

NATIONAL SOCIAL SECURITY WORKERS' UNION
and
ZIMBABWE PENSION & INSURANCE RIGHTS TRUST
versus
MTHULI NCUBE N.O.
and
ZIMBABWE STATISTICAL AGENCY

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 3 February 2020 & 13 May 2020

Opposed application

T Biti, for applicants
K Chimuti, for respondent

ZISENGWE J: The 1st Respondent is Zimbabwe's current Minister of Finance and economic development. He was cited here in his official capacity as such. On the 1st of August 2019 he delivered before Parliament his mid-year budget review and supplementary budget. Below are the relevant excerpts thereof (paragraphs 54-56) which ignited this current dispute.

- “54. *The change in the currency regime from multi-currency regime to Zimbabwe dollar has definitely impacted on the basis for calculation of CPI indices and hence inflation. Given this transition, Zimstat will defer publication of year on year inflation, while building up data of prices in mono-currency for a period of 12 months to February 2020. This will ensure that we compare like with like in terms of currency regimes.*
55. *This is in line with what was done in 2009 after the change of currency regime whereby, Zimstat resorted to only gazetting month on month inflation. Year on*

year inflation publication will therefore resume after February 2020, alongside with month on month inflation publication.

56. *In the interim, stakeholders are encouraged to focus more on month on month inflation as a barometer for price developments”*

“Zimstats” which the 1st respondent refers to in the above excerpt is in fact acronym for Zimbabwe Statistical Agency (i.e. the 2nd Respondent). This is a statutory body mandated with the duty to collect, compile, analyse, interpret and disseminate statistical data on all relevant facets of Zimbabwean life. It is set up in terms of the Census and Statistics Act, [*Chapter 10:29*].

In a word therefore, the first respondent announced the immediate suspension of the publication by the second respondent of the annual inflation figures for a period of 12 months. The reason advanced thereby was that the migration from the multi-currency regime characterised by the use of a basket of currencies (among them the United States Dollar, the British Pound, the South African Rand and the Botswana Pula) to a single currency dispensation wherein the use of the Zimbabwe Dollar as the only permissible legal tender rendered it impossible to calculate the annual inflation rate.

Aggrieved by the aforementioned moratorium, the two applicants launched this application.

The 1st applicant (NSSAWU) is a registered trade Union representing all employees of the National Social Security Authority (NSSA). The 2nd respondent on the other hand is the Zimbabwe Pension & Insurance Rights Trust. It is a registered trust set up in terms of a deed and its core function is to represent the interests of pensioners across the country.

The Basis for the Application (the importance of annual inflation statistics)

The 1st applicant laid the foundation for launching the application in the following terms: that its main mandate is to negotiate on behalf of its constituency (NSSA employees) decent wages from their employer. In those negotiations one of the key determinants is annual inflation figures. The obvious position being that there exists a direct correlation between their wage demands and annual inflation figures: the higher the inflation figures, the higher will be their wage demands to keep abreast with the rise in the cost of living.

It is therefore averred that in the absence of officially published annual inflation figures, the execution of its mandate in this regard is severely handicapped and hamstrung.

Similarly the 2nd applicant sets out in its papers several reasons underpinning the importance of publication of official annual inflation figures the latter which are key and

critical in the discharge of its mandate. It contends that as a body whose main function is to assist and represent pensioners across the social spectrum in the country, its work is inextricably interwoven with issues of inflation.

Apart from the need for the public to be informed of this vital statistic for planning purposes it (i.e. 2nd applicant) cites the following as some the reasons for attacking the ban on the publication of annual inflation statistics. Firstly, that that the computation of pensions and other benefits is heavily reliant on annual inflation data; i.e. that the former should be calculated to ensure that they keep abreast with the latter.

Secondly, it was averred that annual inflation data is a pre-requisite for the calculation of the actual values of the pensions which were (allegedly unlawfully) removed from the books in 2009 with the introduction of the multi-currency regime. In the absence of annual inflation figures that exercise would be rendered futile.

Thirdly, it was averred that year on year inflation figures are a *sine qua non* for the computation of funds that need to be set aside to cater for the adequate future disbursement of pension pay-outs.

Fourthly, it was pointed out that the interrelatedness of inflation and interest rates in general and the dependency of the latter on the former in particular, makes it practically impossible for organisations such as the 2nd applicant to make prudent economic planning in the absence of information on annual inflation figures.

With the foregoing as its foundation the 2nd applicant concludes thus “The decision of the 1st respondent is therefore irrational, grossly unreasonable, illegal and unconstitutional”.

Against the background of the foregoing, applicants refer to four grounds upon which their review application is based and these are:

1. Illegality: In brief, the main thrust of the applicants in this regard is that the 1st respondent by declaring a ban on the publication of annual inflation figures usurped the powers of the Zimbabwe National Statistics Board (the board) something that he could not lawfully do if regard is had to s7 Of the Census and Statistics Act. According to the applicants, decisions of the species of the one in question are the exclusive preserve of the board. The 1st respondent has therefore no power to interfere with the professional independence and functions of the 2nd respondent.

Additionally, it was argued that the decision to impose the moratorium in question is unconstitutional as it is contrary to principles of good governance (s3 (1) (h)), runs counter to

the duty to act conscientiously, honestly and efficiently (s9 (2)) and goes against the obligation to act with unimpeachable professionalism and transparency.

2. Irrationality: Here, the applicants attack the rationale put forward by the respondents to justify the ban in question contending as they do that inflation merely entails a measure of the rate of the diminution of the purchasing power of a currency something which the respondent is well able to do given the available economic data at its disposal. To the applicants, therefore, the reason advanced by the respondents is a red herring designed to misinform the public. The real reason behind the ban, as far as they are able to discern, is that the respondents are alarmed by the escalating rate of inflation brought about by poor economic management, hence the vain attempt to conceal this fact from the public.

In the main, it is contended by the applicants that since 2016 the bond note and the RTGS\$ have been operating alongside the United States Dollar (“usd” for short) under the multi-currency dispensation, the migration to the mono-currency, therefore, wherein only the Zimbabwe dollar (which itself is the same as the bond note and the RTGS\$) cannot in way stand as an impediment to the computation of the rate of inflation. One needs to look no further than the depreciation of the bond note/RTGS\$/Zimbabwe dollar to calculate such rate of inflation. This, according to the applicants, puts paid to the respondents’ argument in this regard.

3. Gross unreasonableness. In this respect it was averred that the reason advanced by the respondents in defending the ban in question rings hollow in view of the fact that the astronomical rise in the rate of inflation is in any event public knowledge. According to them, the attempt to conceal the same is not only futile but grossly unreasonable.

4. Offensive to good governance and Transparency: It is contended in this regard that the decision is inimical to principles of good governance espoused in the Constitution. This point was essentially a repetition of some of the arguments raised above.

RESPONDENTS’ POSITION

The application was opposed by both respondents and opposing affidavits deposed to by George Tongesai Guvamatanga (the permanent secretary in the Ministry of Finance and Economic Development) and Aluwiso Mukavhi (the director General of Zimstats) were submitted detailing the bases on which such opposition was predicated.

Interestingly, the main argument advanced on behalf of the 1st respondent was that the decision to temporarily suspend the publication of annual inflation figures was made not by

him (i.e. 1st respondent) but rather by the 2nd respondent: all that the former did was to announce the same. It was further averred that although the decision was the brainchild of the 2nd respondent, it was nonetheless the product of a consultative process between the two respondents. Implicit in this argument is that the applicants are attacking the wrong person (i.e. the 1st respondent): they are shooting the messenger (so to speak). A further direct spin-off of this position was obviously to counteract the allegation of illegality of the 1st respondent's conduct because the decision was never his in the first place.

Secondly, it was contended that there was no total black-out of the publication of inflation as such as resort could always be made to month-on-month inflation figures which would continue to be published.

Thirdly, and perhaps most significantly, it was averred that the shift to a mono-currency regime rendered it virtually impossible to compute the annual inflation figures the latter metaphorically requiring the "comparison of apples with apples". It was therefore argued that the publication of annual inflation figures would only resume upon the collection of sufficient future data to enable the computation of the same.

POINTS IN LIMINE

The applicants as with the respondents raised a number of preliminary points. Interestingly, the parties called to question the authority of opposite sides' deponents to depose to the affidavits which were submitted in support of their respective positions. Whereas the respondents fired a salvo at the applicants, questioning the authority of Joseph Chimhanda and Martin Tarusenga to institute the application on behalf of the 1st and 2nd applicants respectively, the latter responded in equal measure and impugned the propriety of Guvamatanga to depose to and submit an opposing affidavit on behalf of Minister Ncube.

The authority of Tarusenga and Chimhanda to institute the proceedings on behalf of the applicants

It was pointed out in this regard that the absence of written resolutions from NSSAWU and 2nd respondent's board of trustees granting authority to Tarusenga and Chimhanda to institute the current proceedings on behalf of the 1st and 2nd applicants respectively renders the application defective and on that basis the application should be dismissed.

In his answering affidavit Tarusenga expressed surprise that his authority to bring the application on behalf of the 1st applicant was being challenged. He then proceeds to articulate

two somewhat contradictory positions; and I will reproduce the relevant paragraphs, namely paragraph 2 and paragraph 14.1:

“2. *I am shocked that there is a challenge on my authority or the authority of the Union to bring these proceedings. I contend that it is a question of law the provision of such authority is unnecessary. Our lawyers will argue this point when they prepare heads of arguments”.* (Emphasis my own).

“14.1 *I join issue with this paragraph. I confirm that I have authority to bring these proceedings and in any event I have attached our resolution purely out of an abundance of caution*.” (Emphasis added).

As for Tarusenga he does not address the issue of his authority to institute the proceedings on behalf of the 2nd applicant and confines himself to the question of the 2nd applicant’s *locus standi*.

However, whether through inadvertence or otherwise, neither of the two things which Tarusenga undertook to do ultimately took place: there was no reference in the 1st applicant’s heads of argument to the issue of the resolution in question nor was the resolution attached to the answering affidavit. Similarly there was no resolution from the board of trustees authorizing Chimhanda to launch this current application.

For corporates the law in this regard is now fairly well settled and one of the leading authorities is that of *Madzivire & Ors v Zvarivadza & Ors* 2006 (1) ZLR 514 (SC) where the following was stated:

“It is clear from the above that a company, being a separate legal person from its directors, cannot be represented in a legal suit by a person who has not been authorised to do so. This is a well-established legal principle, which the courts cannot ignore. It does not depend on the pleadings by either party.

The fact that the first appellant is the managing director of the fourth appellant does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorising him to do so.

In Burnstein v Yale 1958(1) SA 768, it was held that the general rule is that directors of a company can only act validly when assembled at a board meeting.”

The court further noted an exception to this above rule thus:

“An exception where a meeting of directors and a resolution would not be required is where a company has only one director who can perform all judicial acts without holding a full meeting. See *African Diamond Distributors (Pvt) Ltd v Van de Wetheuzen N.O and Ors* 1988 (4) SA 726.

The principle in the *Madzivire* case has been followed in several other cases. See for example *Harold Crown & Ors v Energy Resources Africa Consortium (Pvt) Ltd & Ors* SC3/2017, *Deputy Sheriff Chinhoyi v Appointed Enterprises & Ors* HH 1450/13, *First Mutual Investment (Pvt) Ltd v Roussaland Enterprises (Pvt) Ltd t/a Third World Bazaar & Ors* HH 301/17,

The principle in *Madzivire* is primarily based on the common law doctrine of separate legal personality of corporations which was also captured in section 9 of the Old Companies Act, [*Chapter 24:03*] which provided as follows:

“A company shall have the capacity and powers of a natural person of full capacity in so far as a body corporate is capable of exercising such powers”

As similar provision exists, albeit in a more expansive form, in section 19 of the Companies and other Business Entities Act, [*Chapter 24:31*], the latter which repealed the Companies Act. The question that arises is whether this principle is applicable to workers’ other legal entities such as workers’ Unions and trusts as are the 1st and second applicants respectively.

Trade Unions

The short answer to the former is to be found in Section 29 of the Labour Act [*Chapter 28:01*] which provides as follows:

29. Registration of trade unions and employers organizations and privileges thereof

- (1) Subject to this Act, any trade union, employers organization or federation may, if it so desires, apply for registration.
- (2) Every trade union, employers organization or federation shall, upon registration, *become a body corporate and shall in its corporate name be capable of suing and being sued*, of purchasing or otherwise acquiring, holding or alienating property, movable or immovable, and of doing any other act or thing which its constitution requires or permits it to do, or which a body corporate may, by law, do.

In paragraph 4 of the 1st applicant’s founding affidavit it is averred the 1st applicant is a trade Union duly registered according to the laws of Zimbabwe thereby making it fall squarely within the purview of the above Section. In turn it means the decision in *Madzivire* (*supra*) apply with equal force. The failure by the Chimhanda, therefore to attach the resolution by 1st applicant to institute the current proceedings renders its application fatally defective.

TRUSTS

That a trust (unlike a corporation) lacks the character of a legal *persona* is well travelled terrain; (see *Gold Mining and Minerals Development Trust v Zimbabwe Miners Federation* 2006 (1) ZLR 174 at 178 A-C), *Ignatious Musemwa & Ors v Gwinyai Family Trust & Ors* HH 136/16; *Crundall Brothers (Pvt) Ltd v Lazarus N.O & Anor* 1991 (2) ZLR 125. It simply consists of a set of legal relationships between the founder, trustees and beneficiaries. In simple terms that relationship consists the founder agreeing to hand over, and does hand over property that can be administered or disposed of by the trustees for the benefit of another person then known as the beneficiary. A trust has been likened to a deceased a deceased estate which consists of assets and liabilities and whose administration reposes in the trustees. See *Commissioner for Inland Revenue v MacNeillies's Estate* 1961 (3) SA 833 (A); *Ignatious Musemwa & Ors v Gwinyai Family Trust & Ors* (*supra*).

However, Rules 7 and 8 of the rules confer a trust (which is a form of association according to the definition in Rule 7) with the locus standi to sue or be sued. Rule 8 provides:

“8. Proceedings by or against associations

Subject to this order, associates may sue and be sued in the name of their associations.

Rule 8D on the other hand provides as follows:

“This order shall not be construed as affecting –

(a) The entitlement of an associate to institute proceedings on behalf of his association or fellow associates, or

(b) The liability or non-liability under any other law of associates for the conduct of their association or of their fellow associates.

The clear meaning conveyed by these provisions is that it is the *trustees* who are clothed with right to sue or be sued on behalf of the trust. In *Musemwa & Ors v Gwinyai Family Trust & Ors* (*supra*) DUBE J after reviewing various authorities remarked thus:

“The example of a deceased estate which comprises assets and liabilities being equated to a trust, best illustrates the nature of a trust. In order to sue, an estate has to be represented by an executor. The same should be said of a trust, which should be represented by its trustees in whom the trust's assets and liabilities vest, when it sues or is being sued. These observations emphasise the requirement for trustees to bring proceedings and to be joined in actions where a trust sues or is being sued.” (Emphasis added).

What is curious, therefore, about 2nd applicant's situation is that Martin Tarusenga who deposed to the affidavit on its behalf does not identify himself its trustee but rather as its General Manager. One gets the impression that he is an administrative functionary of the 2nd applicant, a position separate and distinct from that of trustee. He cannot therefore rely on rules 7 and 8. If the converse is true, then it was incumbent upon him to demonstrate as much, which he did not.

To compound matters, the deed constituting the trust was not attached to the application (c.f. *WLSA & Ors v Mandaza & Ors* 2003(1) ZLR 500 (H); *The Benatar Children's Trust v Robert Daniel Benatar* HH 124/17 nor was it availed at any stage during these proceedings leaving the court to second guess whether he is indeed empowered to bring these proceedings. How, therefore, can one tell whether he is not on a frolic of his own in instituting these proceedings? All this uncertainty could have been obviated by the attachment of suitable confirmation (whether in the form of the deed of Trust or a resolution or both) empowering him to do so.

DISPOSITION

To conclude therefore, it has not been shown that persons who instituted the application for either of the two applicants were legally authorised by the applicants to do so. In the result I find that the point *in limine* raised by the respondents in this regard is meritorious and I uphold the same.

Accordingly, the application is hereby dismissed with costs.

Tendai Biti Law, Applicants' Legal Practitioners
Civil Division of the Attorney General's Office, Respondents' Legal Practitioners