

ALLAN NORMAN MARKHAM
versus
MINISTER OF ENERGY AND POWER DEVELOPMENT
and
THE ZIMBABWE ENERGY REGULATORY AUTHORITY
and
GREEN FUELS (PRIVATE) LIMITED
and
TONGAAT-HULLET LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 17 March 2021 & 2 June 2021

Opposed Application

T Biti, for the applicant
M Chimombe, for the 1st respondent
J R Tsivama, for the 2nd respondent
K Kachambwa, for the 3rd Respondent

MANGOTA J: *Stare decisis* is part of the jurisdiction of this court and indeed of many jurisdictions the world over. Its meaning and import are not only clear. They are also straight forward. *Stare decisis*, in simple terms, stresses the obvious. The obvious is that an inferior court is bound by the decision(s) of the superior court. The inferior court cannot, by parity of reasoning, ignore or wish away the decision(s) of the superior court unless it can show, in its attempt to wish away such, that the circumstances of the case which the parties placed before it are distinguishable from those which gave rise to the decision(s) of the superior court.

It follows from the foregoing that an applicant who, through his legal practitioner, becomes aware that an application which he has filed is, in many respects, similar to the one which the superior court handled and reserved judgment upon does well if he takes a cue from the principle of *stare decisis*. He will, therefore, be ill-advised to persist with his application when his attention has been drawn to the pending judgment which, to all intents and purposes, may resolve the *causa* of his application. This is a *fortiori* the case where, as *in casu*:

- (i) he is ably legally represented; and
- (ii) his legal practitioner was involved in the case which was placed before the superior court wherein judgment was reserved; and
- (iii) the same legal practitioner is, once again, involved in the litigant's application which, in substance, is similar to the one which the superior court dealt with and reserved judgment upon; and
- (iv) the legal practitioner is thoroughly knowledgeable about the principle of *stare decisis*.

The remarks which I made in the preceding paragraphs of this judgment are relevant to this application wherein the applicant, a natural person, sued the respondents all of whom are in the energy sector moving for a declaratur which is to the effect that the Petroleum Blending Regulations, which the first respondent who is the Minister who is responsible for the sector promulgated in consultation with the second respondent, a statutory body which is set up in terms of s 3 of the Energy Regulatory Act, [*Chapter 13:23*] are *ultra vires* the parent Act and should, therefore, be set aside. He, in the alternative, is asserting that the regulations which the first respondent published in terms of s 57 (1) of the Petroleum Act (*Chapter 13:22*) should be set aside on the basis that they are unconstitutional and that they, therefore, infringe his right to equal protection and benefit of the law under s 56 (1) of the Constitution of Zimbabwe (No. 20) of 2013. He couched his draft order in the following terms:

“IT IS DECLARED THAT:

1. The Petroleum (Mandatory Blending of Anhydrous Ethanol with unleaded Petrol) regulations. S.I. 17 of 2013 are *ultra vires* the Petroleum Act [*Chapter 13:12*] and are set aside.
2. Section 4 of the Petroleum (Mandatory Blending of Anhydrous Ethanol with unleaded Petrol) regulations S.I 17 of 2013 is *ultra vires* the constitution of Zimbabwe and is hereby set aside.” (emphasis added)

The first, second and third respondents oppose the application. The fourth respondent does not. My assumption is that it intends to abide by my decision.

The assertions of the respondents which filed notices of opposition to the application are that the regulations which are the subject of the application are *intra vires* the Petroleum Act and should not, therefore, be set aside. They insist that the regulations are within the four corners of

the Petroleum Act and the Constitution of Zimbabwe. They, in the mentioned regard, place reliance on *Thabani Mpfu v Zimbabwe Energy Regulatory Authority and 2 Others* CCZ 13/20.

Whilst CCZ 13/20 debated the issue of *Thabani Mpfu's locus* to sue the respondents in the manner that he did, the issues which the Constitutional Court made findings upon were, in substance, not dis-similar to the issues which the current applicant placed before me. The Constitutional Court, in essence, decided that:

- (a) *Thabani Mpfu* did not have the *locus* to sue the respondents in his individual capacity or under s 56 (1) as read with s 85 (1) of the Constitution of Zimbabwe – and
- (b) The Petroleum (Mandatory Blending of Anhydrous Ethanol with unleaded Petrol) Regulations, as promulgated under Statutory Instrument 17 of 2013 were /are *intra vires* the Petroleum Act and the Constitution of Zimbabwe.

The Constitutional Court heard CCZ 13/20 on 5 November, 2014. It reserved judgment on the same. It delivered judgment on 23 September, 2020.

The applicant filed this application on 19 May, 2020. He filed it whilst the reserved judgment was pending determination. Mr T Biti, a very senior and experienced member of the legal fraternity, who appeared for *Thabani Mpfu*, argued the case of the applicant. He was, therefore, thoroughly aware of the decision of the Constitutional Court when he appeared and made submissions on behalf of the applicant *in casu*. I say so because he made his submissions on 17 March, 2021 when judgment in CCZ 13/20 had been delivered on 23 September, 2020.

The applicant was, in my view, being either naïve or mischievous when he persisted with this application against the tone of the judgment in CCZ 13/20. CCZ 13/20 settled the issues which he raised with me to a point where no further debate was required of the same. He did not explain his persistence with the application which he knew would not see any light of day. Nor did he show what he wanted to achieve under the stated set of circumstances other than to convey to me the impression that he intended to abuse the court and its process.

The judgment of HLATSHWAYO JCC which I was pleased to read touched on all the issues which the applicant raised in this application. The judgment was well-researched, well reasoned. It dealt with the regulations which form the basis of the applicant's case from the perspective of the Petroleum Act as well as from that of the Constitution of Zimbabwe in a clear and unassailable

manner. The findings which the Constitutional Court made were/are that the Petroleum (Mandatory Blending of Ethanol with unleaded Petrol) Regulations, Statutory Instrument 17 of 2013, were/are not *ultra vires* the Petroleum Act or the Constitution of Zimbabwe.

Given the findings of the Constitutional Court as pronounced under CCZ 13/20, one is left to wonder what there is for me to make a determination upon. I remained alive to this simple fact. The simple fact was/is that the decision of the Constitutional Court had/has a binding effect on whatever decision I would make in respect of the application which the applicant placed before me. *A fortiori* when I heard this application on 17 March 2021 whereas judgment on matters which were/are on all fours with it had been delivered on 23 September, 2020.

I am not persuaded to think that Mr *Biti* who appeared for the applicant does not know the principles of *stare decisis* the remarks of which I made in the foregoing paragraphs of this judgment. I am satisfied that he is very much alive to that principle. I am also not persuaded to think that he did not read the Constitutional Court judgment of 23 September 2020. I am satisfied that, as the legal practitioner who represented Mr *Thabani Mpofo* in CCZ 13/20, he had every reason not only to read but also to study and appreciate the reasoning of the Constitutional Court in respect of the *Thabani Mpofo* case.

Mr *Biti* does not tell why he did not advise the applicant not to persist with the application after he had read the CCZ 13/20 judgment. He does not even tell if he advised the applicant to withdraw. He, in fact, made submissions on a matter which he knew had died before it was born. Why he adopted the attitude which he took remains a matter for complete conjecture. The attitude which he took would have been understandable if it was taken by a young member of the legal fraternity who is learning the ropes. The same cannot be countenanced, let alone condoned, when it is associated with Mr *Biti* who has seen a number of years in the practice of the discipline of law. What he did/does, in my view, amounts to either a dereliction of duty on his part or to sheer mischief which the court will find hard, if not impossible, to accept.

I accept that the parties in the *Thabani Mpofo* case are, in some way or other, different from the parties in the current application. The difference lies in that whilst *Thabani Mpofo* was the applicant under CCZ 13/20, *Allan Norman Markham* is the applicant in this case. Other than that and the fact that CCZ 13/20 was filed as a Constitutional Court matter in terms of which the

constitutionality or otherwise of Statutory Instrument 17 of 2013 was being put to the test, everything else about the two applications was/is substantially the same.

The respondents' assertions which were/are to the effect that the applicant repeated word for word what *Thabani Mpfu* stated in his papers were, therefore, not without merit. He indeed did nothing but exactly that. He did so to a point where the decision of CCZ 13/20 resolved all the issues which the applicant raises *in casu*.

Given the position which I take of the matter and the fact that CCZ 13/20 resolved all the issues which the applicant raised herein, it being a fact that CCZ 13/20 is, in substance, on all fours with this application, there is, therefore, nothing which remains for me to determine *in casu*. I have, however, two comments which I wish to make in so far as this application is concerned. The first is that an applicant for a declaratur, such as the present one, cannot claim relief which is of a consequential nature in a s 14 of the High Court Act application. The section prohibits him from claiming such a relief.

It is pertinent for me to place the abovementioned matter into context. The context is gleaned from the contents of the section which reads;

“The High court may in its discretion and at the instance of any interested party inquire into and determine existing future or contingent right or obligation notwithstanding that such person cannot claim any relief which is consequential upon such determination”. (emphasis added)

The last portion of the cited section of the High Court Act shows that an applicant for a declaratur does not have the right to claim consequential relief at the time that the declaration which relates to his right or obligation is made by the court. He may have a declaration of right made in his favour. He cannot, however, claim relief which is of a consequential nature. The law prohibits him from claiming such a relief unless of course, he combines his application for a declaratur with one which moves the court for consequential relief.

The applicant applies for a declaratur. He does not combine his application with one which moves for a consequential relief. His draft order which moves for a declaratur as well as for consequential relief is improperly before me. The words of the draft order which relate to the relief which is of a consequential nature stand on nothing. The phrase which reads “are/is hereby set aside” does not have any bearing to the rest of the application. It should, therefore, be expunged from the record. It taints the application in a very fatal manner.

The second comment which I wish to make relates to the status of the applicant and his use of words in particular. He states that he is a member of Parliament for Harare North Constituency. As an Honourable member, whom he says he is, one would have expected him to make a clear distinction between a Parliamentary debate and court proceedings which, as is known, carry with them the dignity and decorum of the court.

The language which the applicant employed in his papers left a lot to be desired. That was more apparent in his answering affidavit than anywhere else. He used very intemperate language and made unsubstantiated allegations against the respondents. He reasoned more with his emotion than he did with his mind. He, in the process, succeeded in portraying the simple impression which was that his application was not motivated by any intention on his part to protect what he termed his rights. He showed that he was keen to show what, in his unjustified view, was/is corruption by and/or state capture of, the first and second respondents. He, unfortunately for himself, over-played his song in the mentioned regard to a point where it had no option but to lose all semblance of any meaning. It remained sounding as a broken record which was/is not pleasant to the ear.

The applicant is encouraged to make a clear distinction between debates of Parliament, on the one hand, and court discourse, on the other. Whilst emotions, and not reason, run high in the former, court proceedings are, by their nature, anchored on nothing else but reason. It is for the mentioned reason, if or no other, that those who are schooled in the discipline of law always agree to disagree with respect. It is for the same reason that they proud themselves with use of the phrase *learned friends*. They cease to be learned when they argue like those who are in a beer hall. They cease to be described as such when they employ the language which the applicant employed. That language is best left to Parliamentary debates where it reigns supreme.

The respondents were, therefore, not out of order when they raised concern in respect of the language which the applicant employed in prosecuting his case. They were within their right to show their disdain as they did. And even when they did, they did not argue like they were in Parliament. They did not do so because they are not members of Parliament which the applicant claims he is. They raised their concern in a clear as well as dignified manner which befits the discourse of the court. They are, therefore, very much commended for not having thrown caution to the wind.

The application was not worth the paper that it was written upon. Its author conducted himself in a very odious manner. His views were totally misplaced. He wasted the court's precious time in a situation where he should not have done so at all. He also wasted the respondents' time, energy and financial resources for no apparent reason other than sheer mischief on his part. He should, therefore, be censured for his unwholesome conduct. The censure serves as a measure of my displeasure at his conduct.

I have considered all the circumstances of this case. I am satisfied that the applicant did not prove his case on a balance of probabilities. The application is, in the result, dismissed with costs which are at attorney and client scale.

Mafume law chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners
Sawyer and Mkushi, 2nd respondent's legal practitioners
Ahmed and Ziyambi, 3rd respondent's legal practitioners