GRAIN MILLERS ASSOCIATION OF ZIMBABWE
versus
THE MINISTER OF AGRICULTURE, MECHANISATION
& IRRIGATION DEVELOPMENT
and
RAYCLASH TRADING (PRIVATE) LIMITED
and
BENBOUND INVESTMENTS (PRIVATE) LIMITED
and
BHAGAJI TRADING (PRIVATE) LIMITED
and
THE ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 28 May 2015 & 3 June 2015

Urgent Chamber Application

T. Bhatasara, for the applicant
T. Tabana and *K.L. Murefu*, for first & fifth respondents
Third respondent 'in person'
No appearance for second and fourth respondent

MAFUSIRE J: This was an incredible application. It was brought under a certificate of urgency. Its ostensible basis was an alleged contravention of certain fundamental rights and freedoms as enshrined in the Constitution of Zimbabwe, namely the right to administrative justice (s 68), the right to food and shelter (s 77), the right of access to information (s 62) and the obligation of the government to ensure food security. The evidence in support of the application ranged from media reports, a lobby letter by a trade union, a demand letter by lawyers, and the government's ZimASSET (Zimbabwe Agenda for Sustainable Socio-Economic Transformation) economic blue print.

But the application was a dog's breakfast. After argument I dismissed it with costs. The reasons would follow later. These are they.

The applicant was a voluntary association of grain millers. The membership was said to comprise sixty eight (68) milling enterprises nationwide. As final relief the applicant sought an order declaring that the issuing by the first respondent (to other players), of import licences (for maize meal) contravened the applicant's right (to administrative justice and food sufficiency), allegedly in breach of sections 68(1) and 77(b) of the Constitution. (The information in parenthesis herein has been added due to the imprecision of the applicant's draft order.)

The applicant also sought the cancellation of all the import licences or permits for maize meal that the first respondent had issued. The relevant period was not stated.

As interim relief, the applicant sought an order directing the first respondent to suspend the issuing of (further) import permits for maize meal and to forthwith announce such suspension to ***all*** the permit holders. By "***all***" the applicant evidently meant respondents 2, 3 and 4. They were cited as entities that had been "***wrongfully issued***" with import permits.

The applicant's basis for such relief was this. Its members mill maize and wheat into mealie-meal and flour for sale on the domestic market. They buy the grain from the local farmers. It said in order to ensure food security in the country, the applicant had embarked on contract farming with some local farmers. It averred that its members are not allowed by government to export and import maize meal or flour. The members depend entirely on the domestic market for survival. It was argued that government's conduct, through the first respondent, in indiscriminately issuing import permits for maize meal to disparate players has ominously threatened the applicant's very existence. Its membership was said to have dwindled. It was said most had ceased operations. They could not compete with cheap maize meal imports that allegedly have flooded the domestic market.

The applicant's justification for such a complaint was this. In return for the applicant facilitating optimum capacity utilisation by local farmers through contract farming, the government had promised to create an enabling environment for the applicant's members. Among other things, it banned imports of cheap maize meal. That was in 2012. The applicant's members had embarked on the project in earnest. Natural farming regions 1, 2 and 3 were developed. First respondent's predecessors kept their word. But not the first respondent.

The applicant said the first respondent reneged on the government's promise. Among other things, he abandoned the practice or custom of actively engaging or consulting the

applicant on every prospective application for an import licence. In the past, government would not consider any prospective application for an import licence if it was not accompanied by a letter of support from the applicant. Such conduct by government had insulated the applicant's members from unfair competition. But from about 6 May 2015 onwards, applicant had got wind that the first respondent was dishing out import licences to non-established businesses.

The applicant said a meeting held with the first respondent's officials, as well as representatives from organisations such as the CZI (Confederation of Zimbabwe Industries), ZNCC (Zimbabwe National Chamber of Commerce) and the GMB (Grain Marketing Board) had yielded no results. Matters deteriorated rapidly. Among other things, the applicant was forced to slash the price of maize grain sourced from the local farmers from $320 per tonne to as low as $140 per tonne. The milling industry trade union lobbied government to reconsider its position. It said many jobs were at stake. But the government had remained unmoved. The applicant declared a dispute and got its lawyers to write a letter of demand. But the first respondent did not respond.

Thus the applicant's case for an interdict was this. The issuing of import licences by government (to other players) without consulting it as had been the practice in the past, was a breach of s 68(1) of the Constitution in relation to the applicant. It was argued that the applicant had a legitimate expectation to be consulted because government's conduct threatened the continued viability of its members.

Section 68(1) of the Constitution reads:

> "**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."

Applicant's next argument was that the first respondent's conduct was said to violate its members' rights as set out in s 77(b) of the Constitution. The section reads:

> "**77 Right to food and shelter**
>
> Every person has the right to –
>
> (a) ……;

(b) ……;

(c) sufficient food;

and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right."

Applicant's third argument was that by withholding information on the number of the permits that he had issued, the first respondent had violated the applicant's right of access to information, as spelt out in s 62(1) of the Constitution. The section reads:

"**62 Access to information**

(1) Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwe media, has the right of access to any information held by the State or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability."

The applicant argued that there was now a glut of the maize meal on the market. Prices have become severely depressed. The competition is unfair. The new traders are being issued with licences to import up to eight thousand metric tonnes (8, 000 MT) of GMO+ (Genetically Modified Organism Positive) maize meal. Yet applicant's members are not allowed to import the same cheap product. They were now being compelled to drastically slash downwards the price of grain paid to the local farmers in order for them to remain viable. That is a sure way of chasing the farmers away from the farms. Such a development is threat to ZimASSET. Furthermore, most of the applicant's members would now abandon contract farming. The job losses would be phenomenal. Thus, the matter was crying out for urgent intervention by the judiciary.

That was the applicant's case.

The first respondent opposed the application. So did the third. Nothing was heard from the second and fourth respondents. But copies of the application had been duly served on them.

There was a little matter that concerned me before the start of the proceedings. The third respondent is a company. At the hearing it was not represented by a legal practitioner, but by two of its officials. One of them, Benjamin Bondera ("***Mr Bondera***"), had filed a notice of opposition and deposed to an affidavit, purportedly on behalf of the third respondent. The capacity in which he had done that was not stated. His position at the third

respondent was not stated either. There was no telling whether he was a director or employee. In the affidavit he relied on a purported resolution of the third respondent authorising him and the second official, Eniya Gore ("***Ms Gore***"), to represent the company in all litigation matters. The resolution was jointly signed by Mr Bondera and one other person. But again, neither his position nor that of Ms Gore was stated in that resolution. At the hearing Ms Gore said she would speak for the third respondent.

My concern was that it is a long standing rule of practice that a company does not have an absolute right to appear in the superior courts without legal representation, even though the court may, on good cause shown, grant audience to an individual who is the sole controlling authority and the sole directing mind of the company: see *Lees Import and Export (Pvt) Ltd* v *Zimbank*[1] and *Commaf Holdings (Pvt) Ltd & Anor*[2].

I voiced my concern in spite of the provisions of s 69(3) of the Constitution that say that every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute. Section 69(4) also says that every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum. However, notwithstanding these provisions, my *prima facie* view was that they do not grant an absolute or automatic right to anybody from the company to just pitch up, or sign up process in the superior courts on behalf of the company.

However, I did not decide the matter. Despite Mr *Bhatasara*, for the applicant, labelling those beneficiaries of the new import licences "***brief case businesses***" i.e. fly-by-night entities, he was non-concerned that Ms Gore could speak on behalf of the third respondent. So also was Mr *Tabana*, for the first and fifth respondents. In the end, I granted Ms Gore audience, but without deciding the point. I still leave it open in this judgment.

The first respondent raised three points *in limine*. The first was that the matter was not urgent. It was said that the import licences complained of had been issued from about mid-April 2015. The urgent application was filed only on 22 May 2015, i.e. more than a month later.

However I dismissed the point and held that the matter was urgent. The applicant had not, as it were, sat back when the need to act had arisen: see *Kuvarega* v *Registrar General &*

[1] 1999 (2) ZLR 36 (SC)
[2] 1999 (2) ZLR 160 (HC)

Anor[3]. It said it had got wind from about 6 May 2015 that the first applicant was now issuing more import permits for maize meal, in breach of the government's undertaking to it. It had engaged government in a number of ways that had culminated in a letter of demand by its legal practitioners. The letter gave the first respondent until 19 May 2015 to confirm the suspension of the import licences that had already been issued, and to confirm the suspension of the entire process altogether. When the deadline expired without any response from the first respondent, the applicant sued. Its application was filed on 22 May 2015.

Thus, I was satisfied that even if the applicant's actions had been naïve or misguided, nonetheless it had treated its case with some urgency by taking some action when the need to do so had arisen.

The first respondent's next point *in limine* was that this court has no jurisdiction to deal with a complaint that touches on the Bill of Rights as enshrined in Chapter 4 of the Constitution. It was argued that only the Constitutional Court has jurisdiction over such matters. Support for this contention was said to derive from s 166(3) of the Constitution. That section provides, in the first paragraph, that cases before the Constitutional Court concerning alleged infringements of a fundamental human right or freedom enshrined in Chapter 4, or concerning the election of a President or Vice-President, must be heard by all the judges of the Constitutional Court. The second paragraph provides that other cases not mentioned in the first paragraph must be heard by three judges of that court.

Plainly, there was no merit in the first respondent's second point *in limine*. In s 166(3), the Constitution simply prescribes the composition of the Constitutional Court for particular cases. It shall sit as a full complement of all the judges in some types of cases, and as three judges in others. That is not the same thing as saying all other courts lack jurisdiction in those cases.

The structure of the Constitution is quite plain regarding the jurisdictional limits of the courts in respect of constitutional matters. Section 167(3), as read with s 175(1), provides that it is the Constitutional Court that makes the final decision on whether or not an Act of Parliament, or the conduct of the President, or that of Parliament, is constitutional. It is that court that must confirm any order of constitutional invalidity made by another court before that order has any force.

[3] 1998 (1) ZLR 188 (H)

There is nothing in the above sections that says that the determination of a complaint against an alleged infringement of any of the fundamental human rights and freedoms under Chapter 4 is the exclusive preserve of the Constitutional Court. Matters that are made the exclusive preserve of the Constitutional Court are listed in s 167(2). They are:

(a) rendering advice on the constitutionality of any proposed legislation;

(b) determining disputes relating to the election of the President

(c) determining disputes relating to the qualification of the Vice-President;

(d) determining whether the President or Parliament has failed to fulfil a constitutional obligation.

Thus, complaints such as those raised by the applicant herein are not the exclusive domain of the Constitutional Court.

The first respondent's last point *in limine* was that the applicant had adopted the wrong procedure. It was argued that since its complaint was that it had been denied administrative justice, the applicant ought to have proceeded by way of review, and in accordance with the provisions of the Administrative Justice Act [*Chapter10:28*].

However, that point also lacked merit. That the applicant could proceed by way of an ordinary application for review did not preclude it from seeking an interim interdict on an urgent basis.

On the merits, the first respondent's major defence was that the country was in a drought situation. The government had taken a decision to import large quantities of maize meal to avert hunger and starvation. The first respondent denied having himself or his predecessors made any promises to the applicant to consult it, let alone exclusively, before any decision to grant or refuse any player other than the applicant's members, an import licence for maize and flour. He denied that the maize meal being imported into the country was GMO+. He pointed out that it was an express condition of the import licences that no genetically modified organism were involved in the production of seed, planting material, plant parts, etc. A sample of an import licence issued on 6 May 2015 with that condition was attached.

The first respondent also denied that the applicant's members were precluded from importing maize meal. He said they were free at any time to apply for the necessary licences.

Reference was made to statutory instrument 350 of 1993 (Control of Goods [Import and Export] [Agriculture] Order, 1993. Maize meal is amongst the list of products that can be imported through an import licence in terms of that Order. Any person can apply.

The first respondent expressed ignorance on the arrangement alleged by the applicant that on the basis of promises made to its members, they had entered into contract farming schemes with local maize farmers to whom they had now become yoked to an uncompetitive price of $320 per tonne. He denied any breach of promise. He denied any breach of the Constitutional provisions cited. He said he was not bound to consult the applicant before issuing new import licences. He said the application was nothing more than an attempt to get the courts to sanction price manipulation by a privileged cartel so as to exclude competition for the sake of profits.

On its part the third respondent fumed at being called a "***brief case company***". It claimed that it was well established. It denied that it was importing GMO+ maize meal and challenged the applicant to provide the proof.

Applicant's case was undoubtedly limping. There was no proof that the new traders were bringing in GMO+ mealie-meal. But this was just a minor point. The first respondent denied every material fact upon which the application was predicated. It was therefore applicant's word against that of the first and third respondents. Thus, none of the requirements for an interim interdict was proved. They are these:

- a *prima facie* right, even if it be open to some doubt;
- a well-grounded apprehension of an irreparable harm if the relief is not granted;
- that the balance of convenience favours the granting of the interdict;
- that there is no other satisfactory remedy.

see *Setlogelo* v *Setlogelo* 1914 AD 221 at 227; *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (1) ZLR 289 (SC) @ 391; *Hix Networking Technologies* v *System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (A) @ 398I – 399A)*; Flame Lily Investment Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd and Anor* 1980 ZLR 378; *Universal Merchant Bank Zimbabwe Ltd* v *The Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (HC) @ 238;.

None of the constitutional provisions cited by the applicant had any relevance to the kind of complaint that it brought before the court. Even though it cited those sections, the applicant betrayed the real motive and intention behind its application. Undoubtedly, applicant was stung by the competition. The maize and flour milling industry had been opened up to other players. The founding affidavit was replete with statements that gave the game away. These were some of those statements:

- "**[Applicant's] membership has dwindled** as most of its members were forced to stop operations due to 1st Respondent's acts of policy inconsistency and arbitrary decisions."
- "An intrusion on the local market by competing foreign finished products consequently **diminishes Applicant's members' market share and competitive advantage.**"
- "….1st Respondent …. undertook **to protect** [the] local market from cheap imports."
- "The issuance of import permits by 1st Respondent which has led to [a] glut in the market, has now depressed prices of local maize from $320.00 per tonne … to a range of $140.00 to $200.00 per tonne. This is tragic."
- "The imports will mean **for Applicant's members to survive** (sic) will pay a price of range (sic) $140.00 to $200.00 to the farmers which will simply put them in a negative position of about $130.00" (My emphasis)

There were several such statements. They would probably make much sense in a lobbying forum like Parliament or a business convention. It is altogether different in a court of law. A judicial officer has to consider, as in this case, real infringements of existing or prospective legal rights.

In this matter the applicant failed to show a *prima facie* right accrued, or accruing to it, that could be said to have been breached by the respondent.

The apprehension of an irreparable harm that the applicant alleged was unreasonable. It was not traceable to any wrong done by the first respondent. The country was in a drought situation. The first respondent said that the strategic grain reserves in the country were dangerously low. Therefore, the balance of convenience eminently favoured the issuing of more import licences to more players to bring in large quantities of the staple food. In contrast, applicant's fear of losing its market share was manifestly inconsequential.

Finally, there was an alternative and effective remedy. The applicant's members were free to join the queue for applications for import licences.

On the bigger scale, the application was an attempt to muzzle free trade. It was designed to use the court to get what lobbying, dialogue or bargaining processes probably had failed to achieve. There was nothing to counter the first respondent's strong claim that the country was in a drought situation. Sectarian interests had to give way to the bigger threat of hunger and starvation facing the nation. Not only did the application lack any legal standing, but also it lacked the moral basis. It seems the applicant was only concerned with the welfare of its members. Nothing was said about the interests of the larger body of consumers. If the first respondent's actions had the effect of bringing down the prices of mealie-meal and flour, something that the application unwittingly disclosed, why would a reasonable court want to stop that just because a cartel of 68 members wants to maintain its market share and margins of profit?

There was yet another bigger picture. The first respondent's decision to open up the milling industry to other players so as to avert hunger and starvation in the current drought situation was an executive decision and poly-centric function. It was more than a mere administrative function. I repeat what I said in my judgment in *Zimbabwe Lawyers for Human Rights* v *Minister of Transport N.O. & Ors*[4]. In a Constitutional democracy such as ours, there are three arms of government, namely the legislature, the judiciary and the executive. Each one of them has an exclusive domain of operation. One arm may not interfere with the other arms. But our Constitutional democracy has a system of checks and balances. In appropriate situations one arm may straddle on the domain of the others. That is how the machinery of state functions.

In *National Treasury & Ors* v *Opposition to Urban Tolling Alliance*[5] the Constitutional Court of South Africa stated as follows in paragraphs 66 to 68 of its judgment:

> "[66] A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an

[4] HH 353-14
[5] 2012 (6) SA 229

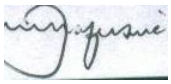
interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.

[67] …… [T]he duty of determining how public resources are to be drawn upon and reordered lies in the heartland of executive-government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national executive subject to budgetary appropriations by parliament.

[68] Another consideration is that the collection and ordering of public resources inevitably call for policy-laden and polycentric decision-making. Courts are not always well suited to make decisions of that order. It bears repetition that a court considering the grant of an interim interdict against the exercise of power within the camp of government must have the separation of powers consideration at the very fore front."

The above remarks applied with equal force to the present matter. It was for these reasons that I dismissed the application with costs.

3 June 2015



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