ECOCASH ZIMBABWE (PRIVATE) LIMITED
versus
RESERVE BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 18 May 2020 & 26 May 2020

Opposed urgent chamber application

Adv T Mpofu, for the applicant
Mr *ABC Chinake,* for the respondent

CHINAMORA J: **Introduction:** The application before me is, firstly, for an interim interdict and, secondly, for a final interdict on the return day. The relief sought is set out in the provisional order as follows:

> "TERMS OF THE INTERIM RELIEF GRANTED
>
> Pending the determination of this matter, the applicant is granted the following relief:
>
> 1. That a final interdict be and is hereby granted against the respondent prohibiting the enforcement of the directive issued on 4 May 2020 against the applicant.
> 2. The applicant be and is hereby authorized to uplift all the restrictions imposed on the accessibility of the ecocash system by its agents in terms of the directive issued by the respondent on 4 May 2020 and restore all functionality to the affected agents
> 3. The respondent shall pay costs of suit".
>
> TERMS OF THE FINAL ORDER
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. That a final interdict be and is hereby granted against the respondent prohibiting the enforcement of the directive issued on 4 May 2020 against the applicant.
> 2. That it be and is hereby ordered that the respondent does not have authority in terms of section 10 of the National Payment Systems Act [Chapter 24:23] to make any directives against the management and the participants of a mobile money payment system without affording them the right to be heard.
> 3. That the directive issued on 4 May 2020 against the applicant by the respondent be and is hereby declared null and void and is consequentially set aside.
> 4. That the respondent pays costs of suit."

It is important that the background to this application be set out clearly for a proper appreciation and perspective on the dispute and the relief that the applicant seeks.

Background

The facts surrounding the dispute between the parties can be deciphered from the founding affidavit, opposing affidavit, answering affidavit and annexures to these documents. The applicant's case as appears from the founding affidavit and answering affidavit can be summarized as follows.

The applicant is a company incorporated in terms of the laws of Zimbabwe and operates the ecocash platform which, *inter alia*, provides services like cash in and cash out transactions and airtime sales, and has numerous agents engaged to do so. The respondent is the regulator vested with the statutory responsibilities to ensure that transactions conducted on the ecocash platform comply with the law against money laundering, and issues directives from time to time to ensure compliance. It principally enforces compliance through the Financial Intelligence Unit (FIU).

Through a letter dated 4 May 2020 ("the directive"), the Acting Director of the FIU wrote to the Chief Executive Officer of the applicant (Ms Natalie Jabangwe). The letter in the critical parts reads as follows:

> "Dear Ms Jabangwe
> **Suspension and re-registration of all ecocash agent accounts with transaction limits of above ZW$100,000-00 per month**
>
> 1. We refer to our directive of the 21st of April 2020, directing Ecocash (Pvt) Ltd (Ecocash) to effect a down ward variation of transaction limits of various categories of ecocash agents.
>
> 2. Analysis of ecocash returns has shown that even the revised limits continue to be abused by many of the agents. We have noted that in most cases, the value and volume of transactions undertaken by high-threshold agents are inconsistent, not only with their business profiles and declared line of business, but also with normal mobile money agent business.
>
> 3. In order to curtail the abuse, it is necessary that the Know Your Customer principle be enhanced for all ecocash agents. In this regard, you are directed as follows:
>
> 4. Subject to the exceptions set out in paragraph (5) below, all agent accounts with a monthly transaction threshold above ZW$100,000-00 (applicable to SMEs) shall be suspended and their accounts frozen, with immediate effect.
>
> 5. Agents falling into the following categories are exempted from the suspension and freezing under this directive, but shall be subject to ongoing regulatory monitoring;
>
> -Bank institutions
> -Bureaux de change
> -Listed companies
> -International organizations
> -Microfinance institutions

-Government and quasi-governmental institutions

6. Any suspended agent wishing to continue with agent business shall apply to Ecocash for re-licencing/re-registration.

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Oliver Chiperesa
Acting Director-General
Financial Intelligence Unit"

The applicant avers that the decisions had a material and ongoing prejudicial effect on it. In consequence, it filed the urgent chamber application which was placed before me seeking the relief captured in the provisional order above. The respondent vehemently opposed the application and took a number of points *in limine.*

Points *in limine*

The preliminary points taken by the respondent are: (a) that the matter is not urgent; (b) that there was a material non-joinder of the director of the respondent's Financial Intelligence Unit (FIU); (c) that the applicant has no *locus standi* to institute this application; (d) that the provisional order is fatally defective as the interim relief sought is the same as the final order that the applicant is asking for; and (e) that the applicant cannot interdict an act done by operation of law. I now turn to examine those preliminary points.

Whether the matter lacks urgency

The respondent averred in its papers that no basis had been set out why this application should be treated on an urgent basis. It asserted that the application was filed on 6 May 2020 and served on the respondent on 7 May 2020. The respondent further submitted that the applicant, by letter dated 7 May 2020, confirmed that it had frozen all agents accounts that had transacted for more than ZW$100,000-00 per months except the categories exempted by the directive. As a result of this letter, the respondent argued that, since the applicant had complied with the directive, there was no basis for the interdict.

On its part, the applicant persisted that the matter was urgent in that it had acted timeously to bring the urgent chamber application before the court, following the directive issued on 4 May 2020. It submitted that it had acted swiftly as soon as the need to act arose. As regards consequence, the applicant contended that the closure of its agents' accounts had affected a majority of people who do not have access to bank accounts, most of whom were in rural areas. It asserted that the

directive hurt "the applicant's business" and there was reasonable apprehension of financial loss by 11 million Zimbabweans. The applicant also contended that it had taken a period of 9 years to build the agency business, and that it was an expensive exercise to complete registration of its agents to enable them to quickly resume operations. Additionally, it argued that the affected agents were not heard before the directive was issued, and that this breached the Administrative Justice Act *[Chapter 10:28]*.

Relating to the argument that, insofar as it had complied with the directive, it had no case for an interdict, the applicant submitted that it did not want to fall foul of the "dirty hands" rule. The decisions in *Econet Wireless (Pvt) Ltd* v *The Minister of Public Service Labour & Social Welfare & Ors* SC 31-16 and *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information and Publicity & Ors* 2004 (1) ZLR 538 (S) were relied on. The authorities are clear that a party served with a directive issued in terms of the law is required to comply and then challenge it. The words of CHIDYAUSIKU CJ in *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information and Publicity & Ors supra*, are pertinent:

> "This is a court of law and, as such, cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards."

In light of the authorities proscribing approaching the court with dirty hands, I am not persuaded to make an adverse finding on the issue of compliance with the directive. Further, given that the application was filed on 6 May 2020 after the respondent's directive was issued on 4 May 2020, I am prepared to accept that the matter was urgent in the sense contemplated in *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (H). Having come to this conclusion, I am satisfied that this point *in limine* was ill taken as it lacks merit.

Non-joinder of Director of the Financial Intelligence Unit

The respondent had raised a preliminary point that there was a material non-jointer to the extent that the FIU, a division within the Reserve Bank of Zimbabwe had not been cited. The basis of the objection was that the Director General of the FIU had issued the directive and, therefore, should have been joined in the proceedings. Mr *Chinake*, for the respondent argued that the FIU had operational independence from the applicant in terms of s6A (2) of the Money Laundering and Proceeds of Crime Act *[Chapter 9:24]*, and was not subject of control by the Minister of Finance

or any other authority. On that premise, it was submitted that the applicant had been improperly cited.

I will not dwell much on this issue since r87 of the High Court Rules, 1971, provides that a matter cannot be dismissed for mis-joinder or non-joinder of any interested party. (See *Sobuza Gula-Ndebele v Chinembiri Bhunu N.O*. SC 29-11). I am in agreement with Adv *Mpofu* that the FIU is not a legal *persona* and, more relevantly, all correspondence relating to the operation of the ecocash platform referred to the applicant as the regulating authority. Noteworthy, is the directive which, in paragraph 6, states that:

> "Ecocash shall only re-licence /re-register any new agent above the SME category, subject to approval by the Reserve Bank of Zimbabwe (National Payment Systems) acting in consultation with the Financial Intelligence Unit"

Also relevant is the letter dated 21 April 2020 on the letterhead of the FIU, which states in the penultimate paragraphs as follows:

> "The transaction limits set out below, may be revised upwards, upon satisfying the regulators (Reserve Bank of Zimbabwe and Financial Intelligence Unit) of the adequacy of Ecocash's AML/CFT controls."

Finally, in this respect, the notice given by the applicant to its customers and agents, advised that the directive of 4 May 2020 had been received from the Reserve Bank of Zimbabwe and the FIU. Those correspondence put beyond reproach that the point *in limine* was unmerited. I accordingly, dismiss it.

Locus standi

The respondent asserted that the applicant does not have standing to seek to enforce the rights of its numerous agents who have not sought to advance their cause before this court. It submitted that the basis upon which the applicant has brought the application in the interest of the agents has not been established. Mr *Chinake* argued that it was simply an attempt by Ecocash to enforce its own financial interests.

On the other hand, Adv *Mpofu* contended that the applicant had demonstrated sufficient interest in the matter and its outcome to come before the court. He submitted that the agents were a key component of the functionality and operation of the ecocash platform. Thus, to the extent that the accounts of the agents had been closed, the applicant had a right to institute proceedings to

interdict the actions of the respondent. Additionally, the applicant argued that its agents were threatening to sue it, hence it had *locus standi* to protect its rights.

I have to consider whether the applicant had established a sufficient legal interest to clothe it with standing to apply for the interdict it seeks. It has been held that a court should be circumspect in affording standing to an applicant purporting to have an interest in the matter, yet it would be advancing a purely financial interest. That question was put to rest in *Zimbabwe Teachers Association v Minister of Education and Culture* 1990 (2) ZLR 48 (HC) which decided that:

> "It is well settled that, in order to justify participation in a suit such as the present, a party such as the … applicant has to show that it has a direct and substantial interest in the subject matter and outcome of the application".

In this respect, in CORBETT J in *United Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C) quoted with approval the view expressed in *Henri Viljoen (Pty) Ltd* v *Awerbuch Brothers* 1953 (2) SA 151 (O) that a "direct and substantial interest" connoted:

> "… an interest in the right which is the subject matter of the litigation and … not thereby a financial interest which is only an interest in such litigation".

See also, *Zimbabwe Stock Exchange v ZIMRA* 2008 (1) ZLR 181 (S) at 185

More recently, in *Dzingirai v Hwende & Ors* HH 468-19, this court (per ZHOU J) appositely put the position as follows:

> "The personal ego, political idiosyncrasies and financial wishes may be interests but they do not give the affected person the legal standing to seek recourse through the court procedures irrespective of how strongly the affected person feels about them".

I agree with my brother judge's lucid observation. The fact of the matter is that Ecocash owns the platform, while the agents enjoy the right of use of the platform as long as the applicant receives its fee per transaction. In other words, the applicant's interest is to get its transactional fee arising out the agent's participation on its platform. The applicant's answering affidavit betrays the nature of the interest it sought to protect. Paragraph 12.2 deserves quoting:

> "Financial interests are also worthy of protection in terms of our law. It cannot be argued on *bona fide* grounds that the suspension of agents will not directly affect the income earning capacity of the applicant which is worthy of legal protection. Applicant has a contractual relationship with its agents in terms of which it earns income from the services performed by agents on its behalf".

While the applicant might feel passionately about the financial strain occasioned by the directive, it is not the kind of interest that can found *locus standi* for the applicant at law.

I have also read the document titled *"Ecocash Agent Terms and Conditions"* signed between the applicant and each one of its agents, which is part of the papers before me. There are terms which I found relevant to my consideration of the issue of *locus standi*. It is worth quoting clause 7, which reads:

> "7. INDEPENDENT CONTRACTOR
> 7.1 The parties acknowledge that, save for the duties and powers of the agent as stated in clause 3 hereof, nothing in this agreement shall be construed to create a relationship of employment or partnership whatsoever between the parties, whether for tax or any other purpose.
> 7.2 Subject to clause 3 hereof, neither party shall have the right to bind the other to any agreement with a third party or to incur any obligation or liability on behalf of the other party"

The question that arises is: if the agents are independent contractors in their own right, on what basis does the applicant have standing to litigate on their behalf? I see no lawful reason for Ecocash to bring the present action to vindicate what essentially are rights which inhere in an independent contractor, who has not even asserted his/her/its loss, actual or potential, before this court.

Also interesting is clause 3.11 which is in the following terms:

> "The agent shall comply, at its own cost and expense, with all laws, license conditions and the requirements of any legislative body or government, provincial, regional or local authority relating to any matter contemplated in this agreement."

In the context of the above clause, I go back to examine the directive issued on 4 May 2020. Paragraph 3 points out that the limits set by the respondent "continue to be abused by many of the agents". Thus, to the extent that the closure of the agents' accounts was premised on abuse by agents, which can be inferred to include failure to comply with clause 3.11, the concerned agents ought to have approached the court. Undoubtedly, it is the agents whose accounts were closed who have *locus standi* to apply to the court alleging that the respondent's action was unjustified since they have not flouted the law or abused the ecocash platform. In this respect, the applicant's founding affidavit fortifies my view. Mr Eddie Chibi (the applicant's Chief Executive Officer) asserts, in paragraph 20.9.1, that the directive does not specify any crimes that the agents allegedly committed. Then in paragraph 20.9.2, he states that the applicant and the agents were not heard

before any decision was made against them. Finally, in paragraph 20.11, the following averments are made:

> "As indicated above, agents perform several functions within the ecocash system. The directive of 4 May 2020 suspends an agent from performing all the functions that an agent is capable of performing in the ecocash system. That means that in addition to the cash in and cash out transactions, the agents will not be able to offer services such as airtime sales, prepaid electricity sales, business to business transactions with merchants and other agents, customer registrations for ecocash and consumer education on how to perform certain transactions. It is my view that an agent can only be lawfully suspended from performing all these functions if it can be shown that the agent is incapable of legally performing all these functions. Naturally, this means that an agent whose main area of trade is selling airtime and does so without any illegality must be excluded from a blanket suspension from the ecocash system." **[My own emphasis]**

Quite clearly, in the above averments, Mr Chibi did not make any case for the *locus standi* of the applicant. Instead, if not paradoxically, he established that it is the agents who had standing. Even more telling that the applicant lacked *locus standi* is paragraph 20.6, which reads:

> "The directive of 4 May 2020 will affect agents such as Transerve, Zuva, Total, N Richards, Metropeech and Engen amongst others who are driving the Zimbabwean economy but do not fall under the exemption mentioned in category 5."

What emerges from the applicant's submissions is that a decision affecting the agents' interests has been unlawfully taken without affording them a right to be heard, or that the respondent has adopted a dragnet approach. That may be so, but does that give the applicant a sufficient legal interest to file an application before the court on behalf of its agents? I think not. If Transerve or the other juristic entities mentioned by the applicant have a cause of action, I take the view that nothing precludes them from approaching this court for redress in their own right. Glaringly, the applicant's founding papers make it obvious that the affected agents (and not the applicant) should have instituted this application. Besides disclosing a purely financial interest, nothing in the papers before me demonstrates applicant's *locus standi* to institute this application. I therefore uphold the respondent's point *in limine*. I would have dismissed the application on this basis alone, however, I prefer to consider the other grounds of objection in case my conclusion is incorrect.

Relief sought is fatally defective

In respect of the relief sought, the respondent submitted that a final interdict cannot ordinarily be founded on a *prima facie* case. In this respect, Mr *Chinake,* for the respondent, drew

my attention to the similarity between the relief sought on an interim basis and the final relief. The respondent argued that, the provisional order was therefore fatally defective, and prayed for dismissal of the application.

Mr *Chinake* argued that, given the way the draft order was framed, if the interim order sought was granted, the applicant would have obtained an order which is final in effect, making it unnecessary for the applicant to come back to court on the return day to have the order confirmed. More importantly, it was submitted that a final order could not be granted on proof of a *prima facie* case. The respondent also contended that the applicant was effectively seeking either a declaratur or a review of the respondent's directive by way of an urgent chamber application, which it could not do. Counsel further argued that the order sought was defective insofar as it was not predicated on the pendency of either an application for a declaratur or a review application in terms of sections 14 and 26, respectively, of the High Court Act [*Chapter 7:06*].

In response, Adv *Mpofu* for the applicant, submitted that the point in *limine* raised lacked merit since the draft order could be amended in terms of r 246 (2) which allows a judge, if satisfied that the papers establish a *prima facie* case, to grant a provisional order either in terms of the draft order filed or as varied. Counsel referred me to *Balasore Alloys Ltd* v *Zimbabwe Alloys Ltd & Ors* HH 228-18, where CHITAPI J made the following observation:

> "In determining whether a *prima facie* case is established the focus should not be to determine whether the applicant has provided evidence to establish what the applicant must finally establish. The approach should be to determine whether the applicant has placed evidence before the judge from which a court properly directed and applying its mind to the evidence could or might find for the applicant … In other words, the judge only needs to be satisfied that there is a case made by the applicant which merits referring to the court for further and fuller argument so that a final determination is made by the court which still hears full argument."

Counsel's argument was made to address the submission that the application was an attempt to obtain final relief through the chamber book process. At the same time, the contention would confront the objection that it was incompetent to obtain a declaratory order or relief available on review via an urgent chamber application. Hence, the suggestion that the propriety or otherwise of the eventual order to be granted on the return day need not be interrogated at the time interim relief is sought. I do not agree that the grant of an interim order can be considered in isolation from the final order to be granted on the return day. I will return to this issue.

It requires no second guessing that the temporary order sought is final in nature. Equally evident *ex facie* the provisional order is that the relief sought in the interim order is the same or substantially the same as in the final order. The impropriety of such an approach has received ample emphasis in this jurisdiction. The seminal case is *Kuvarega* v *Registrar General & Anor supra,* where at 193A-C, CHATIKOBO J appositely cautioned:

> "The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a *prima facie* case. If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a *prima facie* case … if the interim relief were granted in the form in which it is presently couched, she would get effective protection before she proves her case".

See also *Econet Wireless (Pvt) Ltd* v *Trustco Mobile (Pty) Ltd & Anor* S 43-13

The above remarks are even more relevant to the dispute in *casu*, where the grant of the relief sought results in the unfreezing of the accounts frozen in terms of the respondent's directive. Paragraph 1 of the interim interdict requires me to grant a final interdict prohibiting the enforcement of the directive issued by the respondent on 4 May 2020. Then paragraph 2 asks me to order the upliftment of all the restrictions imposed on the accessibility of the ecocash system. Ordinarily, interim orders become operational or executable upon being granted. The consequence is to allow the agents to access the unfrozen accounts and start operating them. Yet the perceived abuse of those accounts is the harm that the directive seeks to prevent pending relicencing of the agents affected by the directive. To put the issue in a contextual perspective, the directive of 4 May 2020 ordered the closure of accounts of individual agents who were transacting above a monthly threshold of ZW$100,000-00 on the ecocash platform. Thus, if the relief sought were granted, to use the language of this court in *Kuvarega v Registrar General supra*, the applicant would get effective protection before it proves its case. I have to ask myself whether granting an order which is final in nature does not presuppose that the applicant has established a clear right. It is beyond argument that it does. I did not read *Balasore Alloys Ltd v Zimbabwe Alloys Ltd supra* as authority for the proposition that a final order can be obtained on proof on a *prima facie* basis.

I proceed to examine the relief that the applicant desires on the return day. The draft order is self-explanatory. Firstly, the applicant seeks a final interdict prohibiting the respondent from

enforcing the directive issued against it on 4 May 2020. This is the same relief which it has asked me to grant on a temporary basis. (See paragraph 1 of interim order). Secondly, it would like a declaratur that the respondent has no authority in terms of section 10 of the National Payment Systems Act to make directives against the management and the participants of a mobile money payment system without giving them the right to be heard. Finally, another order is sought declaring the directive issued on 4 May 2020 null and void and thereby setting it aside. There is no difference in effect between this order and the orders sought in paragraphs 1 and 2 of the interim relief. The result is to unfreeze and allow the concerned agents access to their accounts. The question that I pose is: is there anything remaining to incentivize the applicant to come back to court on the return day when the accounts have already been unfrozen and access gained to the ecocash platform? The answer is obvious. In other words, the applicant can gleefully sit back since it would have achieved through the provisional order what it required by way of final order on the return day.

I return to the issue of whether consideration of the grant of interim relief can be divorced from the eventual relief to be granted on the return day. I have expressed the view that it would be folly to do so, and my view finds support from this court's approach in *Rose v Arnold & Ors* 1995 (2) ZLR 17 (H). The case underscores the necessity of a judge seized with an urgent chamber application to cast his or her eyes on the ultimate order to be confirmed on the return day and evaluate the competency or otherwise of such relief. In that case, a provisional order had been granted which, if confirmed, had the effect of affecting the rights of a third party not before the court. As a result, ROBINSON J (at 21) incisively remarked:

> "In fact, if I am to be completely frank, I would add that had this application been placed before me in chambers in the very first place, I would have had no hesitation in declining to grant a provisional order and in pointing the applicant in the direction of what I consider was the correct path for her to follow".

Conscious of what happened in *Rose v Arnold & Ors supra*, I make the point that a judge dealing with an urgent application in chambers, must interrogate the propriety or otherwise of the relief sought on the return day to avoid falling into the conundrum of granting interim relief which is incapable of confirmation on the return day. Relevantly, r 226 (1) of the High Court Rules, 1971, distinguishes between a court application and a chamber application. In the context of the application before me, I note that s14 of the High Court Act, provides for declaratory relief, and lays down that such relief is obtained by way of an application. An examination of the relief in the provisional

order reveals that the applicant is seeking declaratory relief via a chamber application. I have not found anything in the jurisprudence of this court that justifies such a delinquent approach.

On the contrary, the attempt to seek interim relief which has the effect of a final order has been criticised by this court. In *Mike Velah and Ors* v *the Minister of Primary & Secondary Education and another* HH 124-18, ZHOU J aptly said:

> "The first insurmountable hurdle for the applicants is the relief which they seek. The relief sought is final not just in its form and substance but in its effect. This court has in many judgments warned against the undesirability of seeking final relief through an urgent chamber application under the guise that it is interim relief. Quite apart from the procedural requirement that this kind of relief should be sought by way of review as an ordinary court application as required by order 33 r 256, if the relief was granted as sought its consequences would be irreversible should the provisional order not be confirmed. The interim relief that the applicants seek is that the decision to withhold the applicants' results be set aside, and for the applicants' results to be confirmed and released. Mr *Chamuka* understandably was unable to make any meaningful submission on how that kind of relief could be granted as interim relief. On that ground alone, the relief which the applicants seek is incompetent and this court cannot grant it other than with the consent of all the parties to the dispute. The application thus fails on that basis."

The rationale of this judgment is not open to debate. Without hesitation, I uphold the preliminary point raised by the respondent.

Court cannot interdict a lawful act

The law is established that an interim interdict will not be granted to a person whose rights in a thing have already been taken by operation of law at the time he or she makes an application for interim relief. In *Airfield Investments (Pvt) Ltd v The Minister of Lands, Agriculture and Rural Resettlement & Others* 2004 (1) ZLR 511 (S) 518 A-B, MALABA JA (as he then was) stated:

> "The appellant was not in a position to show the existence of a *prima facie* right of ownership in the land … because at the time it applied for interim relief all the rights of ownership it had in the land had been taken by means of an order of acquisition and vested in … [the State] … When the appellant lodged the application for the interim relief before the court *a quo* the acquisition of the land by the State was a *fait accompli*, all rights of ownership having been extinguished on its part …"

See also *J C Conolly & Sons (Pvt) Ltd v R C Ndhlukula & Anor* SC 22-18

In this respect, Mr *Chinake* contended that granting the relief sought by the applicant on the draft order, amounts to this court preventing the Reserve Bank from performing its functions in terms of the law. I am in agreement with the submission. It would be a disjuncture for an executive functionary to exercise its legitimate statutory mandate, and then have the court undermine that

through an interdict. Rather, the applicant should challenge any perceived irregular exercise of administrative power via an application for a declaratur or review. I find objection that an applicant cannot interdict an act done by operation of law appealing and uphold the point *in limine*. My conclusion in no way means that the applicant cannot approach the court, but that it has selected the wrong method to vindicate the rights it seeks to protect. Put differently, the applicant has come through the back door instead of the front door. The review procedure provided in terms of section 26 of the High Court Act is available to the applicant if so minded. Alternatively, the applicant can utilize section 14 of the High Court Act. Which option to pursue is a matter within its prerogative.

In view of the conclusion I have reached on the issue of *locus standi*, the fatal defect in the provisional order and that it is incompetent to interdict something done by operation of law, it is unnecessary for me to delve into the merits of the case. In relation to costs, the respondent has asked for costs on an attorney and client scale in the event the application failed. Even though I have upheld preliminary points which are dispositive of the matter, I believe that the applicant has litigated in good faith. In the circumstances, I am in agreement with the position taken by CHITAPI J in *Netone Cellular (Pvt) Ltd* v *Reward Kangai* HH 441-19, that a party should not be penalized with punitive costs for holding a contrary legal position, since opposing arguments on the law enhance our jurisprudence. Therefore, in the exercise of my discretion I will award costs on the ordinary scale.

In the result, I make the following order:

1. The application is dismissed.

2. The applicant shall pay costs of suit

Mtetwa & Nyambirai, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners