

HIPPO VALLEY ESTATES LIMITED  
and  
TRIANGLE LIMITED  
versus  
MINISTER OF ENVIRONMENT, WATER AND CLIMATE

HIGH COURT OF ZIMBABWE  
MANGOTA J  
HARARE, 20 February, 2018 and 3 May, 2018

**Opposed application**

*T Magwaliba*, for the applicants  
*E Mukucha*, for the respondent

MANGOTA J: The applicants are sister companies. They are into sugar-cane growing and sugar processing. They operate in the Southern part of Zimbabwe's lowveld.

The respondent is the Minister of Environment, Water and Climate. She is the one to whom the President of Zimbabwe assigned the Zimbabwe National Water Authority Act out of which the Zimbabwe National Water Authority ["ZINWA"] was born. ZINWA is a statutory body.

The applicants concluded two agreements with ZINWA's predecessors. The agreements related to the supply of raw water to the applicants. They were signed in 1961.

The agreements provide that the parties - i.e. the applicants and ZINWA- would jointly review charges for raw water and the respondent would fix the charges if the parties failed to agree. One of the agreements provides that any new charges would take effect in the succeeding year. The other provides that new charges would take effect after a period of two months.

On 17 December, 2015 ZINWA's Chief Executive Officer, one Sakupwanya, addressed a letter to the applicants. The letter which the applicants attached to the application as Annexure C referred to the review of raw water tariffs. It reads, in part, as follows:

"RE: REVIEW OF RAW WATER TARIFFS

This serves to advise that Government, through the recent National Budget pronouncement, has reviewed water tariffs for Commercial Agriculture (Estates) from \$9.45 per megalitre to \$12-00 per megalitre.

The new tariffs are with effect from December 1, 2015" [emphasis added].

Following the above-mentioned letter, the respondent published the Zimbabwe National Water Authority [Raw Water Tariffs] Regulations, Statutory Instrument 48 of 2016 [“the regulations”]. She did so on 6 May, 2016.

The regulations are the subject of this application. The applicants applied to have them set aside. They submitted that these were *ultra vires* the enabling Act, violated their rights, were discriminatory in nature and were, therefore, invalid.

The respondent opposed the application. She stated, *in limine*, that the deponent to the applicants’ founding affidavit did not have the latter’s authority to depose to the same. She stated, on the merits, that she published the regulations in terms of s 50 of the Zimbabwe National Water Authority Act. The Act, she insisted, confers power upon her to make regulations which provide for a tariff of water charges. She submitted that the regulations did not violate the applicants’ rights. She averred that she could set the tariff notwithstanding the agreement which the applicants concluded with ZINWA’s predecessors in 1961. She insisted that the agreements which the applicants referred to were governed by s 39 (7) of the Water Act [Chapter 20:24]. She moved the court to dismiss the application with costs.

The applicants abandoned the *in limine* matter which they had raised in their answering affidavit. The preliminary matter pointed at the fact that the notice of opposition had been filed out of time. They had insisted that the respondent had been barred and should not, therefore, be heard.

The respondent’s *in limine* matter which related to the authority of the deponent’s deposition of the founding affidavit was disposed of by the applicants. They attached to the answering affidavit two resolutions. They called these Annexures A1 and A2. The annexures showed that the deponent had the applicants’ authority to depose to the affidavits for and on their behalf.

The *in limine* matter of non-joinder of ZINWA to the application which the respondent raised in her Heads was devoid of merit. She knows as much as the court and the applicants do that the issue of non-joinder cannot kill an application or a court action.

Reference is made in this regard to r 87 (1) of the High Court Rules 1971. The rule reads in, part, as follows:

“(1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party....”

Whilst it was desirable for the applicants to have joined ZINWA to the application which they filed against the respondent, its non-joinder did not, however, cause the application to be fatally defective. In any event, it is not ZINWA which made the regulations which gave birth to this application. The respondent made them. She was, therefore, correctly sued. She is as the author of the applicants' complaint.

The letter, Annexure C, which ZINWA addressed to the applicants is quite revealing. It states, in clear and categorical terms, that Government reviewed raw water tariffs for the applicants' operations upward. It does not say ZINWA reviewed the water tariffs.

Paragraph 9 of the agreement which the first applicant signed with ZINWA's predecessor in 1961 says of the subject which is under consideration:

"9. REVIEW AND AMENDMENT OF CHARGES

That ZINWA may review the price of water supplied, including the water levy, at any time. The consumer shall be advised, in writing, of any such variation in charges consequent upon such review and the said variation in charges shall take effect after a notice period of two months." (emphasis added).

Paragraph 8 of the agreement which the second applicant concluded with ZINWA's predecessor, on the issue of the review of water tariffs, reads:

"Review and Amendment of Charges .....

8. The charges described in clause 7 hereof shall be subject to review in accordance with the following provisions:
  - (a) Until the 15<sup>th</sup> June, 1966 the said charges may be reviewed at any time but only at the request of the consumer. Upon such review the said charges shall be fixed by agreement between the parties, and failing such agreement shall be determined by the Minister.
  - (b) As from June 1966, the said charges may be reviewed at any time at the instance of either party prior to the end of each year, commencing with the period ending on the 31<sup>st</sup> March, 1967. Upon such review -
    - (i) The said charges shall be agreed between the parties and failing agreement shall be determined by the Minister, and any variation of the said charges consequent upon such review shall take effect as from the beginning of the next succeeding year." (emphasis added).

It is evident, from the foregoing, that the power to review the water tariffs rests with ZINWA in so far as the case of the first applicant is concerned. The same power lies with ZINWA and the second applicant in so far as the second agreement is concerned. The respondent has no power at all to review the water tariffs in the first agreement. She reviews

the water tariffs in the second agreement where ZINWA and the second applicant have failed to agree on the tariff which must apply to the latter's consumption of water for its operations.

The respondent acted *ultra vires* the agreements when she reviewed the water-tariffs for the applicants. She had neither the power nor the authority to do what she did. A *fortiori* when she acknowledges, as she does, the existence and, by necessary implication, the binding nature of the agreements which ZINWA's predecessors signed with the applicants.

The agreements are in tandem with s 30 of the Zimbabwe National Water Authority Act, [Chapter 20:25] ("the Act"). It reads, in part, as follows:

"30 Water and other charges

- (1) The Authority may, with the approval of the Minister and subject to the Water Act [Chapter 20:24], fix charges for –
  - (a) the sale of raw or treated water from water works operated or controlled by the Authority; and
  - (b) .....; and
  - (c) .....; and
  - (d) .....
- (2) When seeking the approval of any charge in terms of subsection (1) or an increase in any charge, the Authority shall apply to the Minister in writing, setting the full details of any proposed charges or increase therein and the basis of the proposal.
- (3) The Minister shall consider forthwith any application in terms of subsection (2) and, if he is satisfied that the proposed charge or increase therein is fair and reasonable having regard to –
  - (a) .....; and
  - (b) .....; and
  - (c) any other relevant economic factors justifying the proposed charge or increase therein, he shall approve the charge or increase therein sought" [emphasis added].

It is evident, from the foregoing, that the respondent cannot *mero motu* increase the water tariffs. It is also clear that he/she cannot increase the water tariffs which ZINWA puts forward to him/her for his/her consideration unless he/she is satisfied with ZINWA's reasons for the increase.

ZINWA has to file a written application to him/her. It has to state its reasons for the proposed increase. Its reasons must satisfy the respondent. It, in short, engages in a formal process which the respondent has the discretion to approve or disapprove.

It is not within the respondent's power to act in terms of s 50 of the Act without ZINWA having made any written representations to him/her on the issue of the proposed increase. Any action by him/her along the suggested lines would be *ultra vires* the Act.

There is, *in casu*, no evidence that ZINWA applied to the respondent to consider any proposed increase. There was, in fact, no proposed increase of water tariffs at all.

The letter, Annexure C, which ZINWA addressed to the applicants forms the basis of increase of water tariffs. The letter has the footprints of the Minister of Finance and Economic Development. It does not have the footprints of the respondent or those of ZINWA.

There is, therefore, no doubt that the respondent acted outside s 30 of the Act when she published the regulations. Her conduct was *ultra vires* the enabling Act, so to speak.

Given the above-described set of circumstances, the complaint of the applicants cannot be faulted. They submitted, and correctly so, that the respondent violated the *audi alteram partem* rule. They said they were not consulted by ZINWA or the respondent when the latter published the regulations.

The *audi alteram partem* rule is a principle of natural justice. It enjoins decision-makers to hear the other side before he/she makes a decision which adversely affects the rights of the other party. The principle has its origins in the biblical story of Adam and Eve when they partook of the forbidden fruit. God did not just impose a punishment against them for having failed to obey the rule which he had directed them to obey at all times. He called upon them, each in turn, to justify his/her conduct. He only imposed the punishment upon each one of them when each failed to acquit himself or herself.

The above-mentioned principle became part of modern Zimbabwe's law. It was born under the Administrative Justice Act, [Chapter 10:28]. Section 3 of the mentioned Act is pertinent. It reads, in the relevant part, as follows:

- “3.     Duty of Administrative Authority
- (1)     An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectation of any person shall—
- (a)     act lawfully, reasonably and in a fair manner; and
- (b)     ---; and
- (c)     ---.
- (2)     in order for an administrative action to be taken in a fair manner as required by paragraph (a) of subs (1), an administrative authority shall give a person referred to in subs (1) —
- (a)     adequate notice of the nature and purpose of the proposed action; and
- (b)     a reasonable opportunity to make adequate representations; and
- (c)     adequate notice of any right of review or appeal where applicable.”

There is no doubt that the respondent violated paras (a), (b) and (c) of subs (2) of s (3) of the Administrative Justice Act. Contrary to the agreements which required the applicants and ZINWA to discuss and agree a review of the water tariffs, the respondent simply increased the same. She did not notify the applicants of the increase. She did not afford them an opportunity to make representations. She simply published the regulations as a bombshell. The publication adversely affected the applicants' rights. It was, at any rate, not within the scope of her work to review the water tariffs. That work was for ZINWA to perform. Her work was to either approve or disapprove what ZINWA would have placed before her.

Judicial notice is taken of the fact that Government and ZINWA are two separate and distinct authorities. The respondent falls under the executive arm of Government. She, it has already been stated, administers the Act under which ZINWA falls. ZINWA, on the other hand, is a statutory body. It is a parastatal which has its own structure which is separate and different from Government. ZINWA, and not Government, should have reviewed the water tariffs. Government, however, reviewed these. Reference is made in this regard to the contents of Annexure C. These state, categorical terms, that Government reviewed raw water tariffs for the applicants' operations.

The respondent's statement which was to the effect that the agreements which the applicants concluded with ZINWA's predecessors were governed by s 39 (7) of the Water Act [Chapter 20:24] was totally misplaced. The section does not deal with the current subject – matter. It deals with the reallocation of water. It, therefore, does not apply to the issue which is before me.

The applicants stated, and correctly so, that s 56 of the Constitution of Zimbabwe grants all persons equality before the law. They insisted, and again correctly so, that it grants to all persons the right to equal protection and benefit of the law. The section, they state, outlaws discrimination which is based on class or economic or social status.

That the respondent violated s 56 of the Constitution requires no debate at all. She singled out the operations of the applicants only and published regulations for those alone. All other sectors, amongst them mining and industry, had their charges reduced or maintained. The annexures which the applicants attached to the application bear testimony on the above observed matter. The respondent failed to justify the discrimination which she caused the applicants to suffer.

The regulations which the respondent published violated:

- i) the agreements which the applicants and ZINWA's predecessors concluded.

- ii) section 30 as read with s 50 of the Act.
- iii) section 56 of the Constitution of Zimbabwe.

They are unlawful in every respect of the word. They cannot stand. The respondent's opposition to the application was completely devoid of merit.

The applicants proved their case a balance of probabilities. The application is, accordingly, granted as prayed.

*Scanlen & Holderness*, applicant's legal practitioners  
*Civil Division of the Attorney General's Office*, respondent's legal practitioners