

JOHN TRANOS MATUKUTIRE
versus
THE MEDICINES CONTROL AUTHORITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
OMERJEE J
HARARE, 15th and 16th July 2008

Opposed Application

Mr *H. Mukonoweshuro*, for the applicant
Ms *S. Njerere*, for the respondent

OMERJEE J: This is an application to review the decision to cancel applicant's premises and person's licences by respondent in its statutory capacity as the issuing authority. The facts surrounding this dispute are virtually common cause. They can be conveniently summarised as follows:-

1. Applicant is a Pharmacist by profession and holds a valid practising certificate issued by the Pharmacist Council of Zimbabwe in terms of the Health Professions Act [*Cap. 27:19*]. During the relevant period applicant operated Pharmacies in both Harare and Chinhoyi namely, Forrestal Machipisa, Lomagundi and Chinhoyi Pharmacies.
2. On 7 August 2007 an Inspector of the respondent (Medicines Control Authority) visited/attended at Chinhoyi Pharmacy and discovered that the Pharmacy was, at the time of his visit, open for business and operating in the absence of a qualified supervising Pharmacist.
3. This resulted in the Inspector ordering an immediate temporary closure of the Pharmacy. The Pharmacy staff present complied with this order.
4. Between the months of August to September 2007 and on divers occasions both verbal and written communications relating to the closure of the Pharmacy and the reasons thereof ensued between applicant and his legal practitioner on the one hand and respondent's officials on the other.
It would appear that these discussions failed to yield any amicable resolution between the two disputants.
5. Subsequently, on 23 October 2007 respondent notified applicant by way of written

notice, its intention to cancel, in terms of s 61 of the Medicines and Allied Substances Control Act [*Cap. 15:03*] (“The Act”), both the premises licence and person licence it had earlier issued to him.

6. The respondent cite its grounds for arriving at that decision in the following terms:-

“The Committee considered your comments and resolved, in terms of s 61 of the Medicines and Allied Substances Control Act to **intend to cancel** your premises (persons) licence ... for failure to provide continuous personal supervision of the above mentioned premises by a licensed person in contravention of s 55(1)(b) the said Act”.

The notices expressly advised applicant of his entitlement to submit to respondent any representations he may have, in written form, within 30 days of receipt thereof.

7. Pursuant to this applicant through his legal practitioner submitted written representations dated 20 November 2007 which in the main registered applicant’s protestations against respondent’s intention to cancel both his premises and person licences.
8. On 20 February 2008 applicant in the company of his legal practitioner upon Invitation by respondent attended a joint meeting of respondent’s legal Committee and Licensing Committee, where he was afforded opportunity to make verbal representations concerning the issue of the intended cancellation of his two licences.
9. On 25 March 2008 applicant received two separately written letters from respondent informing him of its decision to effectively cancel the two licences on the basis of the earlier cited ground that applicant had breached the provisions of s 55(1)(b) of the Act i.e operating a Pharmacy without the continuous personal supervision of a licensed Pharmacist.
10. Aggrieved by this decision applicant on or about 1 April 2008 filed with this court what he purported to be an ‘urgent chamber review application’. On 4 April 2008 the application came before GOWORA J who ordered that the matter be removed from the roll by reason of non-compliance with Order 33 Rule 256 of the Rules of this court.
11. Applicant, on 10 April 2008 using the same set of papers earlier filed as the urgent chamber review application, re-instituted the matter as an ordinary court

application for review. He went about doing this by filing a notice of amendment.

The Application

In attacking respondent's decision to cancel his licences applicant raises four grounds of complaint and prays for the following order:-

- (i) An order setting aside the decision of respondent to cancel both Person and Premises Licences of the applicant on the basis of s 55(1)(b) of the Act.
- (ii) An order setting aside the disqualification of applicant from applying for a Person Licence for a period of 12 months.
- (iii) An order for costs on a higher scale.

Respondent's opposition

In opposing this application respondent, in addition to dealing with the merits has also raised two points *in limine*. Because of the view I take it is convenient to start by dealing with the second raised preliminary point. Respondent has urged this court in the exercise of its discretion to decline dealing with the main application on the basis that applicant has approached this court before exhausting his domestic remedies and has failed to give any good reasons for not submitting himself to the available domestic remedies.

It is obvious that his preliminary point has been raised because the legislation under which respondent derives and exercises its powers to cancel licences provides in s 62 that:-

“Any person who is aggrieved by a decision of the Authority in terms of the Act may, within 30 days after the date of that decision, appeal by notice in writing to the Administrative Court”

The respondent's decision to cancel the licences was made pursuant to the provisions of s 61 of the Act and therefore that decision falls squarely within the purview of the above-cited provision. Indeed respondent had in its letters of cancellation of licences drawn applicant's attention to this provision.

The relevant principles

It is trite that this court's common law jurisdiction to review proceedings of inferior tribunals is not automatically ousted or suspended pending the exhaustion of available domestic remedies *Zikiti v United Bottlers* 1998(1) ZLR 389 (H) at 391 H.

However, this court will not rush to exercise its review jurisdiction where domestic remedies are provided for, unless good reason has been shown to exist as to why an applicant has refrained from resorting to the provided remedies. In this regard SMITH J in *Musandu v Chairperson of Cresta Lodge Disciplinary Committee* HH 115/94 commented:-

“In my view, this court should not be prepared to review the decision of a domestic tribunal merely because the aggrieved person has decided to apply to court rather than proceed by way of the domestic remedies provided ... A litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for approaching the court earlier”.

The approach of our courts, therefore, is that where domestic remedies provide effective redress in respect of the complaint and where the unlawfulness alleged has not been undermined by the domestic remedies themselves, an aggrieved person should exhaust such remedies unless there are good reasons or special circumstances for approaching the High Court without having first exhausted the domestic remedies.

Applying this principle to the present case, can it be said that applicant has shown a good and sufficient reason for refraining to first submit his grievance to the Administrative Court as required by s 62 of the Act?

In paragraph (V) of his answering affidavit applicant states that his reasons for approaching this court without resorting to the procedure provided for under s 62 of the Act is because he has reason to apprehend that there will be unacceptable delays in the hearing and disposal of his matter by the Administrative Court were he to lodge an appeal with that court, His fears are founded against the backdrop of delays he has experienced in a different appeal matter filed with that court on 31 July 2007 but which had still not been heard by this year. The official reason given for not having timeously set the matter was the unavailability of assessors. For the sake of completeness it must here be recorded that from respondent's papers it would appear that this appeal was finally argued on 2 June 2008 and now awaits judgment.

This reason advanced by applicant, in my view, does not constitute a good and sufficient reason warranting this court to exercise its discretion in his favour. Admittedly, there was a lengthy and *prima facie* unreasonable delay in the disposal of his other appeal by the

Administrative Court. This court finds that the reasons given of lack of assessors is flimsy and smacks of administrative inefficiency on the part of officials in that court.

Having so said it is my firm view that the lack of or unavailability of assessors was a temporary problem as evidenced by the fact that on 2 June 2008 assessors were available and the matter involving applicant's other appeal was heard. In short there is no real foundation upon which applicant could claim that delays in hearing appeals at the Administrative Court are a permanent feature of that court. Further applicant has not in my view shown that an appeal to the Administrative Court was not capable of affording him effective redress.

I note in passing that at the heart of applicant's bone of contention with respondent's decision, lies in what he believes to be the wrong interpretation placed on the legislative phraseology 'under the continuous personal supervision of a qualified Pharmacist' by respondent. In otherwords applicant's contention directly attacks the merits of the decision by the respondent. It is thus not a determination fit for review but one that is more appropriate to be determined in a full appeal hearing.

In the result this court declines to hear the matter on the basis that the applicant has not exhausted the available domestic remedies, which in my view, are best suited to effectively and fully deal with his grievances.

Because I have arrived at this conclusion there will be no need to deal with the other preliminary issue raised by respondent or the other arguments advanced by either party on the merits of the case.

Accordingly, the application is dismissed with costs.