Judgment No. HB 8/05
Case No. HC 31/05
X-Ref HC 1281/04; 1069/04;
3476/04; 1013/04; 1115/04;
1902/04; 2052/04

NIMR AND CHAPMAN (PVT) LTD

And

CECON ENTERPRISES (PVT) LTD

And

NAMPAK FOIL (PVT) LTD

And

NATIONAL BLANKETS (PVT) LTD

And

O'CONNOLLY AND CO. (PVT) LTD

And

COTTON PRINTERS (PVT) LTD

And

RADIATOR AND TINNING

And

UNIVERSAL COMPONENT MANUFACTURERS (PVT) LTD

Versus

ZIMBABWE ELECTRICITY SUPPLY AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 7, 10, 14 & 27 JANUARY 2005

Adv. P Dube (Ms) with Ms N Ncube and M Ndlovu for the applicants
J Sibanda for the respondent

Urgent Chamber Application

NDOU J: This matter has a chequered history which culminated in provisional orders granted in favour of the applicants against the respondent. Of these, in respect of applicants NIMR & Chapman Manufacturing (Pvt) Ltd and O'Connolly and Co (Pvt) Ltd the provisional orders were confirmed by order of CHIWESHE J in HB-35-04. In respect of the other matters the respondent filed opposition papers and the matters are still pending. The order in HB-35-04 has been appealed against by the respondent and the appeal is still pending in the Supreme Court. The said order was confirmed in the following terms:

> "1. That the respondent be and is hereby interdicted from disconnecting electricity supply from the applicants premises pending finalisations of the action to be instituted by the applicant against the respondent within seven days from the date of this order.
> 2. That the respondent's ungazetted increase in the tariffs be and is hereby declared null and void.
> 3. That the respondent would be acting *ultra vires* its powers in terms of the Electricity Act [Chapter 13:19] if it increased electricity tariffs retrospectively.
> 4. That this order shall lapse in the event that the applicants does not institute an action in terms of paragraph I hereof.
> 5. That this order shall be deemed to be the order granted in case number HC 823/04 and in case HC 842/04."

For the record, the applicants instituted the proceedings against the respondent as contemplated in paragraph I as read with paragraph 5 of the above order. The background of this matter is that towards the end of 2003 the respondent revised its tariffs for electricity upwards. It proceeded to effect the increased tariffs and demanded payment from the consumers of its electricity inclusive of the applicants. Prior to the revision of the tariffs the respondent did not gazette the new tariffs as required by the enabling piece of legislation *viz*, the Electricity Act [Chapter 13:19]. Further, the respondent demanded that exporting consumers, like the applicants, pay part of their bills in foreign currency. The first, fourth, sixth and seventh applicants

objected to the revised ungazetted tariffs and to the demand that part of their bills be paid partly in foreign currency. This court ruled against the respondent declaring that it was illegal to levy bills in foreign currency. The respondent appealed to the Supreme Court, but prior to the matter being heard the relevant statutory instrument was repealed with effect from 1 April 2004. The repeal did not however, deal with the amounts already accrued in foreign currency prior to the repeal. It is the applicants' case that the respondent simply converted these amounts to Zimbabwe dollars and they are part of the amounts that have resulted in threatened or actual dis-connections which authored these current applications. In so doing the respondent has ignored its pending appeal. There is no order to execute pending the appeal. Before the matter got to where it is now there were attempts to settle out of court. These were all in vain. The applicants do not object to the payment for services rendered by the respondent. They object to pay illegally increased tariffs. They want the respondent, as a creature statute to act in terms of the enabling Act, *supra*. They want the respondent to abide by the order of this court in HB-35-04, *supra*. Their view is in essence that by reducing the challenged and ungazetted tariffs by forty-five *per centum* the respondent will have in disguise increased their tariffs without following the regime in the Act for such revision of tariffs. The respondent will also have defeated the above order of this court. In the circumstances by disconnecting the applicants' electricity in such circumstances the respondent is in contempt of this court. Notwithstanding the dispute between the parties and attempts at settlement, the applicants continued to pay what they considered to be reasonable charges prior the illegal upward revisions. The respondent's case is that the dis-connections are for unpaid electricity billed from April 2004 electricity consumption. Its view is that bills

for this period are not subject of the dispute and orders granted by this court. Further, the respondent relies on the repealed predecessor to [Chapter 13:19]. The respondent's argument is that the repealed Act [Chapter 13:05] was still in force for the purposes of the revision of tariffs. I propose to deal with these issues in turn.

Which Act governs the setting of prices and tariffs by the respondent? Is it the Electricity Act [Chapter 13:05] or the Electricity Act [Chapter 13:19]?

In terms of section 1(2) of [Chapter 13:19] and the proviso thereto, the President was to fix the date of coming into effect of that Act. This was to be done by the President by way of notice in a Statutory Instrument. Under the proviso to subsection (1) the President had the authority to set different dates for the coming into effect of different parts of the Act. By Statutory Instrument 159B-03, the President set the 1st August 2003 as the date on which the Act would come into effect. The President, in his wisdom, did not act in terms of the above-mentioned proviso. He instead, chose to bring the entire Act into effect.

By Statutory Instrument 66 of 2003, the administration of this Act was assigned to the Minister of Energy and Power Development. In light of the above the Act [Chapter 13:19] was given the force of law in its entirety with effect from 1 August 2003. The Act [Chapter 13:19] is law and its provisions are, therefore, binding upon the respondent. Act [Chapter 13:19] is of full force and application. It has been properly brought into effect in terms of its own above-mentioned provisions, and has even once been amended. It follows that Act [Chapter 13:05] has been impliedly repealed when Act [Chapter 13:19] was brought into effect in its entirety by the President. From the above actions of the President, it is inconceivable that he intended that two Acts should operate concurrently. The scope of coverage and the

handling of the issue of tariff revision by the two Acts are so vastly different as to be parallel and irreconcilable. The later Act, therefore, should be deemed as having repealed the earlier – *lex posterior derogate priori*.

The test of whether there has been a repeal by implication by subsequent legislation is whether the provisions of the later Act are so inconsistent with the provisions of an earlier Act to an extent that the two cannot stand together – *West Ham Church Wardens and Overseers* v *Fourth City Mutual Building Society* [1892] I QB 654; *S* v *Maharaj* 1962 (4) SA 615; *Haunawa* v *Cabinet of South West Africa & Ors* 1983 (1) SA 164.

In any event, even if it is the position that these two Acts are running concurrently, in light of the apparent irreconcilable conflict, the latter Act i.e. [Chapter 13:19] should prevail – *Kanera NO* v *Minister of Labour and Social Welfare* 1983 (2) ZLR 29 at 31 A-B.

Further, in HB-35-04 supra, this court per CHIWESHE J, held that the respondent has to comply with the procedures laid down in Act [Chapter 13:19] for the revised tariffs to be lawful. This finding is subject to the above mentioned appeal and I do not understand why the respondent is still relying on Act [Chapter 13:05] in light of this finding.

Are the bills after April 2004 subject to the provisional orders?

The effect of the provisional orders would impact on bills after April 2004 to the extent that such bills may not reflect an ungazetted increase or revision of tariffs without complying with the provisions of the Electricity Act [Chapter 13:19]. This is so because this court in HB-35-04 *supra*, has determined that the respondent's increase in tariffs as being null and void and declared that the respondent would be

acting *ultra vires* its powers in terms of the Electricity Act [Chapter 13:19] if it increased tariffs retrospectively.

The total amounts used for the dis-connections seems to be inclusive of the retrospective increased charges and ungazetted charges subject matter of HB-35-04. This is what the bills submitted by the respondent reflect. To that extent the provisional orders are applicable. If the post April 2004 bills do not reflect any increase in the tariffs or any retrospective increased charges then I doubt if the provisional orders would be applicable. In view of the above findings I hold the view that the applicants have made out a *prima facie* case for the provisional orders sought as amended. The amendments are necessary for clarity that this order is only applicable to disconnects occasioned by increased tariffs which are contrary to the provisional orders already granted by this court.

In passing I should point out the Minister responsible for the administration of the Act should by now have appointed the Commission so that the respondent can effect increases in consultation with the consumers as provided for in the Act.

Accordingly, the provisional order is granted in terms of the amended draft.

Lazarus & Sarif, applicants' legal practitioners
Job Sibanda & Associates, respondent's legal practitioners