

KAROI TOWN COUNCIL
versus
TELONE (PVT) LTD

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 9, 16, 27 May 2016 and 6 July 2016

Civil Trial

Ms Takawira, for the plaintiff
J Dondo, for the defendant

CHAREWA J: The plaintiff issued summons against the defendant, claiming for the payment of \$63 766 comprising:

- a. \$32 250 for arrears on operating licences;
- b. \$31 516 for arrears on rates
- c. Interest at the prescribed rate from date of summons; and
- d. Costs of suit on a legal practitioner and client scale.

The defendant counterclaimed for \$42 057.92 in outstanding telephone charges, interest thereon at the prescribed rate from date of counterclaim and costs of suit.

By the time the matter was ready for hearing before me, the defendant had admitted owing \$31 516 in arrears for rates, but denied any indebtedness arising from non-payment of operating licences¹ claiming exemption in terms of the Shop Licences Act, [*Chapter 14:17*]; while, for its part, the plaintiff admitted owing \$42 057.92 in outstanding telephone charges.

Consequently the parties agreed to a set off as follows:

1. If the defendant is exempted from paying for operating licences, then it is owed \$10 541.92 by the plaintiff (\$42 057.92 - \$31 516.00).
2. However, if the defendant is NOT exempted from paying operating licences, then it owes the plaintiff \$21 708.08 (\$32 250 - \$10 541.92).

The sole issue for resolution before me therefore was a question of law: whether the defendant was entitled to an exemption from paying for shop licences in accordance with s 3 of the Shop Licences Act [*Chapter 14:17*] as read with the First Schedule to the act, in

¹ I have used the terms “operating licences” and “shop licences” to denote the same thing.

particular s 1 (d) thereof, and if so, whether the charging of interest and penalty by the plaintiff was proper.

The premises or place of business to which the dispute referred was the defendant's telephone exchange.

I therefore directed the parties to file heads of argument, which were argued on 16 May 2016.

Plaintiff's submissions

The plaintiff argued that s 4 of the Shop Licences Act (the Act) binds the defendant. This section provides in subsection (1) that:

“.....no person shall, in any shop, store or other fixed place of business, carry on the trade or business of selling or letting for hire any goods, except in terms of a licence.”

While not conceding that defendant does not operate a “shop”, plaintiff pointed out that the section also refers to any “other fixed place of business”.

It went on to argue that s 3 as read with s 1 (d) of the First Schedule to the Act is inapplicable as defendant does not let or hire anything, but carries on a main business. Moreover, plaintiff further asserted, the Post and Telecommunications Corporation (PTCC) of which Telone claims to be a successor company, used to pay for its shop licence, and if the defendant seeks to be treated differently, it must show why.

In any event, the plaintiff argued, the PTCC was a parastatal established under an act of parliament which has since been repealed, and was exempted from paying shop licences because it was a statutory body. The defendant, on the other hand, is a private entity incorporated under the Companies Act, and cannot claim an exemption accorded to a statutory body.

Further, the plaintiff submitted that ss 105 and 106 as read with s 113 of the Postal and Telecommunications Act [*Chapter. 12:05*] apply to licensing with or by the Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ), and not to the defendant. There is no reference therein to the defendant or to shop licences or that the defendant is exempted from paying for shop licences.

Finally, the plaintiff argued that, in terms of the law, it prepares a budget which fixes tariffs. Such budget is advertised and consultative meetings are held should there be any objection. The budget fixing the charge for a telephone provider at \$4 000 for shop licences and 100% penalty charge for operating without a licence was advertised on 21 November and

6 December 2014. The defendant never objected. The budget was then approved by the responsible Minister and became law. The defendant cannot now claim to be exempted therefrom.

Defendant's submissions

For its part, the defendant argued that the PTCC never used to pay for shop licences, and defendant being its successor in accordance with ss105, 106 and 113 of [*Chapter. 12:05*], is therefore also exempted. That the defendant is the successor to the PTCC is put beyond doubt by the provisions of s 108, and in particular subsection (3) which reads as follows:

“All bonds, hypothecations, deeds, contracts, instruments, documents and working arrangements that subsisted immediately before the relevant transfer date and to which the Corporation was a party shall on and after that date, be as fully effective and enforceable against or in favour of the appropriate successor company as if, instead of the Corporation, the appropriate successor company has been named therein.”

Therefore, argued the defendant, any suit directed against the PTCC with regard to its operation of telex, telephone, telephone exchange and other telephony apparatus would be directed against it as PTCC's successor in that regard.

The defendant submitted further that the Shop Licences Act specifically defines trades or businesses to which the Act does not apply, and in terms of s 1 (d) of the First Schedule, this includes telex, telephone and private wire installations and apparatus let on hire by the PTCC. And, since the defendant is operating a telephone exchange, as successor to the PTCC in that regard, as opposed to a shop, it is therefore subject to the exemption in terms of s 3 as read with the s 1 (d) of the First Schedule to the Shop Licences Act [*Chapter:14:17*].

The defendant further argued that the issue of the plaintiff's budget process does not assist plaintiff as the question is whether or not, at law, the defendant is obliged to pay for a shop licence for its telephone exchange.

Merits

After the close of arguments, it being agreed by the parties that if the plaintiff was to produce receipts showing that the Post and Telecommunication Corporation used to pay shop licence fees for its telephone exchange, then the defendant would not have any defence, I postponed the matter to 27 May 2016 to enable the plaintiff to bring forth such receipts.

The plaintiff did not bring any receipts to show that the Post and Telecommunication Corporation used to pay for shop licences for its telephone exchange. Instead, it submitted its duplicate copy of a receipt book with receipts 0236601-0237000 showing that under receipt number 0236752, defendant paid \$5 175.00 on 14 June 2010 for a Booster Licence. The

plaintiff did not attend Court on 27 May 2016 to explain the relationship between this receipt and the shop licence fee pegged at \$4 000 per year.

Further the plaintiff submitted bank statements showing deposits from Telone. However, there is no explanation as to what these deposits represent, especially since on the face of them, they are not in multiples of \$4 000. There was no attempt to show that these payments were in respect of shop licences for telephone exchanges levied in terms of s 4 of [Chapter. 14:17].

In addition the plaintiff submitted statements, receipts and invoices from Rusape, Kadoma and Gokwe town councils. However, most of these documents pertained to booster and net-kiosk licences. Others just refer to payments from Telone with no explanation as to what was being paid for. Only two, Rusape Town Council tax invoice dated 12 May 2016 and Gokwe Town Council tax invoice dated 1 May 2016 at p 5 and 14 of the submitted bundle, referred to Shop or Trading Licences. However, it is not clear whether these were for telephone exchanges, (bearing in mind that defendant's argument is that it is exempted from paying for shop licences for operating a telephone exchange) or whether the payments related to net-kiosks, or any other business of the defendant.

In my view these documents do not address the question which the plaintiff was required to answer: **did PTCC use to pay for shop licences to operate a telephone exchange?** I am not therefore persuaded to accept these documents and find them irrelevant to the issue at hand. The plaintiff has therefore failed to show that PTCC was not exempted from paying for shop licences in terms of s 3 (1) and that it used to so pay.

It is trite that the Shop Licences Act empowers local authorities to levy licence fees for businesses and trades operating within their area of authority (See s 4 (1) and s 12 (2)). However, in the interests of the public or a section of the public, maintenance of law and order, defence, preservation of public safety or any hostile act or activity against the government or inhabitants of Zimbabwe, the Minister responsible for the administration of the act may grant exemptions from such shop licence fees (See s 6).

The First Schedule (as amended from time to time) thus lists the business/trades subject to exemption from paying shop licence fees. More particularly, s 1 (d) thereof exempts

“telex, telephone and private wire installations and apparatus let on hire by the Posts and Telecommunications Corporation”.

It seems that at pp 3-4 (paragraphs 3.3.1 to 3.3.3, 3.4 and 3.6) of its heads of argument, plaintiff admits that the PTCC, as a public (parastatal) institution was exempted from paying shop licences. Rather, its argument appears to be that Telone, being a privatized company in which the state has an interest instead of a parastatal, is not a successor to PTCC and is therefore not entitled to the exemption which was specifically accorded to PTCC by s 1 (d) of the First Schedule to the Shop Licences Act.

The issue

The issue that I must resolve therefore is whether the defendant is a successor to the PTCC which ceased to exist as it was unbundled and its enabling statute was repealed. And if so, whether defendant can claim the exemption previously enjoyed by PTCC.

Analysis

The plaintiff argues that the defendant is not a successor company to PTCC, firstly because PTCC ceased to exist and defendant is a new standalone privatised company rather than a parastatal. And because defendant is not PTCC it cannot therefore claim the exemption that was granted to PTCC (see paragraphs 3.3.1 -3.3.3 of its heads).

Secondly, it argues that the purport of s 1 (d) is that the legislature intended to exclude only the PTCC for the benefit of the public. Relying on *Air Zimbabwe (Pvt) Ltd & Anor v Steven Nhuta Civil Appeal No. SC 144/13 (Judgment No SC 65/14)*, the plaintiff submits that it was never the intention of the legislature to extend immunity to an indeterminate number of companies. Therefore Telone is not a successor company to the PTCC in the same manner that the Supreme Court held that other separate companies created under the *Air Zimbabwe Corporation (Repeal) Act (No. 4 of 1998)* were not successor companies to Air Zimbabwe Corporation.

I cannot agree with the plaintiff's arguments or its interpretation of the Air Zimbabwe case. It is quite clear from that case that the *Air Zimbabwe Corporation (Repeal) Act* envisaged the creation of only one successor to the Air Zimbabwe Corporation. I cannot do better than to quote Ziyambi JA at pp 7-8 when she stated:

“The Repeal Act was brought into operation on May 8 1998. Its purpose, as set out in the preamble, was ‘to provide for the dissolution of Air Zimbabwe Corporation and the transfer of its functions, assets, liabilities and staff to a company formed for the purpose; to provide for the repeal of the Air Zimbabwe Corporation Act [*Cap 13:02*]; and to provide for matters connected with or incidental to the foregoing’. (The underlining is mine)

Section 3 of the Repeal Act provided:

3. Formation of a successor company

Subject to this section, the Minister shall take such steps as are necessary under the Companies Act [*Chapter 24:03*] to secure the formation of a company limited by shares, which shall be the successor company to the Corporation for the purposes of this Act:

Provided that, if such a company has been incorporated for the purpose before the date of commencement of this Act, the Minister may, by notice to the Corporation, direct that that company shall be the successor company to the Corporation for the purposes of this Act.” (Emphasis provided)

Section 4 of the Repeal Act made provision for the shareholding of the successor company and s 5 for the transfer of assets and liabilities of the Corporation to the successor company.

The company nominated by the Minister in terms of s 3 was Air Zimbabwe (Private) Limited. See *Jayesh Shah v Air Zimbabwe Corporation*².

On 28 December 2012 the Finance Act amended the Repeal Act by inserting a new s 9A. Section 8 of the Finance Act provided:

“8 New section inserted in Act No.4 of 1998

- (1) The Air Zimbabwe Corporation (Repeal) Act (No.4 of 1998) is amended by the insertion of the following section after s 9-
‘9A Legal proceedings against Corporation or Successor Company
The State Liabilities Act [*Chapter 8:14*] applies with necessary changes to all legal proceedings against the Corporation or any successor company.’
- (2) Subject to subsection (3), the amendment effected by subsection (1) applies to all legal proceedings against the Corporation or successor company (as those terms are defined in s 2 of the Air Zimbabwe Corporation (Repeal) Act (No.4 of 1998)), that were commenced or completed before the date of commencement of this Act.

The term ‘successor company’ was defined in s 2 of the Repeal Act as follows:-
‘successor company’ means the company referred to in section *three*.’

It admits of no doubt, therefore, that the legislature clearly had in mind one successor company. It is also clear that had the appellants’ contention to the contrary been correct, the legislature would have expressed itself in words which lend themselves clearly and unambiguously to the meaning contended for by the appellants.”

She went on to make a distinction between the Air Zimbabwe Corporation (Repeal) Act and S68 of the Electricity Act [*Chapter 13:19*] which did envision the creation of one or more successor companies. Clearly, the Air Zimbabwe case does not assist the plaintiff on the question whether or not defendant is a successor company to the PTCC, firstly because that

² HH133/10 KUDYA J remarked:

“Section 3 of the Repeal Act mandated the Minister of Transport and Energy to secure the formation of a company limited by shares in terms of the Companies Act [*Cap 24:03*] to succeed the Corporation. If such a company was in existence before the commencement of the Act, the Minister was empowered to notify the Corporation and direct the company to become the successor to the Corporation. The company he nominated as the successor company, Air Zimbabwe (Private) Limited, was already in existence by the time the Repeal Act was published. It had been incorporated on 20 November 1997”.

case did not hold that Air Zimbabwe (Pvt) Ltd, which had been nominated by the Minister in terms of s3, to succeed Air Zimbabwe Corporation was not a successor company to Air Zimbabwe Corporation. The Court only held that since the legislature created one successor company, Air Zimbabwe Holdings (Pvt) Ltd could therefore not claim immunity as a successor company to Air Zimbabwe Corporation.

Section 105 of the Postal and Telecommunications Act provides that:

“appropriate successor company” means the successor company or, where more than one successor company is formed, the successor company licensed in terms of section *one hundred and thirteen* to operate the cellular telecommunication, postal or telecommunication services carried on by the Corporation immediately before the fixed date, or any company formed to undertake the purchase, manufacture, maintenance and repair of equipment and apparatus used by any such company, as the case may be; (my emphasis).

It is apparent that the legislature envisaged that the PTCC could be succeeded by at least four companies engaged in the business units as underlined. The defendant, by the nature of its business is clearly engaged in the third aspect: telecommunication services, which was previously carried out by the PTCC. Other successor companies may be concerned with cellular telecommunication (Netone), postal services (ZIMPOST) or the purchase, manufacture, maintenance and repair of equipment and apparatus used by any such company.

S106 reinforces this position as its heading and subsections (1) (3) and (4) are worded thus:

“106 Formation of successor companies and exclusive reservation of certain postal and telecommunication services to the Corporation and the appropriate successor company

(1) Subject to this section, the Minister shall, not later than six months after the fixed date, take such steps as are necessary under the Companies Act [*Chapter 24:03*] to secure the formation of one or more companies limited by shares, which shall be the successor company or successor companies to the Corporation for the purposes of this Act.

(2)

(3) Any person other than the Corporation or the appropriate successor company who provides any service reserved to the Corporation or the appropriate successor company in terms of paragraph (a) or (b) of subsection (2) shall be guilty of an offence and liable to the forfeiture of any proceeds accruing to him on account of the provision of the reserved service and to a fine not exceeding level ten or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

[Subsection amended by section 4 of Act 22 of 2001]

(3) Until a telecommunication licence governing the service in question is issued to another person, there shall be deemed to be reserved to the Corporation or the appropriate successor company, as the case may be, such particular service comprised within a telecommunication service as may be prescribed.”

Consequently I am of the view that the defendant is a successor company to the PTCC with respect to provision of telecommunication services.

As to whether the defendant is entitled to the exemption that the PTCC enjoyed, it seems to me that the rationale for such exemption still subsists. As aptly stated by the plaintiff, the basis of the exemption was to ensure provision of services for the benefit of the public. If the reason for such exemption had ceased to exist, then the legislature would have repealed s 1 (d) of the First Schedule to the Shop Licences Act.

I do not believe that the specific naming of PTCC in that section precludes the exemption from being enjoyed by the successor company, whether or not it is still a parastatal or a privatised institution, in the same way that the Supreme Court did not find that the property of Air Zimbabwe (Pvt) Ltd was not protected in terms of the State Liabilities Act [*Chapter 8:14*].

It seems to me that, because the government still recognises its obligation to ensure access to communication by the public, it maintained its majority shareholding in the privatised institution. To my mind, it would appear that what government and the legislature merely intended was that the service should now be provided on good corporate governance basis, with the management being accountable for their corporate decisions, and to limit the financial burden on the fiscus by allowing the privatised entities to operate from their own resources with government benefiting from the dividend on its shareholding.

I am bolstered in this view by the provisions of s 108 (3) which states that instruments and working arrangements that subsisted before the unbundling of PTCC would be as fully effective and enforceable in favour of the appropriate successor company as if it had been named therein.

I therefore find that the defendant is exempted from paying shop licences for its telephone exchange in terms of its status as a successor company to the PTCC. Consequently, the issue of the propriety of the interest and penalty thereon is moot.

Now, it has been pointed out by the plaintiff that the defendant operates other business activities or provides services other than those mentioned in s 1 (d) of the First schedule, for example providing broadband, Wi-Fi, modems, fibre etc which are not exempted from shop licencing fees. That may be true, but the plaintiff has not stated whether these other services are being provided by the defendant at the telephone exchange. As is evident from the statements and invoices from other local authorities, the defendant does operate shops for these services for which it pays shop licence fees (see pp 3-4 above).

I have not heard the defendant to argue otherwise. Its objection has been reserved to being levied shop licence fees for operating a telephone exchange which falls within the exemption provided by the Act.

I do not find it necessary to resolve the issue whether, since defendant pays licensing fees to the Posts and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) for operating its telephone exchange, it must again pay licensing fees to the plaintiff for the same. I have already found that defendant is exempted from paying shop licences for its telephone exchange in terms of its status as a successor company to the PTCC.

As for the argument that the Urban Councils Act [*Chapter.29:15*] empowers the plaintiff to fix tariffs and charges in respect of certificates, licences or permits, the defendant does not dispute this, but argues that plaintiff cannot levy shop licences against it for its telephone exchange because the Shop Licences Act so precludes.

It is clear that the Urban Councils Act permits local authorities to fix tariffs and charges. But the levying and collection of shop licence fees which are fixed under the Urban Councils Act can only be done in terms of the Shop Licences Act.

While I agree that once a budget of a local authority is approved by the Minister, it creates a legitimate right for the defendant to claim payment for levies, charges and fees as prescribed there in, I am not convinced that such budget overrides specific legislative provisions. In this case, in my view, whether or not the defendant objected to the budget is immaterial in the face of specific exemption granted to it under the Shop licences Act. *In casu*, the latter Act exempts the defendant from paying shop licences for its telephone exchange.

As argued by the defendant, the present case is on all fours with the rationale in *Zimbabwe Electricity Transmission and Distribution Company (Pvt) Ltd v Bindura Rural District Council and 59 Others* HH 102/15, that a plaintiff cannot levy a shop licence fee when the Act of parliament under which it purports to derive its authority does not so permit.

Costs

Both parties sought costs of suit. However, I note that the plaintiff has succeeded on just under 50% of its total claim while the defendant succeeded on 100% of its claim. In the premises, it is just and equitable that the plaintiff should pay a portion of the defendant's costs. In my view, it is fair that the plaintiff should pay two thirds of the defendant's taxed costs.

DISPOSITION

Consequently, it is ordered that:

- a. The defendant be and is exempted from paying to the plaintiff operating licences for its telephone exchange in accordance with s3 of the Shop Licences Act [*Chapter. 14.17*].
- b. The plaintiff's claim for arrears on operating licences be and is hereby dismissed.
- c. The plaintiff's claim for \$31 516.00 in arrear rates is set off against the defendant's claim for \$42 057.92 in outstanding telephone charges.
- d. The plaintiff shall pay to the defendant the difference in the sum of \$10 541.92 in outstanding telephone charges and interest thereon at the prescribed rate from the date of counterclaim.
- e. The plaintiff shall pay two thirds of the defendant's costs of suit.

Takawira Law Chambers, plaintiff's legal practitioners
Dondo & Partners, defendant's legal practitioners