

REPORTABLE ZLR (65)

Judgment No. SC 67/07
Civil Appeal No. 158/05

MUTUMWA DZIVA MAWERE v THE MINISTER OF JUSTICE,
LEGAL & PARLIAMENTARY AFFAIRS

SUPREME COURT OF ZIMBABWE
CHEDA JA, GWAUNZA JA & GARWE JA
HARARE, JULY 17, 2007 & SEPTEMBER 11, 2008

A P de Bourbon SC, for the appellant

E I Manikai, for the respondent

CHEDA JA: The appellant is a businessman currently residing in the Republic of South Africa. The respondent is the Minister of Justice, Legal and Parliamentary Affairs in the Zimbabwean Government and is responsible for the administration of the Prevention of Corruption Act [*Cap 9:16*] (“the Act”).

On 9 July 2004, the Minister, by notice in the *Zimbabwean Government Gazette Extraordinary*, declared the appellant to be a Specified Person in terms of s 6 of the Act.

About 17½ weeks after the above notice, the appellant applied to the High Court for condonation for the late filing of the application for review and for the order declaring him to be a specified person to be set aside.

The order that the appellant sought was as follows -

1. Condonation be and is hereby granted for the late filing of the application for judicial review.
2. The decision of the respondent declaring the applicant to be a specified person in terms of s 6 of the Prevention of Corruption Act [*Cap 9:16*] published in the General Notice 345A of 2004 in the *Government Gazette Extraordinary* of 9 July 2004 be reviewed and is hereby set aside.
3. The respondent shall pay the costs of this application.

ALTERNATIVELY

4. It is declared that the respondent exceeded his powers in terms of s 6 of the Prevention of Corruption Act [*Cap 9:16*] when he issued a notice published in General Notice 345A of 2004 in the *Government Gazette Extraordinary* of 9 July 2004 declaring the applicant to be a specified person for purposes of the Prevention of Corruption Act [*Cap 9:16*].
5. It is declared that the applicant is under no lawful impediment in respect of his property in Zimbabwe.
6. The respondent shall pay costs of the application.

The High Court in its judgment no. HC 11951/04 dated 11 May 2005, after careful consideration of the reasons for the delay in filing the application, granted condonation to the applicant, proceeded to deal with the main application and dismissed it with costs.

This appeal is against the High Court's decision dismissing the application for review.

In his heads of argument the respondent raised the points *in limine* that the appeal should be dismissed on the basis that the appellant has no *locus standi* to appear before this court, more particularly:

- 1.1. The appellant is a specified person and has not obtained the authority of the investigator to launch this appeal; and
- 1.2. The appellant is a fugitive from justice.

Locus Standi

The appellant launched the application at the High Court in order to challenge the specification by the respondent and has appealed following the High Court's dismissal of the application.

In his submission the specification was wrong and that is why he is challenging it.

It is a legal requirement that a person who is specified should first seek authority from the investigator before engaging in any transactions that affect his estate.

Section 10 of the Prevention of Corruption Act provides as follows:

“10. Transactions by specified persons

- (1) Subject to this section a specified person shall not –
- (a) expend or in any way dispose of any property, or
 - (b) enter into any contract for the disposal of any property; or
 - (c) operate any account with any bank building society or financial institution;
 - (d) increase his indebtedness or adversely affect his estate; or
 - (e)
 - (f) Perform any act as an agent of a company or partnership that is also a specified person without the approval of the investigator assigned to the specified person or otherwise than in accordance with any condition imposed by the investigator.

without the approval of the investigator assigned to that specified person.

(2) No person shall do anything referred to in subs(1) for, or on behalf of a specified person, without the approval of the investigator assigned to that specified person or otherwise than in accordance with any conditions imposed by the investigator

- (3) ...
- (4) ...
- (5) ...
- (6) ...

(7) Any transaction carried out in contravention of subs (1) or (2) shall be void and where any property has been transferred as a result of any such transaction, the investigator may, on behalf of the specified person, recover any such property by proceedings in any court.”

The appellant is a specified person in Zimbabwe, not in the Republic of South Africa. The above restrictions can only apply to his assets in Zimbabwe and not in the Republic of South Africa.

It has not been shown that in instituting this appeal while he is in the Republic of South Africa, he is expending on any of his assets which are in Zimbabwe.

Any assets which he may have in South Africa are not affected by the above provision. The investigator has no jurisdiction over the applicant's assets which are not in Zimbabwe.

Accordingly, this Court cannot hold that he has no *locus standi* to launch the appeal in this court in the absence of evidence suggesting that he is expending or disposing of assets in Zimbabwe.

In addition, it is a moot issue whether he can be deprived of his constitutional right to challenge an administrative decision such as the above in a court of law to test its correctness. For example if such authority was refused by the investigator the appellant would have a right to appeal if it was unreasonably refused.

Fugitive from Justice

The other point *in limine* raised by the respondents is that the appellant is a fugitive from justice and should not be allowed to use the justice machinery for his protection.

The Shorter Oxford English Dictionary defines fugitive as "one who flees or tries to escape from danger, apt or tending to flee, given to or in the act of running away".

There is evidence to show that the appellant left Zimbabwe sometime ago and is now a citizen of the Republic of South Africa. There is no evidence to show that he deliberately put himself beyond the reach of the law. There is no evidence to show that he intended to go into hiding when he left Zimbabwe. It may well be that he was aware of some unlawful acts on his part when he left Zimbabwe, but there is no evidence to link his departure from Zimbabwe with the acts that led to his specification.

For this court to hold that he is a fugitive from justice it would have to be shown that he left Zimbabwe with the intention to flee and deliberately put himself beyond the jurisdiction of this court to avoid any legal action that might be brought up against him, or that he is in hiding within the jurisdiction of Zimbabwe.

(See *William Peter George Sylow v The State* HH-136-02 and other cases cited therein).

The appellant was specified when he was already a citizen of the Republic of South Africa.

I therefore cannot hold that the appellant falls under the category of a fugitive from justice.

The fact that an attempt was made to arrest and bring him to Zimbabwe and that he is now avoiding coming to Zimbabwe does not make him a fugitive from justice.

No person can be compelled to leave his country of residence and citizenship in order to go and subject himself to the jurisdiction of another country to face any legal action in that country.

I therefore come to the conclusion that the appellant cannot be denied a hearing on that basis.

WHETHER THE SPECIFICATION SHOULD BE SET ASIDE

Section 6 of the Act reads as follows:

“Power of Minister to Specify Persons

- (1) Where the Minister, on reasonable grounds suspects that any person –
 - (a) by theft, fraud or other unlawful means has caused the misappropriation or loss of property of the State, a statutory body, a local authority or any other person; or
 - (b) has received property from the State, a statutory body, a local authority, or any other person whether directly or indirectly, in contravention of any law, or as a result either direct or indirect of the action of any person who has caused misappropriation or loss such as is referred to in paragraph (a); or
 - (c) has accepted or obtained any benefit, advantage or profit corruptly or in circumstances that amount to an offence in terms of this Act, or Chapter IX (Bribery and Corruption of the Criminal Code);

- (d) is associated with or has been party to any transaction whatsoever with any other person who has done anything referred to in paragraph (a), (b) or (c) and as a result of such association or transaction, may be liable to the State, a statutory body, a local authority or any other person for any claim or proceedings in respect of any property or be liable to have the transaction set aside, and is satisfied that it is in the national interest to do so, he may, by notice in the *Gazette*, declare such person to be a specified person.”

The grounds upon which the application was brought before the High Court were that:

- “(a) The applicant only became aware of the specification in mid-September as he is not normally resident in Zimbabwe and no order was served on him personally;
- (b) The respondent breached the rules of natural justice in failing to afford the applicant a hearing prior to declaring him to be a specified person;
- (c) The respondent had ulterior motives for the declaration;
- (d) The respondent did not have the jurisdictional facts to entitle him to exercise his discretionary power to declare the applicant to be a specified person;
- (e) The Prevention of Corruption Act does not have extra-territorial application, and creates no crime or conduct that has extra-territorial effect.”

The respondent, in his affidavit, denied the allegations made by the appellant.

The appellant was at sometime a citizen of, and resident in, Zimbabwe. He has filed papers to support his argument that he is no longer a citizen of Zimbabwe and that the Act does not apply to him.

The Act is intended to deal with matters where the Minister has suspicion against any person.

“Any person” would include the appellant or any registered company. The Interpretation Act [*Cap 1:01*], s 3 defines a person to include any company incorporated; or any local or other similar authority. It is irrelevant whether a person is a resident or citizen of another country as long as that person has done one of the things mentioned in s 6(1) of the Act. His companies are incorporated according to the laws of Zimbabwe.

If the Minister on reasonable grounds suspects that the appellant has been involved in activities that have resulted in any loss to the State or other persons or institutions in which the State has a direct interest he can specify that perso. The appellant cannot avoid being investigated simply because he is not a citizen or resident of Zimbabwe. There is nothing to prohibit investigating the activities of a person simply because he resides outside Zimbabwe.

Specification of a person under the Act is simply a declaration. It is neither an arrest nor detention. It is a declaration that is made in order to facilitate an investigation.

The appellant complains that the specification was made without notice to him. The purpose of the specification is to facilitate investigations. It is not a conclusion or declaration that the person has committed any offence or crime. It is only after the investigations that a conclusion can be reached as to whether the person specified has engaged in any unlawful activities that have caused any loss to the State or other persons.

Even if it is accepted that the specification of a person may have serious implications the argument that the appellant should have been notified first is not reasonable in the circumstances. It would defeat the whole purpose of specification if a person were to be informed that it was intended to investigate him as this would give the person an opportunity to take whatever action he could to frustrate the intended investigations.

The person specified is given an opportunity under s 8(c) of the Act to give any explanation on the matters concerned when he is questioned by the investigator.

Section 9 of the Act also gives the specified person the opportunity to present his position on being examined by the investigator. In other words, the person is given the opportunity of a full hearing. Specification is not a final action against the person concerned.

In any case the report of the investigation is kept secret and does not prejudice the appellant by any publicity at that stage.

Once the Minister has received the investigator's report he may either confirm the specification and take any other action that he thinks fit, or cancel the specification. This means also that if the report absolves the specified person of any wrong doing, the Minister may revoke the specification.

The specification is a provisional step taken by the Minister and does not in any way stand as proof that any offence or wrongdoing has been proved against the specified person.

There is no good reason for claiming that a person should first be warned that he will be investigated as this would defeat the whole purpose of investigation.

There is no provision in the Act for the Minister to warn or give notice to the person concerned before investigating him. Accordingly, the Minister cannot be ordered to issue such a warning first which is not provided for in the Act. The claim that the specification offends against the rules of natural justice cannot be sustained since if the Minister sees it fit to cancel the specification, he can do so after a report is made to him.

The submission made, that the appellant should have been heard first, is akin to saying that a person reasonably suspected of committing a criminal offence by a

police officer should not be arrested unless he is first heard. This would render nugatory the criminal justice process. The same may be said in the instant case.

The manner in which the specification was made was therefore in accordance with the law and cannot be said to be invalid. It was clearly within the Minister's powers.

The case of *Holland & Ors v Minister of the Public Service, Labour & Social Welfare* 1997 (1) ZLR 186 (SC) referred to by the appellant refers to three fundamental requirements of natural justice to which a person directly affected by an impending inquiry is entitled, that is -

- (a) the right to have notice of the charge or complaint;
- (b) the right to be heard;
- (c) the right to be given the opportunity to adequately state a case in answer to that charge or complaint.

All the above provisions were met in this case in that the specification was published in the official *Government Gazette* and was intended to facilitate an investigation. The specified person was to appear for a hearing before the investigator at which the appellant could present his case following any issues raised against him or any complaint that would be made.

What the appellant suggests is that even before an investigation was made he should have been warned of the suspicion and impending investigation. There is no such right in the Act. The specification is not different from any other provisional orders made in our Courts where it is feared that investigations may be jeopardised if prior warning is given to the person involved.

It is sufficient that the appellant is informed by the notice declaring him as a specified person that investigations are to be carried out against him and that he is eventually afforded an opportunity to present his case.

I therefore do not agree that a failure to give appellant a hearing before the specification is a breach of his constitutional right.

The appellant alleged that the respondent acted with an ulterior motive. This is denied by the respondent.

The appellant says the respondent acted after attempts to arrest him and extradite him from South Africa had failed. This clearly highlights the fact that there was a suspicion by the Minister against the appellant which necessitated more investigations which could be best dealt with after specification and appointment of an investigator.

The respondent has also been criticized for taking action against the appellant without any jurisdictional facts.

However, the respondent's affidavit shows that certain information had been made available to him concerning the activities of the appellant and his companies.

In *South African Defence of Aid Fund & Anor v Minister of Justice*, 1967(1) SA 31, CORBETT J as he then was, held that a jurisdictional fact is a fact the existence of which is contemplated by the legislature as a necessary pre-requisite to the exercise of the statutory power.

At page 35 of the above judgment he went on to say:-

“Two points remain to be mentioned. As I have already indicated an exercise of the power granted by sec. 2 (2) involves two decisions. The first of these consists of the State President being satisfied upon one or more of the matters listed in paras (a) to (e) and constitutes the jurisdictional fact. The second consists of the decision to exercise the power, the jurisdictional fact having been found to exist. Once it is clear that the jurisdictional fact did exist, then it is difficult to see upon what grounds the further decision to exercise the discretionary power to declare the organization unlawful could be challenged in a Court of law: but, inasmuch as plaintiff's case does not touch upon this aspect of the matter, it is unnecessary to pursue this point. The second point arises from the fact that the power under sec. 2 (2) is exercised by the issue of a proclamation.”

This case also makes the point at p 37 that the right to exercise a discretionary power is made dependent upon the existence of a jurisdictional fact and that jurisdictional fact consists of the repository of the power satisfying himself, subjectively speaking, upon certain matters.

In this case the Minister had before him information concerning externalization of foreign currency from Zimbabwe using SMM (Pvt) Ltd, a company

that is owned or controlled by the appellant. The minister also had information before him that SAS, the South African company in which the appellant has an interest had for a long time failed to remit to AA Mines, a division of SMM, its export proceeds thereby prejudicing the mines of the necessary working capital and in addition failing to meet its obligation.

What is expected of the Minister in this situation is not necessarily the truthfulness of what is alleged. It is sufficient if the Minister, upon whom the power is conferred by the statute, is satisfied after careful consideration of the matter that the jurisdictional facts do exist.

The question whether the information is true or not can only be dealt with properly when the matter is investigated and the appellant is afforded an opportunity to be heard.

I do not consider that the jurisdictional facts that the Minister relies on in such a situation need to be concrete or proved facts.

All that is required, in my view, is that they be facts on which the Minister can form an opinion.

See *Minister of the Interior v Bechler & Ors*, 1948 (3) SA 409 at p 442.

In *Tefu v The Minister of Justice & Anor*, 1958 (2) SA, it was pointed out, (on p67) that what was expected of an officer in making a decision on whether an organization may be declared unlawful was that he be satisfied of certain conditions, or that he forms an opinion.

There is no requirement at this stage for the allegations to be fully proved.

The respondent has listed the following cases in his heads of argument which show that legal process has been instituted against the appellant and his companies.

1. *Steelmet (Zimbabwe) Pvt Ltd vs FSI Trading Proprietary Limited* 2006/27875
South African High Court
2. *SMM (Pvt) Ltd vs Southern Asbestos Sales (Proprietary) Ltd*, 2005 JOL
14902(W)
3. *Afaras Mtausi Gwaradzimba* (in his capacity as the *Administrator of SMM Holdings (Pvt) Ltd & SMM Holdings (Pvt) Ltd vs Africa Resources Limited, Mutumwa Dziva mawere & 2 Ors* 2005HPC 0306 (Zambian High Court)

An attempt had even been made to have the appellant arrested and brought to Zimbabwe. There is even at this stage, a need to investigate the appellant's activities for possible prosecution. There is therefore no merit in the submission that the Minister had no jurisdictional facts.

There is no requirement for the Minister to state the grounds for specification in the notice or to give the basis of the suspicion.

When the appellant is invited for a hearing the grounds of specification are presented in detail and discussed with him.

This is a proper opportunity for a fair hearing before the investigator. There is no basis for complaining that he is not afforded a hearing.

The Act says various transactions referred to in s 6 of the Act are prohibited. These include expending or disposing in any way any property, entering into contracts to dispose of property, operating any account with a bank, increasing any indebtedness which affects his estate and other types of business transactions.

Once the Minister had a reasonable suspicion about some of the appellant's activities he was entitled to ensure that the appellant was stopped from engaging activities. The appellant cannot be heard to argue that he should have been warned first then left to engage in such actions freely during the investigations.

The appellant argued that he has a distant relationship with these companies mentioned in this matter, yet at the same time he complains:

“that the actions of the respondent are having a detrimental effect on me, and that the activities of the respondent and those he has appointed are directly impacting on my business in South Africa and elsewhere in the world.”

He could not complain of being under any impediment in respect of his properties in Zimbabwe if the specification did not affect any transactions with these businesses or companies.

No company of his in South Africa or the rest of the world was specified other than those in Zimbabwe with which he admits to having a relationship. His submission that he has no assets in Zimbabwe except a house, is clearly contradicted by himself in his detailed reference to the share holdings of the companies in Zimbabwe. In fact through his holding companies he owns all the companies referred to in Zimbabwe.

The fact that those companies are run by boards does not make much difference to their ownership.

The respondent has, in his affidavit, detailed certain matters in which legal processes have been instituted against the appellant in Zambia, South Africa and the United Kingdom. Proof of these matters is irrelevant at this stage. What is important is that the circumstances provided a basis for the Minister to specify the appellant so that investigations can be carried out.

The information given to the Minister that the appellant was also wanted on charges of externalizing funds and fraud, further strengthens the grounds on which the Minister acted.

On the basis of these facts, the argument that the Minister had no jurisdictional facts is devoid of merit, more so when the appellant himself has disclosed his position regarding all the companies he controls in Zimbabwe through his Holding Company.

It is significant also to note that the appellant is actually cited by name in one of the cases which is *Atara Mtausi Gwaradzimba* (in his capacity as the Administrator of SMM Holdings (Pvt) Ltd) *and SMM (Pvt) Ltd v African Resources Limited, Mutumwa Dziva Mawere & 2 Ors* 2005 HPC 0306 (Zambian High Court). (my underlining)

In his replying affidavit, the appellant admits being a director of SMM Holdings. The appellant also admits that he has three bank accounts in Zimbabwe. This contradicts his denial of assets in Zimbabwe.

In summary, the following facts are clear from the record:-

1. The appellant does have assets in Zimbabwe in the form of a house, bank accounts and companies he owns through some holding companies.
2. There are allegations of fraud and externalization of funds.
3. There are pending cases involving several companies owned by him through his holding companies.
4. His relationship with these companies is not denied.

5. He has resisted coming or being brought to Zimbabwe to assist in the investigations of the allegations.
6. There are facts which entitled the Minister to have a suspicion against him for the purpose of specifying him in terms of the Act.

The Act makes the provision for specification, then investigation, and the Minister simply cancel the specification if he sees fit after the investigation and hearing.

While the appellant contends that the Act has no extra-territorial effect, the Act simply declares a person as specified. The specification is not an arrest or a matter for a court trial. It is only naming a person specified and that investigations be carried out against that person.

There is no basis for alleging *ultra vires* motives when it is clear that some wrongful conduct on the part of the appellant and his companies is alleged.

The lifting of the corporate veil was done partly by the appellant himself in his admission of being the sole owner of the holding companies that control the companies in Zimbabwe. The appellant cannot accuse the court *a quo* for doing so.

In specifying a person who is outside the country I do not understand the provisions of the Act to be spreading its jurisdiction outside Zimbabwe, but simply that

such specified person, whether in or outside Zimbabwe, is prohibited from engaging in any transactions concerning his affairs or assets in Zimbabwe.

I do not understand the specification to prohibit dealings with assets that are outside Zimbabwe.

I am therefore unable to find that the Minister exceeded his powers, but find that he acted according to the Provisions of the Act.

I therefore come to the conclusion that there is not merit in the appeal and it is dismissed with costs.

GWAUNZA JA: I agree

GARWE JA: I agree

Costa & Madzonga, the appellant's legal practitioners

Civil Division of the Attorney-General's Office, the respondent's legal practitioners