

REPORTABLE (26)

ECONET WIRELESS (PRIVATE) LIMITED
v
(1) THE MINISTER OF PUBLIC SERVICE LABOUR AND
SOCIAL WELFARE (2) THE REGISTRAR OF LABOUR
(3) NATIONAL EMPLOYMENT COUNCIL FOR
COMMUNICATIONS AND ALLIED SERVICES

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA AND BHUNU JA
HARARE 15 JANUARY 2016 & 23 JUNE 2016

L Uriri, for the appellant
T Mpofo, for the respondents

BHUNU JA: The cardinal issue for determination in this case is the appellant's right to be heard *vis-a-vis* its obligation to obey the law before being heard. In legal parlance the issue has to do with the application of the age old dirty hands doctrine as determined through the cases and amplified by this Court in the case of *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of state for Information and Publicity and Ors* 2004 (1) ZLR 538 (S).

The factual and legal basis upon which the appeal is founded is this. The appellant is engaged in the cellular communication industry. The Labour Act [*Chapter. 28:01*] provides for a system of Collective Bargaining Agreements regulating the employment relationships of employers and employees in their respective industries. To that end, s 82 (1) (a) of the Act provides that:

“Where a collective bargaining agreement has been registered it shall with immediate effect from the date of publication in terms of section eighty-five or such other date as may be specified in the agreement, be binding on the parties to the agreement, including all members of such parties and all employers, contractors and their respective employees in the undertaking or industry to which the agreement relates.”

By General Notice 106 of 2010 in the Government Gazette of 20 May 2010 the Registrar gave notice to extend the scope of the National Employment Council for the Communications and Allied Services Sector to include the interests of Cellular Communications. The General Notice reads:

“It is hereby notified in terms of section 61 of the Labour Act [Chapter 28:01], an application has been received for the variation of scope of registration of the National Employment council for the communications, computer networks, internet and E-mail providers, broadcasting, courier services in the Communications and Allied Sector in Zimbabwe.

Any person who wishes to make representation relating to the application is invited to lodge such representation with the Registrar of Labour, Private Bag 7707, causeway, Harare within 30 days of publication of this notice and state whether or not he wishes to appear in support of such representation at any accreditation proceedings.”

Pursuant to the notice the appellant embarked on a concerted effort to challenge the authenticity of the National Employment Council Registration certificate in a series of letters culminating in the registrar of Labour writing to the appellant on 24 February 2011 confirming the authenticity of the registration certificate in question. The letter reads in part:

“We write to confirm that the certificate of Registration of the Employment Council with the change of name and variation of scope is authentic and was issued by this Ministry.”

Despite such authentication the appellant persisted with its bid to challenge the authenticity of the certificate of registration through its lawyers. The Registrar however considered that there were no valid objections and proceeded to publish the Collective

Bargaining Agreement for the Communications and allied Services Industry Statutory Instrument 1 of 2012 in the Government Gazette of 6 January 2012 with the result that it became law and binding on that date in terms of s 82 (1) (a) of the Act.

Section 36 (1) of the Statutory Instrument requires the appellant as an employer in the industry to register with the said National Employment Council within one month of the Statutory Instrument coming into effect.

Pursuant to the collective bargaining agreement coming into force, the General Secretary of the National Employment Council wrote to the Appellant on 9 January 2012 apprising it of the need to comply with the law while pursuing legal remedies if any. The letter reads in part:

“May we take this opportunity to put the matter to rest as this issue is adequately covered by our current labour legislation in s 61 (5) of the Labour act [Chapter 28:01] which specifically says. ‘Any person aggrieved by any action by the Registrar in terms of this section may appeal to the Labour Court’ Econet thus has the right to seek redress in the courts if it still queries the NEC variation of registration Certificate but until the courts rule otherwise, this does not exempt Econet from complying with the Communications and Allied Industry’s regulations in terms of S.I. 1 of 2012.

We have enclosed the NEC Registration Form and monthly returns Form for your attention. We trust you will comply with the registration requirements within the stipulated time.”

In open defiance of the law, the appellant did not register with the National Employment Council or pay its union dues protesting that the promulgation of S. I. 1 of 2012 was irregular, and to that extent, invalid.

Its further written protests were not responded to with the authorities insisting on compliance. This prompted the appellant to approach the High Court on review for redress in terms of s 3 of the Administrative Justice Act [*Chapter 10:28*].

The relief sought included:

1. Condonation of the late noting of the review proceedings.
2. Nullification of the registration of third respondent as the National Employment Council for the Communications and Allied Services Industry S. I. 1 of 2012.
3. Nullification of the corrected certificate of registration issued by the second respondent to the 3rd respondent.
4. Nullification of sections 33, 34, 35, and 36 of the collective Bargaining Agreement communications and allied Services S. I. 1 of 2012.

At the hearing that followed, the respondents took two points *in limine*:

1. That the appellant should be denied audience because it was approaching the court with dirty hands for want of compliance with the law.
2. That the High Court had no jurisdiction to entertain the matter.

The High Court sustained the first objection *in limine* with the learned presiding Judge making the following pertinent remarks:

“The Act does not go further to provide that pending the determination of the review of the process leading to the promulgation, the law is suspended. As long as the law remains in the statute books it must be complied with.

In view of the above findings, this court will withhold its jurisdiction until such time the applicant submits itself to the law.

The respondents prayed for costs on a higher scale. I see no reason of {sic} denying them their prayer.”

Having come to that conclusion, the learned judge did not find it necessary to determine the other issues raised until the appellant had purged its defiance of the law.

The appellant has now approached this Court on appeal complaining that the court *a quo*'s refusal to grant it audience on account of the dirty hands doctrine was unjust and a denial of its right of access to the courts under s 69 of the Constitution.

In further developing its argument, it was submitted on its behalf that the Council's insistence on payment of subscription dues was tantamount to unlawful expropriation of its private property. It was finally submitted that the court *a quo*'s determination in this respect amounted to a denial of the right to protection of property under s 71 of the Constitution.

The court *a quo*'s sentiments are however consistent with the ruling in the Associated Newspapers of Zimbabwe case (*supra*) in which the learned Chief Justice was at pains to emphasise the need for citizens to obey the law first before approaching the courts. In that case his Lordship had occasion to remark at page 548A – D that:

“This Court is a court of law, as such it 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.

...

For the avoidance of doubt, the applicant is not being barred from approaching the court, all that the applicant is required to do is to submit to the law and approach this court with clean hands on the same papers.”

It is a basic principle of our law which needs no authority that all subsisting laws are lawful and binding until such time as they have been lawfully abrogated. If,

however, any authority is required for this proposition, one need not look further than Black on the Construction and Interpretation of the Laws (1911) page 10 para 41, where the learned author says:

“Every act of the legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favour of the validity of the Act. If it is fairly and reasonably open to more than one construction that construction will be adopted which will reconcile the statute with the constitution and avoid the consequence of unconstitutionality.”

What this means is that all questioned laws and administrative acts enjoy a presumption of validity until declared otherwise by a competent court. Until the declaration of nullity, they remain lawful and binding, bidding obedience of all subjects of the law.

The doctrine of obedience of the law until its lawful invalidation was graphically put across by *Lord Radcliffe in Smith v East Elloe Rural district Council* [1956] AC 736 at 769 when he observed that:

“An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of illegality on its forehead. Unless the necessary procedures are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.”

If it were not so, and every litigant challenging the validity of any law was excused from obeying the law pending determination of its validity, there would be absolute chaos and confusion rendering the application of the rule of law virtually impossible. This is because anyone could challenge the validity of any law just to throw spanners into the works to defeat or evade compliance with the law.

As the Communications and Allied Industry Regulations S.I. 1 of 2012 were properly gazetted and became law on 6 January 2012, they are valid and binding legislation. Every person to whom an Act or legislative instrument relates is under a mandatory obligation to obey the law until it has been repealed or declared invalid by the courts. The appellant was therefore duty bound to obey the law until such time as it had been lawfully abrogated regardless of its attitude to the validity of the law.

Considering that Zimbabwe is a constitutional democracy firmly founded on the rule of law it is difficult to fault the learned judge's line of reasoning in any way. The term 'rule of law' connotes obedience and submission to the dictates of the prevailing laws of the land.

While s 69(3) of the Constitution guarantees the appellant's right to access the courts, it is no licence for it to approach the courts with hands dripping with dirt. The appellant is not being denied access to the courts. What it is being asked to do is to cleanse itself by obeying the prevailing laws of the land before approaching the courts.

By the same token, while under s 71 of the Constitution, the appellant has the right to protect its property through the courts, there is a corresponding obligation to do so with clean hands.

For the foregoing reasons we found as a matter of fact and law, no merit in the appellant's complaint that it had been denied its constitutional right of access to the courts and protection of its private property.

The learned judge in the court *a quo* did not fall into error or misdirect herself in any way by denying the appellant access to the court until it had cleansed itself by complying with and obeying the prevailing laws of the land.

For that reason, I conclude that there is no merit in this appeal.

It is accordingly dismissed with costs.

ZIYAMBI JA: I agree.

GARWE JA: I agree.

Mtewa & Nyambirai, appellant's legal practitioners

Civil Division of the Attorney-General's Office, 1st and 2nd respondent's legal practitioners.

Messrs Matsikidze Mucheche, 3rd respondent's legal practitioners.