TRANSPORT OPERATORS ASSOCIATION OF ZIMBABWE

versus

THE MINISTER OF TRANSPORT,

COMMUNICATION AND INFRASTRUCTURAL

DEVELOPMENT

and

MINISTRY OF TRANSPORT, COMMUNICATION AND

INFRASTRUCTURAL DEVELOPMENT

HIGH COURT OF ZIMBABWE

BERE J

HARARE, 14 November 2012

**Opposed Application**

*S. Bhebhe*, for the applicant

*Z.W. Makwanya*, for the respondents

BERE J: In this application the applicant seeks relief in the form of a declaratur to the effect that the Road Traffic (Construction and Equipment Use) Regulations 2010 (Statutory Instrument 154 of 2010) (“the Regulations”) and the amendments thereto are invalid, null and void or alternatively, that s 10(2) of the Regulations is ultra vires the Road Traffic Act [*Cap 13:11*] (“the RTA”) and therefore null and void.

The brief background is that after holding a number of consultative discussions on the mooted fundamental changes to the Regulations with the applicant and other stakeholders, the second respondent proceeded to enact the Regulations whose main thrust was to ban the importation of and the eventual phasing out of heavy left-hand drive motor vehicles in Zimbabwe as these were purportedly deemed to be a threat to road safety on our roads.

The regulations in question were purportedly enacted in terms of s 81 of the RTA.

Alarmed by the manner in which the regulations were enacted and the general impact of the Regulations on its membership, the applicant sought legal intervention in challenging the legality of such subsidiary legislation.

As indicated, the applicant has taken issue with the legality of the whole Statutory Instrument 154 of 2010 in the main and alternatively s 10(2) thereof. I now propose to deal with these issues in detail.

Strange as it might appear, I prefer to deal first with the alternative order sought. In doing so, I am proceeding on the assumption that S.I. 154 of 2010 was properly enacted (which point I must stress I am not conceding to). In fact, as I will demonstrate later in my judgment it is not possible for one to conclude that S.I. 154 of 2010 was properly enacted.

THE LAGALITY OF SECTION 10(2) OF S.I. 154/2010 (“the Regulations”)

The applicant has alleged in the alternative that s 10(2) of the Regulations is ultra vires the RTA in that it went beyond the powers conferred on the first respondent by the enabling Act.

Despite his spirited effort in his heads of argument to oppose this position Mr *Makwanya,* for the respondent, in his submissions to court and after some probing from the court realised the fallacy of his opposition and made a concession that indeed s 10(2) of the regulations could not be defended in its current form as it was indeed ultra vires the RTA.

The very strong and persuasive argument put forward by Mr *Bhebhe,*  for the applicant becomes clearer if one examines s 10(2) of the Regulations vis-à-vis s 81(2) and (3) of the RTA.

For starters s 10(2) of the regulations provides as follows:-

“No person shall drive on a road any motor vehicle registered in terms of the Vehicle Registration and Licensing Act [*Cap 13:14*] for the first time in Zimbabwe on or after the 31st of March, 2011, if the steering wheel of the vehicle is on the left hand side;

Provided that no heavy vehicle fitted with a steering wheel on the left-hand side shall be driven on a road after the 31st of December 2015” (my emphasis).

It is common cause that the first’s respondent’s power to enact regulations is derived from s 81(2) of the RTA. This section gives the first respondent powers to provide for all matters which are specified thereunder.

However, the legislature in its wisdom did not give the first respondent sweeping or wholesale powers in the making or formulation of such Regulations naturally because of the inherent dangers of doing so.

The first respondent’s powers are specifically limited by s 81(3) of the RTA which provides as follows:-

“In the exercise of the powers conferred upon him by subs (2), the Minister may provide for all or any of the matters set out in the Third Schedule”.

The Third Schedule (s 81(3)) specifies matters in which the first respondent may make regulations. Of relevance to this case is para 6 of the Third Schedule which provides as follows:-

“6. The prohibition of the use on roads of any motor vehicle which is fitted with a steering apparatus on the left (or rear) side, unless such motor vehicle is provided with an apparatus to enable the driver thereof efficiently to signal his intention to change direction or stop” (my emphasis).

It is abundantly clear that s 6 (*supra*) curtails the powers of the first respondent in making the Regulations. The first respondent is only empowered to regulate for the prohibition (if need be) of left-hand drive motor vehicles with no “apparatus to enable the driver to efficiently signal an intention to change direction or stop” (my emphasis).

The wholesale prohibition of heavy left-hand drive vehicles in the manner captured by s 10(2) of the Regulations was clearly never intended by the legislature.

The purported ban itself is a nullity because the first respondent no doubt went beyond the dictates of the law giver, the legislature. If it is intended to do so, then the first respondent must go back to Parliament and ask that same Parliament to grant him more powers than he is allowed to enjoy at this stage.

In determining this point, I have been properly referred by the applicant’s counsel to a number of decided cases on the point. I am grateful for it has made my task easier.

Thus in *Trust Insurance Broker* (*Pvt*) *Ltd* v *The Minister of Finance and Anor[[1]](#footnote-1)*the learned judge observed and remarked as follows:-

“…. The legislature had given the Minister only limited administrative powers to enable him to carry out its wishes but these powers did not include the power to override, alter, add to or subtract from the express wishes of Parliament as set forth in the Act…” .

Clearly in my view, the provisions of s 81(2) and (3) of the Act are quite clear. The clear language used does not leave room to the first respondent to read into the Act anything other than what the Act says in its clear and unambiguous language. The position is commented upon by Maxwell on Interpretation of statutes[[2]](#footnote-2) when he observes that where the language used by the legislature is unambiguous, “it is hardly necessary to go beyond such language”.

I am more than satisfied that s 10(2) of the Regulations is ultra vires the enabling Act (RTA) as argued by the applicant.

THE LEGALITY OF THE ROAD TRAFFIC (CONSTRUCTION AND EQUIPMENT USE) REGULATIONS 2010 (STATUTORY INSTRUMENT 154 OF 2010)

Having dealt with the alternative prayer let me go back and deal with the main relief desired by the applicant.

The main thrust of the applicant’s case is that the Regulations were enacted in completed violation of s 81 of the RTA in that they were enacted by the second respondent when in fact the Act requires that they be made by the first respondent.

It is extremely difficult for one to decipher the nature of the respondents’ defence to this averment given the poorly drafted notices of opposition which were evidently just duplicated and whose cumulative effect amounts to no more than a bare denial.

The RTA requires that the Regulations be enacted or made by the first respondent and in this regard s 81(2) of the RTA provides as follows:-

“The Minister may be regulation provide for all matters which –

1. by this Act are required or permitted to be prescribed; or
2. in his opinion, are necessary or convenient to be prescribed for carrying out or giving effect to this Act” .

Both the applicant’s counsel and the respondents’ counsel are agreed that

the legislature clearly intended that the Minister (the first respondent) be responsible for the making or enacting of such regulations.

WHO MADE THE REGULATIONS?

The question as to who made the regulations cannot be an issue of conjecture and speculation. The answer must be found in the regulations themselves.

It will be noted that the preamble to the regulations in issue is framed as follows:-

“It is hereby notified that the Ministry of Transport, Communications and Infrastructural Development, in terms of s 81 of the Road Traffic Act [*Cap 13:11*] has made the following regulations”. (my emphasis)

Faced with this clear position in the regulations, both the respondents could only respond in their opposing affidavits by stating:-

“The Statutory Instrument was not enacted by the second respondent but by the Minister. However, the error does not necessarily nullify the application of the Regulations given the fact that it is found in the Preamble of the Regulations” (my emphasis).

This same position was repeated by the respondents’ counsel in

submissions made in open court.

Two issues arise from the position adopted by the respondents.

Firstly, there is an unsolicited, admission that the regulations could not possibly have been made by the second respondent but by the first respondent.

The second point that is raised in the notice of opposition as captured above requires one to consider the effect of a preamble to an enactment. I will deal with these issues one after the other.

Firstly, I wish to emphasize the point that s 81(2) of the RTA makes it clear that it is to the Minister (first respondent) that the delegation of such subsidiary legislation is reposed to. The word ‘Minister’ is defined in the RTA itself and there is a world of difference between ‘Minister’ and ‘Ministry’. The two cannot be interchangeably used. They are different. The ‘Minister’ in this situation cannot delegate his functions to the Ministry. It remains the ‘Minister’s prerogative to make the necessary regulations as dictated by the RTA.

THE ALLEGED MISTAKE

To simply allege that “there was a mistake” in a matter that must be decided on papers is in my view the “lazy way out of trouble” which confirms the absence of a ‘*bona fide*’ defence. I am not surprised because this position confirms the ‘bare denial’ which runs through both the respondents’ opposing affidavits.

It is not surprising too that there was no effort made by the respondents to explain through their papers or supporting affidavits their basis for alleging a mistake. There was no evidence recorded or otherwise furnished to me to try and sustain this defence.

What in fact one finds is that when there was need to subsequently amend S.I. 154 of 2010, the amending instrument, S.I. 44 of 2011 re-stated that the amending regulations were being made not by the ‘Minister’ but by the ‘Ministry of Transport, Communications and Infrastructural Development’ which again the second respondent is not competent to do. In my view, all this land credence to the allegations raised by the applicant that the regulations were enacted by the second respondent

THE EFFECT OF A PREAMBLE TO AN ENACTMENT

The value to be attached to a preamble in interpreting statutes is well documented and one needs to go no further than the Interpretation Act which provides as follows:-

“The preamble to an enactment and any punctuation in an enactment shall form part of the enactment and may be used as aids to the construction of the enactment[[3]](#footnote-3)”.

This being the case, the joint position adopted by the respondents in trying to render the preamble insignificant does not assist them. If anything it enhances the applicant’s position.

I am more than satisfied that given the clear and unambiguous language used by the lawmaker in s 81 of the RTA, the legislature’s intention was to repose the discretion to make appropriate regulations in the first respondent and no one else. It was only the first respondent who could have exercised that power and this would accord with public policy which requires among other things that the first respondent applies his mind to the desired regulations and that he be held accountable.

This elementary position in the interpretation of statutes is made clear by reference to s 26 of the Interpretation Act which is worded in the following manner.

“**26 Holders of offices**

Where any enactment confers a powers, jurisdiction or right or imposes a duty, on the holder of an office as such, then the power, jurisdiction or right may be exercised and the duty shall be performed, from time to time, by the holder for the time being of the office or the person lawfully acting in the capacity of such holder[[4]](#footnote-4)”

In this regard counsel for the applicant drew my attention to the instructive position adopted by their Lordships in the case of *Cargo Carriers* (*Pvt*) *Ltd* v *Zambezi and Ors* where the court remarked as follows:-

“As INNES ACJ (as he then was) was careful to point out in *Shidiack* v *Union Government* (*Minister of the Interior*) 1912 AD 642 at 648:

“…. where the legislature places upon any official the responsibility of exercising a discretion which the nature of the subject matter and language of the section show can only be properly exercised in a judicial spirit, then that responsibility cannot be vicariously discharged[[5]](#footnote-5)”.

Having specifically made the finding that the regulations were made by the second respondent as opposed to the first respondent what then remains is to consider the fate of such regulations.

I am satisfied by the well-presented and forceful submissions by the applicant’s counsel Mr *Bhebhe* that the effect of such improper enactment was to render the regulations fatal as they are ultra vires the enabling Act.

Again in this regard I derive comfort by religiously following the position adopted by the Supreme Court in the case of *Mugwebie* v *See Co Ltd and Anor* where SANDURA JA with the concurrence of the other Lordships re-stated the eloquent words of Lord DENNING Mr in the case of *Mcfoy* v *United Africa Co. Ltd* (1961) 3 All ER 1169 at 11721:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

Consequently, the enacted regulations, S.I. 154 of 2010 is hanging in the air. It is not supportable by s 81 of the RTA because of the manner in which it was enacted. Its enactment was a violent assault on the clear provisions of the RTA. It must not be allowed to be recognised in this country.

Both the main and the alternative reliefs sought are clearly sustainable. This application ought not to have been opposed in the first place. It was misplaced adventurism on the part of the respondents to oppose the relief sought by the applicant.

Costs

This is one rare case where one has to fight hard to avoid taking the initiative to grant costs on Attorney-client scale.

IT IS ORDERED BY WAY OF A DECLARATUR:

1. That the Road Traffic (Construction and Equipment Use) Regulations 2010 (Statutory Instrument 154 of 2010) and the amendments thereto be and are hereby declared invalid, and null and void.
2. That the first and second respondents, jointly and severally the one paying the other to be absolved, pay the costs of suit.

*Kantor and Immerman,* applicant’s legal practitioners

*Civil Division of the Attorney General’s Office*, respondents’ legal practitioners

1. HB 13-07 [↑](#footnote-ref-1)
2. Maxwell on Interpretation of Statutes, Roy Wilson and Brian Galpin 11th Ed, Sweet and Maxwell Limited, London p. 192 [↑](#footnote-ref-2)
3. The Interpretation Act [Cap 1:01] s 6 thereof. [↑](#footnote-ref-3)
4. The Interpretation Act (supra); s 26 [↑](#footnote-ref-4)
5. 2000(1) ZLR 93(S) at p 97 AB [↑](#footnote-ref-5)