

CHAPARREL TRADING (PRIVATE) LIMITED
versus
ZIMBABWE ENERGY REGULATORY AUTHORITY (ZERA)

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 24 and 30 September 2013

Urgent Chamber Application

J. Samukange with C. Venturas, for the applicant
J.R. Tsivama, for the respondent

MAVANGIRA J: The applicant's complaint is that it has been constructively evicted from premises that it has been leasing for a very long time. It contends that it was in peaceful and undisturbed possession of the premises until it was despoiled by the respondent through its officials who sealed off its pumps on 19 September 2013. Resultantly, it can longer operate the service station that it was operating as the pumps are sealed off. It also contends that the respondent by its action has resorted to self-help which the law frowns upon. It is contended that the respondent ought to have followed the correct procedure as laid down in s 39 of the Petroleum Act [*Cap 13:22*]. Furthermore that this matter is therefore deserving of urgent attention by this court.

On 19 September, 2013 the respondent ZERA issued an order purportedly in terms of s 39 of the Petroleum Act, the Act, stopping the use of the facilities at 35 Coventry Road, Harare. Against the section calling for "Licence condition contravened" the order issued by the respondent reads:- "operating without a licence". The respondent's counsel in his submissions to the court stated that the reference to s 39 was in error as the provision in terms of which the respondent acted is in fact s 55 of the Act. The respondent denied having acted outside the law and maintained that as the regulatory authority it acted within the confines of the law and in particular in terms of the powers granted to it in terms of the Act. Furthermore, the respondent contends, the matter is not urgent as the applicant was aware since 21 June 2013 that its application for a petroleum licence was refused but did not do anything until now, some three months later. The respondent also "rebukes" the applicant for not proceeding as provided for in s 56 of the Act which provides:-

“56 (1) Any person who is aggrieved by -

(a) a decision of the Authority not to issue a licence

.....

may appeal to the Administrative Court”.

The respondent also states in its opposing affidavit sworn to by Gloria Magombo, its Chief Executive Officer, that the applicant cannot claim to have been in peaceful and undisturbed possession of the property when the site on which it wishes to be licenced in terms of the Act is subject of a dispute.

Annexure “H” to the application is a letter dated 9 September 2013 to the Managing Director of the applicant from the respondent. It states *inter alia*,

“... on the 21st of June 2013, ZERA responded to your application advising of its intention not to issue you with a license on the basis that the issuance could potentially infringe on the rights of another licensee. ZERA emphasised that it reserves the right not to issue a license for the said property pending the finalisation of the dispute”

It further also states:-

“ ... ZERA is confirming its position as stipulated in the letter dated 21 June 2013, that it is not in a position to issue Trek Petroleum with a license until the matter before the court has been finalised. ZERA is currently in receipt of a High Court matter case No. 3047/13 (hereto attached) wherein Engen Oil Zimbabwe (Pvt) Ltd (plaintiff) and A. Springer Holdings (Pvt) Ltd (1st defendant) and Trek Petroleum (2nd defendant) are cited as parties to the litigation. The matter is to bring finality with regards to the lease dispute referred above.

ZERA hereby orders you to close your site with immediate effect pending the finalisation of the matter before the courts. Any continued operation would be in breach of the provisions of the Petroleum Act. Failure to comply with the order will result in legal action being pursued against Trek Petroleum”

A perusal of the Act brings to the fore s 35 which provides in pertinent excerpts:

“(1) An application for a licence shall be made to the Authority

(2)

(3) Subject to subsection (6), if, on consideration of an application in terms of subsection (1), the Authority is satisfied that –

(a)

(b) the grant of the license does not infringe the rights of any other licencees;
and

..... the Authority shall issue the appropriate license to the applicant.

In *casu*, the respondent refused to issue the applicant with a licence on the basis that such issuance could potentially infringe on the rights of another licensee and that it was not in a position to issue such license until the matter pending before the court is finalised. It advised the applicant accordingly on 21 June 2013.

It is of particular significance that before the letter of 9 September 2013, ZERA had on 1 August 2013 written to the applicant to the following effect:

“Reference is also made to our telephonic conversation on the 30th of July 2013 wherein you intimated that the matter between Springer Holdings and Engen before the courts might have been finalised. Pursuant to the verbal representations made by you on the 19th of July 2013 it is ZERA’s request that you obtain the court order in the said matter. This will help expedite the processing of your licence in the event that it is proven that you are the holders of the lease for the land in dispute.

In the interim let it be known that you are operating in contravention of the Petroleum Act [Cap 13:22] and the Energy Regulatory Authority Act [Cap 13:23]. In view of the foregoing ZERA may opt to impose the penalty for operating without a licence in the event that the requested documents are not availed within 7 days from the receipt of this letter”.

The response from the applicant given in a letter dated 14 August 2013 was to the effect that the applicant did not at anytime intimate that the court case between Engen and Springer Holdings had been finalised and also that it did not have any knowledge of the then current position of the court case.

What emerges from the above and from a perusal of the papers and submissions made in this case is that sometime in April 2013 the applicant applied to the respondent for a retail petroleum license. On 21 June it was advised of the respondent’s refusal to grant the same and the reasons therefore. The reasons pertain to a dispute over the premises which dispute is pending before the courts. In so doing, the responding was acting within the powers given to it in terms of the Petroleum Act. More significantly though, it appears to me that the existence of the dispute, which is not denied by the applicant, puts paid to the applicant’s claim that it has been in peaceful and undisturbed possession of the property. Furthermore, and if I should be wrong in making this conclusion, the respondent was in any event acting within the confines of the law in taking the action that it did. Section 55(9) in terms of which the respondent acted, empowers it to so act. It provides:

“(9) An inspector or police officer may, in the exercise of the powers conferred upon him or her by this section, seize any –

- (a) petroleum products or storage apparatus which he or she has reasonable cause to suspect is being used by or is the possession or under the control of a person in contravention of this Act “.

It appears to me that the respondent did not take the law into its own hands. Rather the law was put into the respondent's hands by virtue of the Petroleum Act in terms of which it took the action now complained of. In terms of s 29 of the Act no person other than a licensed petroleum company shall procure, sell or produce any petroleum product. In *casu* the applicant was operating without a licence in contravention of the Act. The respondent then, after communication was entered into between the two as detailed above, invoked the powers that s 55(9) gives to it as the regulatory authority. It seems to me that the nature of the industry or product that the respondent regulates is well served by the provisions of the Act with particular reference herein to s 55(9). Against such a background there can, in my view, be no basis for treating this matter as urgent. Furthermore, and in any event, the applicant could have pursued the recourse provided for in s 56 of the Act, appealing to the Administrative Court. Notably the applicant has apparently filed with this Court an application for the review of the respondent's refusal to issue it with a license. That application is also still pending.

The various authorities cited by the parties appear to me to be distinguishable from the facts *in casu* and are thus of no effective rescue to the applicant's case.

I am not persuaded that the applicant has established urgency of the nature contemplated by the rules.

In the result I find that this matter is not urgent.

Ventures and Samukange, applicant's legal practitioners
Sawyer & Mkushi, respondent's legal practitioners