INDIGENOUS PETROLEUM ASSOCIATION OF ZIMBABWE
versus
ZIMBABWE ENERGY REGULATORY AUTHORITY
and
MINISTER OF ENERGY AND POWER DEVELOPMENT

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 18 September 2020 & 10 March 2021

Opposed application

T. Mpofu, for applicant
J R Tsivama, for 1st respondent
LT Muradzikwa, for 2nd respondent

DUBE J

1. The applicant seeks an order for confirmation of a provisional order granted on the following terms;

   "TERMS OF THE FINAL ORDER SOUGHT
   That you show cause why a final order should not be made in the following terms
   1. The 1st respondent's Notice headed "licensing of Petroleum Sector Operators in 2020" date stamped 9 March 20202 be and is hereby declared null and void.
   2. The 1st respondent's board be and is hereby declared improperly constituted and thereby null and void.
   3. 1st respondent shall pay the costs of suit."

   TERMS OF THE INTERIM RELIEF GRANTED

   Pending confirmation or discharge of this Provisional Order, the applicant is granted the following interim relief;
   1. That the following provisions of the 1st respondent's Notice headed "*Licensing of Petroleum Sector Operators in 2020*" date stamped 9 March 2020 be and are hereby suspended.
   a) The requirement of twenty-five (25) branded service stations;
   b) The requirement of a performance bond with a value of $30 000 000.00; and
   c) The requirement to pay $2 000 000.00 as the fee for a procurement license.

2. The applicant represents indigenous players in the petroleum industry. The first respondent is established in terms of the Energy Regulatory Authority Act, [*Chapter 13; 23*], (the Act) and is the regulator for the petroleum industry. The second respondent

is the Minister responsible for overseeing the affairs of the petroleum industry and has the responsibility to appoint the first respondent's Board.

3. On 9 March 2020, the *Licensing of Petroleum Sector Operators in 2020 Notice*, [the Notice], was issued by the first respondent. The Notice increased procurement licence fees from ZWL$23 000.00 to ZWL$2000 000.00. The following are part of the conditions introduced ;

> "b. **Other conditions**
> i A procurement licensee shall have a supply contract from a trader at the time of application for a licence;
> ii. A procurement licensee shall have \own at least 25 sites and should provide evidence of such ownership
> iii. A procurement licensee should provide a performance bond with a value of ZWL 30 million before licensing…."

4. Aggrieved, the applicant approached the court on an urgent basis seeking to interdict the first respondent from giving effect to the Notice and allow the applicant's members to continue operating on the basis of their 2019 licences. It took issue with the hike of the procurement licence fees from ZWL$23 000.00 to ZWL$2 000 000.00 per annum and conditions for renewal of licences in part (b) of the notice. In particular it challenged, the requirement of having 25 sites, ownership and control thereof and payment of the performance bond of ZWL$30 000 000.00. The parties consented to a provisional order suspending the operation of the impugned conditions of the Notice on 18 March 2020.

5. In this application, the applicant seeks confirmation of the provisional order. It submitted as follows: Section 6 of the Energy Regulatory Authority, [*Chapter 13:23*], the Act, requires that the first respondent's board should have four women as part of it. The first respondent's board has three women. Secondly, the board is improperly constituted for want of a properly qualified legal practitioner. This is not the board contemplated by the Act. It contended that the Board has no legal validity and cannot transact valid business or make valid decisions. It could not have issued a valid Notice.

6. The applicant further submitted that the respondent failed to make a reasonable, lawful and fair decision when it came up with the notice. The members of the applicant had a legitimate expectation that their businesses would continue. They have vested interests in their businesses which the law protects. They were not heard before a decision affecting them was made. The measures put in place create monopolies. There is no explanation why a cash business requires a performance bond and why the sum should be so exorbitant. The respondent failed to engage the applicant on this issue and the measures taken are

unreasonable .The first respondent has not explained the factors it took into account in effecting an 8600% increase .The decision is arbitrary. The impugned notice is irregular and unlawful .It seeks an order declaring the Notice and the first respondent's Board improperly constituted and null and void.

7. On the question of the propriety of these proceedings, it submitted that after engagement, the first respondent has climbed down on its position. The first respondent conceded that the notice it issued was unlawful. When the application was filed, the respondent accepted that it failed to hear the applicant when it came up with the notice and that the conditions related to the 25 sites and performance bond could not be given effect to resulting in the parties consenting to the provisional order.

8. It contended that for the reason that the requirement to pay ZWL $ 2.000.000 in licence fees does not form part of (b) of the Notice which was withdrawn, it remains a live issue. There is still need for the court to pronounce on whether the requirement to pay this amount was validly made. The provisional order must be confirmed and cannot be discharged as it addresses the issue of illegality that the respondent accepted exists. It contended that discharging the provisional order makes valid that which the first respondent has accepted is a nullity. The first respondent wants the provisional order discharged so that it can issue a fresh notice, showing that the first respondent accepts that the notice cannot stand. The applicant does not agree with the proposed new terms.

9. The applicant contended that for the reason that the second respondent is barred for failure to file a Notice of opposition and heads of argument on time, clause 2 of the final order sought related to the constitution of the board is unopposed by the second respondent who declined to make an application for upliftment of bar. The first respondent cannot oppose that part of the order. The first respondent will hence forth be referred to as the respondent.

10. The respondent opposes confirmation of the provisional order and urged the court to discharge the provisional order. It submitted as follows: At the time of being served with the urgent chamber application, part of the impugned notice, which was the basis of the applicant's complaint, was set aside by the second respondent of its own accord in terms of the Petroleum Sector Notice dated 13 March 2020. Section (b) of the said Notice which refers to procurement licences was withdrawn .The issues complained of were addressed by a withdrawal of the conditions.

11. The revised procurement licence conditions will be published in due course. It seeks to have the provisional order discharged and consequently dismissal of the final relief sought

to enable it to set the applicable petroleum procurement licensing conditions in line with its mandate. The court cannot nullify the amended notice. No basis has been shown for the relief sought as it has been overtaken by events and remains purely academic. The court should discharge the provisional order as it is no longer relevant.

12. The respondent disputes that its board was improperly constituted. It maintained that the composition of the board is not before the court .Whether a board decision is valid or not is not determined by the quorum required for such meeting, the vote making the decision, or the number or composition of the entire board. The applicant failed to challenge the quorum for specific meetings and therefore an attack of the general composition of the board is misplaced.

13. It submitted that the Notice was issued by the chief executive officer of the respondent and employees of the respondent and that there is nothing to show that the Notice was issued by the respondent's Board. The applicant assumes that the Board was involved. The respondent contended that the appointment of the legal practitioner is saved or rendered of no consequence by s11 of the schedule to the Act which enables the Board to operate as it is, as long as it has a quorum.

14. The respondent's assertion that this dispute ought to have been taken to the Administrative Court in terms of s 56 of the Petroleum Act does not find favour with the court. The Notice being challenged is that of the Zimbabwe Regulatory Authority an authority established in terms of s 3 of the Act. The Petroleum Act [*Chapter 13:22*], creates a different entity altogether being the Petroleum Regulatory Authority. The Petroleum Regulatory Authority is not a part of these proceedings and the Notice impugned is not one made by the Petroleum Regulatory Authority. The provisions of the Energy Regulatory Authority Act do not oust the jurisdiction of this court.

15. Section 14 of the High Court Act [*Chapter 7:06*], empowers the court to deal with a declaratory application in the following circumstances;

> "14. The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

16. In *Johnsen* v *AFC* 1995 (1) ZLR 65 (H), the court dealt with the requirements of declaratory relief and held as follows:

> "The condition precedent to the grant of a declaratory order under section 14 of the High Court Act 1981 is that the applicant must be an "interested person", in the sense of having a direct

> and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment the court. The interest must concern an existing, future or contingent right …"

17. A declaratory judgment is a determination of a court that settles any legal uncertainty or controversy between the parties. It tackles the rights, duties and obligations of the parties in a dispute. It must be shown that there are interested parties on whom the declaratory judgment will bind. There must be a live dispute. A declaratory application should not be resorted to where the relief sought is abstract or academic. There must be a real controversy which the application seeks to address.

18. In *Thokozani Khupe* v *Movement for Democratic Change Tsvangirai (MDCT),* v *Parliament of Zimbabwe and Ors* CCZ20/19 at p7 the court remarked as follows;

> "A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the court's jurisdiction ceases and the case becomes moot "

19. Declaratory relief is always in the discretion of the court. The discretion must be exercised judicially taking into account the fact that courts do not decide matters which are purely academic or abstract. The court has an entitlement to decline to entertain a dispute simply because of developments outside the record which have the effect of terminating or resolving the dispute. No useful purpose is served by asking a court to resolve a dispute which has resolved itself rendering the decision of the court academic.

20. The dispute between the parties centres on the validity of the Notice issued of 9 March 2020. It is common cause that the provisional order was granted after the impugned conditions in part (b) of the Notice had already been formally withdrawn by the respondent. The conditions under (b) ceased to exist having been withdrawn by the respondent. It is for this reason that the respondent intends to come up with revised conditions.

21. Courts will grant orders for confirmation of a provisional order on the return day only when a case has been made for final relief sought. The return date is set to allow the court an opportunity to hear full argument on the case .The court is empowered to vary, confirm or discharge a provisional order whether the order was either entered with the consent of the parties or was an order of the court. An order for confirmation of a provisional order is made when the court is satisfied that a case has been made out for final relief and has the effect of bringing the dispute to finality. Where the applicant has not made a case for final relief, the provisional order is discharged. Confirmation proceedings are conducted on the premise that there is a live dispute between the parties which the court must settle.

22. What has since happened after the provisional order was granted is that the parties engaged and the respondent is prepared to address the concerns raised by the applicant in its urgent chamber application. It intends to issue another Notice in consultation with the applicant

23. The part of the Notice dealing with payment of ZWL$2000 000. 00 license fees is not covered by the respondent's withdrawal and effectively remains as part of the Notice. However, the court has considered that the challenge which relates to the ZWL$2000 000.00 annual fee, was resolved by the parties .A letter written by the applicant dated 19 April 2020 bears testimony to this fact and reveals that its members are in agreement with the license fees of ZWL$2000 000.00. This occurrence albeit outside the record, terminates the controversy between the parties.

24. The impugned conditions in part (b) of the Notice having been withdrawn and the other resolved by the parties themselves, there is simply no dispute to talk about. The applicant is not taking issue with the other licensing requirements which the applicant's members have been complying with. What remains of the Notice are terms and conditions agreed to.

25. *In Econet Wireless* v *Minister of Finance and Others* 2001 (1) ZLR 373 (S) at 374, the court remarked as follows;

> "The present case is similar to a case where the respondent has given an unequivocal undertaking that the wrongful act complained of will not be continued or repeated. It is well established that in such a case the court will usually refuse to grant an interdict. "

26. Equally, where an unequivocal undertaking that a wrongful act or conduct will not be continued or repeated is made and a provisional order to that effect granted, and a respondent undertakes, unequivocally that the wrongful act complained of will not be continued or repeated, stops or withdraws an act or action, there should be no basis for seeking confirmation of the provisional order. This undertaking renders the confirmation proceedings academic. No useful purpose will be served by dealing with the dispute on its merits on the return date. It is only in cases where a party has been shown to be *mala fide* in its undertaking that a wrongful act will not be proceeded with that an appropriate remedy will be granted on the return date. Otherwise, the appropriate course is to dismiss the application for confirmation of proceedings.

27. By acceding to the provisional order, even after withdrawing some of the conditions, the respondent accepted that it failed to make a reasonable, lawful and fair decision when it came up with the notice. The respondent has not only withdrawn the impugned conditions, it has made clear indications that the provisions complained of will not be persisted with and is

willing to further engage and come up with a mutually agreed Notice after consulting members of the applicant.

28. There is no longer any justiciable live dispute arising from the impugned conditions of the Notice and the ZWL$2000.000.00 license requirement .The applicant's complaint has been overtaken by events and so is the purpose of the interdict granted in terms of the provisional. No basis has been shown to continue with the enquiry regarding the reasonableness and fairness of the conditions impugned. Discussing whether the impugned conditions of the Notice that have been withdrawn are valid, fair and reasonable becomes purely academic. It would be inappropriate to declare the conditions as they were in the Notice of 9 March 2020 *null and void* as such a move will be abstract and purely academic. There is nothing for the court to set aside. The fact that an applicant has taken steps to correct its own illegality to a complaint raised by an urgent chamber application entitles the court to refuse to grant he relief sought.

29. No basis has been shown for discharge of the provisional order. It is nonsensical to expect the respondent to consent to the final order sought thereby acceding to the suggestion that the conditions impugned are a nullity when they are no longer in place and agreed to.

30. In the final analysis, I must conclude that the subject matter of the application being part (b) of the Notice and the licence fees of ZWL$2000 000.00, having been withdrawn and agreed to, the relief sought has been overtaken by events. No basis no basis has been shown for a judgment on the merits of the matter. The parties insist on being heard in a matter that has already resolved itself. No purpose will be served by enquiring and pronouncing on the constitution of the Board of the respondent. There is no real controversy between the parties. The application has been rendered academic and abstract. It is undesirable to make an academic pronouncement. Accordingly, I make the following order;

The application is dismissed with costs.

Atherstone and Cook, applicant's legal practitioners
Sawyer and Mkushi, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd respondent's legal practitioners