89(1) is not unlimited in its application. Firstly, it was limited to "anything which under this Act is to be prescribed" and nothing in the Act requires the Minister to prescribe anything more pertaining to the registration of insurance brokers than the forms and documents described in s 35(2). Accordingly, the power in s 89(1) to "prescribe anything which under this Act is to be prescribed" does not empower the Minister to require insurance brokers who are already registered in terms of s 35 to possess additional qualifications and to register again.

Secondly, he submitted, the power was limited to regulating only those things which in the Minister's opinion are "necessary or convenient to be prescribed for carrying out or giving effect to" the Act. Re-registration, he submitted is not in any way "necessary or convenient … for carrying out or giving effect to" the Act.

In response to the Minister's averment in his affidavit that "it became necessary to require all to come and re-register" to enable him to monitor their solvency and ensure the correct maintenance of principles and practices in the industry and that "re-registration was the only avenue of taking stock", he submitted that the Minister already has those powers in ss 89(2) and (3) of the Act.

If the Minister did exceed the powers granted to him by Parliament in s 89 (1) then the Regulations would be void to the extent of such excess. I turn to examine the power conferred on the Minister by Parliament in s 89(1) of the Act, namely:

> "… anything which under this Act is to be prescribed or which, in his opinion, is necessary or convenient to be prescribed, for carrying out or giving effect to this Act …".

The power hereby conferred must be construed in the light of the approach of the courts in such matters, which is, that power will only be given to a subordinate law-making body to alter an enactment of Parliament in extraordinary circumstances. Thus in *Van Heerden N.O. and Others vs Queens Hotel (Private Limited and Others*[1], MACDONALD, JP (as he then was) had this to say:

> "the power of a subordinate law-making body to alter the enactments of Parliament is so far-reaching in its implications that it will be readily understood that it is a power but rarely granted and usually only for the most compelling reasons, for example, in times of dire emergency when the Parliamentary safeguards inherent in the ordinary legislative process must perforce give way to the need for swift and decisive action in the interests of the safety and security of the State."

The subordinate power must be construed strictly. The following words by LORD SELBOURNE[2] were quoted with approval in the *Van Heerden* case, *supra*:

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[1] 1972 (2) RLR 472 (RA) at 496D-H
[2] *Seward v The Owner of the "Vera Cruz"* [1884] 10 AC 59 at 68

> "Now if anything be certain it is this that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed altered or derogated from merely by force of such general words without any indication of a particular intention to do so."

Thus, as it was put in the *Van Heerden case*[3], courts of law lean against implying an alteration or repeal of one statute by another and for obvious reasons lean even more heavily against implying that Parliament has conferred power on a subordinate law-making body to alter or repeal an Act of Parliament.

In the instant case there is no express power conferred on the Minister to alter the provisions of the Act[4] relating to the qualifications for registration of insurance brokers or for their de-registration. In the absence of an express power to so alter the Act, the Court must ascertain from the language of the enabling statute whether, notwithstanding the absence of an express provision, the clear intention of Parliament as expressed in the Act was to grant the power to alter the Act.

Section 35(2) of the Act provides:

> "(2) An application for registration as an insurance broker shall be made to the Commissioner in the prescribed form and shall be accompanied by such documents as may be prescribed.
>
> (3) If the Commissioner is satisfied that an applicant in terms of this section —
>
> (a) is not seeking to register under a name identical with the name of a person registered in terms of this Act, or so nearly resembling the name of such person as to be mistaken for it; or
>
> (b) has not, under any law of any country -

[3] Supra at p497A
[4] Section 35 of the Insurance Act [Chapter 24:07]

(i) been adjudged or otherwise declared insolvent or bankrupt and has not been rehabilitated or discharged; or

(ii) made an assignment to or arrangement or composition with his creditors which has not been rescinded or set aside; or

(c) has not been convicted by any court wheresoever situate of any offence involving dishonesty, or of an offence in terms of this Act for which he was imprisoned without the option of a fine; or

(d) has not entered into an agreement relating to the preferential offer of insurance business with any person carrying on insurance business so as to impair his impartiality in placing insurance business; or

(e) is authorised, if he negotiates insurance business, other than life insurance business, to act as correspondent of brokers who are authorised by insurers in any country to place business with any such insurers;

the Commissioner shall register the applicant as an insurance broker and shall issue him a certificate of registration.

(4) Notwithstanding anything contained in subsection (3) if the Commissioner is of the opinion that it would not be in the public interest to approve an application for registration as an insurance broker, he shall reject the application and notify the applicant in writing accordingly."

In this section Parliament set the requirements for the registration of insurance brokers. Once an applicant meets those requirements then, unless the Commissioner is of the opinion that it would not be in the public interest to approve his application, the Commissioner is obliged to register him.

Similarly, cancellation of registration is provided for in s 38 of the Act. It provides:

"38 Cancellation of registration of insurance brokers

(1) The Commissioner shall notify a registered broker in writing that he proposes to cancel his registration as an insurance broker and of his reasons for so doing if at any time he is satisfied that if the registered insurance broker were an applicant

for registration in terms of section thirty-five he would not be qualified for being so registered.

(2) If a registered insurance broker who has been so notified of the Commissioner's proposal to cancel his registration as an insurance broker fails to lodge with the Commissioner a request to submit his case for review by the Minister as is provided in subsection (1) of section seventy-one within the period mentioned in that subsection or, having lodged such request within that period, withdraws the request before the Minister gives his decision in the case, the Commissioner shall cancel his registration and notify the insurance broker in writing accordingly.

(3) The Commissioner may, at the request of a registered insurance broker or his liquidator, trustee or judicial manager, cancel his registration as an insurance broker:

Provided that before canceling such registration the Commissioner shall satisfy himself that all the liabilities of the insurance broker in respect of his business have been met or other provision has been made for them by means acceptable to the Commissioner."

Here also, Parliament prescribed the procedure for cancellation of the registration of insurance brokers. The Minister is given the power to review the Commissioner's decision at the request of the broker who has been notified of the Commissioner's intention to cancel his registration. The provisions of ss 35 and 38 clearly evince the intention of Parliament regarding registration and de-registration of brokers.

Not only is there no express grant of power to alter those requirements but, from a reading of s 89 together with ss 35 and 38 of the Act set out above, I can find no indication of an intention on the part of Parliament to grant to the Minister the power to amend the Act. It must, therefore, be taken that in enacting s 89, Parliament was alive to the provisions of ss 35 and 38 and did not intend to grant power to the Minister to alter the requirements for registration or the procedure for de-registration of insurance brokers. Clearly the power granted in s89 to the Minister is to enact regulations necessary for the administration of the Act as it stands, not to amend the Act. By setting additional

qualifications for registration as well as requiring registered brokers to re-register on pain of de-registration, the Minister exceeded the power granted to him in s 89.

I therefore hold that s 14 of the Regulations is *ultra vires* s 89 of the Insurance Act [Cap 24:07] and is accordingly void and of no force or effect.

We were not asked for a declaration of nullity in respect of s 4 of the Regulations which prescribes the additional requirements set by the Minister for the registration of insurance brokers. Suffice it to say that had this relief been requested we would no doubt, for the same reasons, have granted it.

Accordingly, the appeal is allowed with costs. The order of the High Court is set aside and substituted as follows -

"The Provisional Order is confirmed."

MALABA JA: I agree

GARWE JA: I agree

Calderwood, Bryce Hendrie & Partners, appellant's legal practitioners