SCAN AND MILLING (PRIVATE) LIMITED
T/A SCAN AND MILLING CENTRE DENTAL LABORATORY
and
DR. FRANCIS DANHA
versus
HEALTH PROFESSIONS AUTHORITY ZIMBABWE
and
OFFICER IN CHARGE –ZIMBABWE REPUBLIC POLICE AVONDALE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 25 & 14 April 2021

Urgent chamber application

M. Ndhlovu with *A. Marara,* for applicants
R. Magundane with *P. Murove,* for 1st respondent
T. Tembo, for 2nd respondent

TAGU J: This is an urgent chamber application for an interdict and a declaratur pending the return date.

INTRODUCTION

The second applicant is the Managing Director of the first applicant. The first applicant is a Laboratory established in terms of the laws of Zimbabwe and both applicants deal with the people's health and lives. The first respondent (HEALTH PROFESSIONS AUTHORITY-ZIMBABWE) (HPA) is a statutory body created in terms of the Health Professions Act [*Chapter 27.19*] and regulates the affairs of the applicants. The second respondent is an official cited in in his official capacity as the person entrusted with execution of the order by the first respondent.

THE FACTS

The basis of the application and as more fully amplified in the 2nd Applicant's founding affidavit is that the 1st Respondent raised a penalty in terms of Statutory Instrument 78 of 2017 in the sum of US$690.00 on the 8th of March 2021. The Applicants proceeded to make a payment of $690.00 on the rate of one-to-one in terms of s 4(1)(f) of SI 33 of 2019 which provides that-

> "that every enactment in which an amount is expressed in United States dollars shall, on the and after effective date, be construed as reference to the RTGS dollar, at parity with the United States dollar, that is to say, at a one-to-one rate."

They said the annual subscription of ZWL One Thousand Two Hundred and Ninety Three Dollars (ZWL $1 293.00) was paid on the 6th of June 2020 due to the constraints caused by the Covid-19 lockdown.

However, the Applicants having proceeded to make a payment of $690.00 on the rate of one-to-one the 1st Respondent proceeded to accept the payment of $690.00 but decided to reject it as settlement of the fee citing the provisions of SI 85/2020 which provides:

> "7. (1) Any person who provides goods or services in Zimbabwe shall display, quote or offer the price for such goods or services in both Zimbabwe dollar and foreign currency at the ruling exchange rate."

The applicants objected and advised the 1st Respondent that the provisions do not apply to them as they were not commercial entities rather, it was a regulatory body and does not fall under the scope of the "goods or services". Without hearing the Applicants and in full face of a dispute as to the currency to be used to levy its penalty, the 1st Respondent proceeded to purportedly close the first Applicant's laboratory which is an essential service. The first Respondent proceeded to instruct the second Respondent to go and man the premises and prohibit the Applicants from accessing the premises which also houses a dental surgery separately. The Applicants are now praying for an interim order for stay of prosecution, opening of the Applicants' premises pending the confirmation of the provisional order.

The relief prayed for by the Applicants was couched as follows:

"1. TERMS OF THE FINAL ORDER SOUGHT

That you should show cause why an order in the following terms should not be granted;

1.1 The **$690.00 and $1500.00** paid by the **Applicant** to the **1st Respondent** be and is hereby declared as payment for the penalty in accordance with the provisions of SI 78/2008.
1.2 Fines levied by the Applicant (sic) are hereby declared not **"goods and services**" as per the provisions **of SI 185/2020**.
1.3 The **Applicant** be and is hereby ordered to reopen the 1st Applicant Laboratory without levying any other penalties or charge other than the **$690 and $1 500** already paid.
1.4 The **2nd Respondent** be and is hereby barred from arresting the **2nd Applicant** in connection with the alleged non-compliance with **SI 78/2008**.
1.5 Any party opposing this application be and is hereby ordered to pay costs of suit on an attorney client scale.

PENDING THE RETURN DATE, THE FOLLOWING BE AND IS HEREBY GRANTED:

2. INTERIM RELIEF

Pending the return day, it is hereby ordered;

2.1 The **1st Respondent** be and is hereby ordered to reopen the **1st Applicant** pending the confirmation of the order in this matter.

2.2 The **2nd Respondent** be and is hereby ordered to refrain from barring the 1st Applicant from conducting its normal operations.

2.3 The **Respondents** are barred from instituting criminal proceedings against the **Applicants.**

SERVICE OF THE PROVISIONAL ORDER

In the event of the Respondent breaching any of the terms of this provisional order, the Sheriff of the High Court and if need be with the assistance of any member of the Zimbabwe Republic Police, be and are hereby authorized to effect this order."

The respondents filed notices of Opposition to the Application.

At the hearing of the matter three things occurred. Firstly, the applicants applied to file an amended draft provisional order. The application was not opposed by both respondents. The application was duly granted. The part of the new amended provisional order now reads as follows-

2. "**INTERIM RELIEF**

Pending the return date, it is hereby ordered that;

2.1 The order or decision of the 1st Respondent communicated to the 2nd Respondent dated the 17th March 2021 closing the operations of the 1st Applicant be and is hereby suspended."

Secondly, the 2nd Respondent having seen the amended draft provisional order, applied to be excused from the proceedings since the relief in the provisional order being sought by the Applicants no longer apply to them and were prepared to abide by the order of the court. The 2nd Respondent was duly excused.

Thirdly, the 1st Respondent raised five (5) points *in limine*. The first point being that the application is not urgent. The second point being that there are material non-disclosures. The third point being that the matter is improperly before the court. The fourth point *in limine* being that the relief as amended is incompetent. The fifth and last point being that of the non-citation of the Minister of Health and Child Care. All these points *in limine* were opposed by the applicants. I will dispose of the points *in limine* in the order they were raised before dealing with the merits of the application, if necessary.

APPLICATION NOT URGENT

The 1st Respondent in its Notice of Opposition averred that the Applicants have not established urgency in this matter or alternatively, any alleged urgency that may arise is self-created. It said the non-compliance monetary penalties that were levied by the 1st Respondent on the Applicants were in accordance with the Health Professions (Registration and Fees of Health Institutions) Regulations, which penalties were not fully paid. The Applicants have been operating illegally for a year and the 1st Respondent proceeded to close the Applicants' premises in accordance with its powers as set out in the Health Professions Act (*Chapter 27.19*}. In support of

the contention the counsel for the 1st Respondent submitted that the requirements to pay in US$ were known by the Applicants as far back as June 2020 of the rates to be paid in US$. The 2nd Applicant knew by 6 June 2020. The counsels for the 1st Respondent indicated that the demand was sent to the Applicants by the 1st Respondent in September 2020 and they tendered a letter of demand to that effect. It was their contention that the Applicants ought to have brought this application then. The Applicants were jolted into action by the closure of their premises. They referred the court to the sentiments made by CHATIKOBO J in the famous case of *KUVAREGA* v *REGISTRAR –GENERAL & Ano*r 1998 (1) ZLR 188 at 193 where he had this to say-

> "There is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency. In the present case, the applicant was advised by the first respondent on 13 February 1998 that people would not be barred from putting on T-shirts complained of. It was not until 20 February 1998 that this application was launched. The certificate of urgency does not explain why no action was taken until the very last working day before the election began. No explanation was given about the delay. What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

The 1st Respondent submitted therefore that the need to act did not arise on the 8th of March 2021 but in June 2020.

The certificate of urgency says the matter is urgent due to the nature of work conducted by the applicant. It says the applicant deals with people's health and people's lives. The closure of the laboratory on the 17th of March 2021 on the basis of argument of currency or rate when the law has answered the question does not make sense. In his founding affidavit the 2nd Applicant reiterated that the matter is urgent due to the nature of work conducted by the applicants. The counsel for the Applicants in his oral submissions said the causa is the letter dated 17 March 2021 concerning the closure of the Laboratory. To him the need to Act arose on the 17th of March 2021. He said what necessitated the application is the closure of the first Applicant due to the nature of its work. For this contention the Applicant's council referred the court to the cases of *Kudzanai Chimedza* v *Dowell Zvega and Messenger of Court Bindura* N.O HH-710/20 wherein reference was also made to the case of *TM Supermarkets (Private) Limited & Another* SC- 37/17, *Sawyer* v *Chiodza & Ors* 1999 (1) ZLR 203 (H). He insisted that the matter is urgent and the need to act arose on the day of the closure of the first Applicant.

In casu, the dispute over the rate of payment has a history. In his founding affidavit the 2nd Applicant chose to keep the history of the matter short and narrowed his explanation to the events of the 17th March 2021 leading to the closure of the 1st Applicant and thereafter. The impression created was that the need to act arose on or about the 17th of March 2021. It is not in dispute that the 1st Applicant was indeed closed on the 17th of March 2021. However, the 1st Respondent managed to show to this court that the dispute over the rate or the currency to be used in the payment of penalties and or subscriptions has been raging on since June 2020. I say so because the 1st Respondent produced a copy of an e-mail that was generated by the 1st Respondent and

addressed to the 1st Applicant as far back as the 2nd of September 2020. The subject of the e-mail was worded as follows-"HPA Final Reminder." On attachments to that email were the following words- "HPA Final Remainder Letter for the Year 2020.pdf; Proforma Invoice Scan and Milling Centre Pvt Ltd.pdf." Further, the proforma invoice Annexure "A" for $690.00 on the description heading reads "2020 NON COMPLIANCE FEE" Then on the currency it is written "TOTAL PRICE US$". Finally, at the bottom of the proforma invoice is endorsed the following words- "* Payment is in US$ or equivalent local currency at ruling bank auction rate at time of payment."

What is therefore clear from the e-mail dated 2 September 2020 is that at least by then the Applicants were aware of the currency to be used. It is not as if they became aware of the currency on or about the 17th of March 2021. If the Applicants genuinely did not want to pay in US$ then they should not have sat on their laurels until the 17th of March 2021. They had the time to challenge the currency in which they were to pay as far back as June 2020 but they chose not to do so until their Laboratory was closed for non -payment of the compliance fees. I therefore agree with the council for the 1st Respondent that what jolted the Applicants into filing the present application is the closure of the 1st Applicant. At least they should have anticipated that sooner or later the 1st Respondent was going to close their Laboratory. Urgency in this matter is therefore self -created. This is not the type of urgency contemplated by the Rules. They waited until the day of reckoning drew closer. For these reasons this application is not urgent.

MATERIAL NON-DISCLOSURE

The 1st Respondent's submission is that the Applicants on page 1 of the application omitted to disclose the History of this matter and if they had disclosed it this matter would not have been set on an urgent basis. It said the fact of the matter is that the 2nd Applicant has been operating without a licence for two years hence the penalty of US$690.00. For two years he had no practicing certificate. It reiterated that if this fact had been disclosed this matter would not have been set down on urgent basis. It said further that in the case of *Central (Pvt) Ltd* v *Pralene Moyas &Deputy Sheriff, Harare* HH-57/2012 Courts frown on litigants who do not disclose material facts hence should not be heard, matter should be removed from the roll. In that case BERE J (as he then was) quoting NDOU J, said-

> "The Courts should, in my view, discourage urgent applications, whether ex-parte or not, which are characterized by material non-disclosures, mala fides, or dishonesty. Depending on the circumstances of the case, the Court may make adverse or punitive orders as a seal of disapproval of mala fides or dishonesty on the part of litigants. In this case, the applicant attempted to mislead the Court by not only withholding material information but by also making untruthful statements in the founding affidavit. The applicant's non- disclosure relates to the question of urgency. In the circumstances, I find that the application is not urgent and I dismiss the application on that basis."

In his submissions the counsel for the Applicants referred the Court to the case of *Chiroswa Minerals (Private) limited and Base Minerals (Private) limited* v *Minister of Mines and Morris Tendayi Nyakudya & Vambo Mills (Private) limited* HH-261/2011. He said the law does not punish non-disclosure but material non-disclosure. He referred the court to page 13 para (s) 7.2 and 7.3 of the founding affidavit where he said the Applicants disclosed the History of this matter. He further referred the Court to pages 23 to 31 of the record which show the correspondences between

the parties where the issue of the penalty was being discussed. To him there was disclosure and it was only when the premises were closed that Applicants came to Court.

The Court noted the contents of paragraphs 7.2 and 7.3 on page 13 of *Dr. Francis Danha*. They say the following-

> "7.2 The **history** of this matter is brief, and I intend to keep this application short.
>
> 7.3 The **1st Respondent** raised a penalty in terms of **Statutory Instrument 78 of 2017** in the sum of **US$690.00**. A copy of the invoice is attached hereto as "**Annexure A"**.

In my view the contents of the two paragraphs do not disclose the full History of the matter. They do not disclose that the Applicants have been operating for close to two years without a licence or a practicing certificate hence the levying of a fine of US$690.00. Neither do these paragraphs show when the penalty was levied.

Coming to the correspondences from pages 23 to 31 of the record these are for the period 5 March 2021 to 15 March 2021. On the e-mail that the second Applicant generated on page 23 he was asking to be advised of the penalty amount and currency as well as the relevant statutory instrument used to effect that penalty. It is headed "**Request for information concerning 2020 penalty for Scan and Milling".** Clearly the second Applicant was aware that there was a penalty for the year 2020 in which he or the 1st Applicant had not paid the compliance fees and were operating without paying the necessary fees. For him to have generated the e-mail of 5 March 2021 the second Applicant must have been reacting to some communication that must have been forwarded to him from the 1st Respondent before that date. He was aware that he was in arrears and had been operating without a practicing certificate for some time. All this History was omitted in the founding affidavit. As I stated earlier when dealing with the issue of urgency, if the Applicants had disclosed that by September 2020 they had received communication from the 1st Respondent to pay US$ 690.00 but were challenging it then this matter may not have been set down for hearing on an urgent basis because the Applicants did nothing from either June 2020 when told to pay US$690.00 or at least September 2020 when an e-mail with attachments were sent to them by the 1st Respondent. I therefore agree with the counsel for the 1st Respondent that there are material non-disclosures in the application.

THE MATTER IMPROPERLY BEFORE THE COURT

The 1st Respondent's contention was that the proper application should have been for review of the decision of the Regulator and SI 33/19 and not a declaratory order. Reliance was made to the cases of *Secretary for Transport & Anor* v *Makwavarara 1991(1) ZLR 18 (SC) and Triple C Pigs (Partnership) and Colcom Foods Limited* v *The Commissioner General Zimbabwe Revenue Authority* HH-7/2007. The counsel for the 1st Respondent submitted that if this order is granted it will amount to the review of the Commissioner's decision.

The Applicants submitted that if they had not amended the draft provisional order they would have conceded that the application was improperly before the court because the relief they

initially sought was one that can only be granted on review and not as an urgent chamber application.

I therefore agree with the 1st Respondent's observation that matter appeared improperly before the court. This was observed before the matter came up for hearing. However, the Applicants applied to amend the draft provisional order at the time of hearing and the Notices of Opposition had already been filed. The Applicants now want the suspension and not the setting aside of the order or decision of the 1st Respondent communicated to the 2nd Respondent dated 17th March 2021 closing the operations of the 1st Applicant pending the return date. While the suspension may amount to authorizing the Applicants to continue operating without a practicing certificate until the return date, which is illegal, I am of the view that in the face of the amended draft provisional order, this point *in limine* has no merit.

RELIEF AS AMENDED IS INCOMPETENT

The brief submissions by the 1st Respondent was that the Applicants have not been licenced since 2020, so how can he be allowed to operate if the order or decision of the 1st Respondent is suspended pending the return date. The 1st Respondent further submitted that SI 78/2008 says annual subscriptions should have been paid each year. By suspending the order to close the 1st Applicant the court would be allowing them to break the law, hence the relief sought is incompetent.

Counsel for the Applicants submitted that this point *in limine* is without merit. He said the relief being sought will only have life only as long as this case is alive. He averred that the 2nd Applicant has a licence, and that there was only late payment of subscriptions. He said for 2 years they were negotiating and he could not have operated without a licence.

The Applicants are conceding that they were late in paying their subscriptions which means they were operating without paying subscriptions leading to the closure of the 1st Applicant. As I said elsewhere when dealing with the point *in limine* that to suspend the order or decision of the 1st Applicant communicated to the 2nd Respondent would amount to this Court allowing the Applicants to continue operating illegally. It is trite that courts cannot allow illegality to perpetuate. The Applicants want the order or decision of 1st Respondent to be suspended and the status quo to continue as long as this matter is alive pending the return date. The Applicants must comply first and complain later. I will therefore uphold this point *in limine.*

NON-CITATION OF THE MINISTER

1st Respondent's position is that the Minister of Health and Child Care should have been cited because the Applicants are challenging SI 78/2008. The Applicants averred that Rule 87 provides that non-citation does not defeat the cause. They said for issuance of Provisional Order the Minister of Health and Child Care does not take part. They said the Minister is relevant on the final relief and not interim relief. They prayed for the dismissal of the point *in limine.*

The 1st Respondent persisted with the point and cited the case of Tour Operations Business Association of Zimbabwe v Motor Insurance Pool & Ors 2015 (1) ZLR 965 (C).

The starting point is Order 13 Rule 87 (1) of the Rules of this Honourable Court. The Rule provides as follows-

"**87. Misjoinder or nonjoinder of parties**

(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affected the rights and interests of the persons who are parties to the cause or matter."

The Applicants are therefore correct to say non joinder of a party does not defeat the cause. It is only where there is material non joinder that the cause may be defeated, I will give the Applicants the benefit of the doubt and dismiss this point *in limine.*

CONCLUSION

I have upheld the points *in limine* that this matter is not urgent. The urgency in this case is self-created. I also upheld the pointy *in limine* that there are material nondisclosures in this case, that the relief sought in the amended draft provisional order is incompetent. While I dismissed the points *in limine* relating to matter not being properly before the court and non-citation of the Minister, I am convinced that on the basis of the points *in limine* that I upheld, this application ought to be struck off the roll of urgent matters.

IT IS ORDERED THAT

1. The application is struck of the roll of urgent matters.

Mutamangira and Associates, applicants' legal practitioners
Scanlen & Holderness, 1st respondent's legal practitioners
Civil Division of Attorney-General's Office, 2nd respondent's legal practitioners.