DISTRIBUTABLE (49)

ZIMBABWE NATIONAL WATER AUTHORITY
v
(1) HIPPO VALLEY ESTATES LIMITED (2) TRIANGLE LIMITED

SUPREME COURT OF ZIMBABWE
PATEL JA; MAVANGIRA JA; UCHENA JA
HARARE, JULY 27, 2017 & JUNE 20, 2019

J. Dondo, for the appellant

T. Magwaliba, for the respondents

MAVANGIRA JA: This is an appeal against a decision of the High Court granting the respondents' application for the review of the appellant's decision to increase tariffs applicable to the respondents.

Factual Background

The appellant is a statutory authority established in terms of the Zimbabwe National Water Authority Act [*Chapter 20:25*] (the ZINWA Act) and has a mandate to regulate and manage Zimbabwe's natural water reserves.

The respondents are public companies duly incorporated according to the laws of Zimbabwe and they carry on business in the sugar production industry.

In the late 1950s and early 1960s, the appellant entered into water supply agreements with the respondents in terms of which the appellant undertook to provide raw water for the irrigation of the respondents' sugar cane. From the inception of the agreements the relationship between the parties was cordial until 2015. In 2015 the government proposed a national budget that included raising water tariffs for the commercial sugar estates. On 17 December 2015, the appellant wrote to the respondents stating that water tariffs had been increased in light of the proposed national budget. The relevant parts of the letter read as follows:

> "This serves to advise that Government, through the recent National Budget pronouncement, has reviewed raw water tariffs for Commercial Agriculture (Estates) from $ 9.45 per megalitre to $ 12.00 per megalitre.
> The new tariffs are with effect from December 1, 2015.
> The revision of the tariffs has been done in light of the need to encourage efficient water use and to mobilise resources for the maintenance of existing water infrastructure and the completion of new dams."

On 2 February 2016, the respondents objected to the upward review of water tariffs and filed a court application in the court *a quo* for the review of the appellant`s decision on the following grounds:

"1. Gross irregularity in the proceedings and the decision.
2. Gross unreasonableness in the decision.
3. Failure by the respondent (appellant herein) to act lawfully, reasonably and in a fair manner. No opportunity was given to the applicants (respondents herein) as affected parties to make representations before the decision was made.
4. Irrationality.
5. Discrimination against the commercial agriculture operators."

Further basis for the respondents' objection to the upward review of water tariffs was that not only did they have agreements with the appellant stating that the tariffs would not be increased without consultation, which agreements were binding on the appellant, but the ZINWA Act also stipulated and made clear the procedures to be followed where tariffs were

to be increased. It was further argued that such procedures did not permit tariff increases on the basis of budget statements.

It is pertinent to note that before applying for the review of the appellant`s decision in the High Court, the respondents noted an appeal against the same decision to the Minister in terms of s 49 of the ZINWA Act. The attack on the appellant`s decision was premised on essentially the same grounds which were raised on review in the High Court.

The application for review was opposed by the appellant. The appellant took a preliminary point to the effect that the application was not properly before the court for the reason that there was an appeal before the Minister made in terms of s 49 of the ZINWA Act, which appeal had not been determined. It contended that the respondents could not approach the High Court on review when there was a pending appeal pertaining to the same matter. The gravamen of the preliminary point was essentially that the respondents had not exhausted the local remedies available to them.

On the merits, the appellant argued that in terms of s 30 (1) of the Water Act [*Chapter 20:24*] (the Water Act) it was entitled to fix charges for the sale of raw or treated water. It was argued that s 39 (7) of the Water Act superseded the water agreements which were entered into between the parties and that the Minister could thus increase water tariffs even without consulting the affected parties. The appellant also denied that its actions were grossly unreasonable or irrational.

The court *a quo* dismissed the appellant`s point *in limine* and found that the appellant had acted unprocedurally. Regarding the merits, the court found that the appellant

had violated the agreements that it had concluded with the respondents because both agreements were clear in providing that no increase in tariffs would be made without consultation of the affected parties. The respondents' application was thus granted. It is against that decision that the appellant now appeals.

This Appeal

At the onset of proceedings counsel for the respondents moved for the appeal to be struck off the roll for the reason that the six grounds of appeal as reflected in the Notice of Appeal offended against the rule relating to prolixity. Counsel for the appellant submitted in response that all the other grounds of appeal ought to be struck out except for grounds 1(a) and 2 which did not so offend. With the subsequent consent of the respondent's counsel, the court struck out grounds of appeal 1(b) and (c), 3, 4, 5 and 6 and the matter proceeded on the basis of grounds 1(a) and 2. On an examination of the grounds of appeal 1(a) and 2, it is my view that this appeal turns on the determination of the issue of whether or not the court *a quo* was correct in dismissing the appellant`s point *in limine*.

Application of the Law to the Facts

As aforementioned, the appellant raised a point *in limine* in the court *a quo* to the effect that the application for review was not properly before the court. The appeal to the Minister was noted on 19 January 2016. The application for review was filed with the court *a quo* on 2 February 2016. The respondents' appeal to the Minister against the appellant`s decision was in terms of s 49 of the ZINWA Act which provides as follows:

> "**49 Appeals**
> (1) If any person is aggrieved by any decision or action of the Board or the chief executive in the performance of the functions of the Authority, he may, within twenty-eight days after being notified of the decision or of the action being taken, appeal in writing to the Minister.

> (2) For the purpose of determining an appeal noted in terms of subsection (1), the Minister may require the Board, the chief executive or any employee of the Authority, to furnish him with the reasons for the decision that is the subject of the appeal.
> (3) The Minister, after due and expeditious inquiry and, except where the Board's decision is the subject of the appeal, after consultation with the Board, may make such order on any appeal noted in terms of subsection (1) as he considers just.
> (4) An appeal shall lie to the Administrative Court against any order of the Minister in terms of subsection (3).
> (5) The Board, the chief executive or an employee of the Authority, shall take all necessary steps to comply with any order made by the Minister in terms of subsection (3) or by the Administrative Court on an appeal in terms of subsection (4).
> (6) The noting of an appeal in terms of this section shall not, pending the determination of the appeal, suspend the decision appealed against unless the Minister or the Administrative Court, as the case may be, directs otherwise."

It was contended for the appellant that the respondents could not properly file an application for review when there was a pending appeal before the Minister filed in terms of the ZINWA Act. The appellant contended that the respondents ought to have exhausted the domestic remedies which were available to them in terms of the ZINWA Act before applying for review in the High Court.

The law on the principle of exhaustion of domestic remedies was laid down by GUBBAY CJ in *Girjac Services (Private) Limited v Mudzingwa* 1999 (1) ZLR 243 (S) at 249E-F where he stated the following:

> "In this matter, the procedure under s6 of the Code of Conduct, and the availability of an appeal to the Labour Relations Tribunal, was capable of affording the respondent effective redress against the unlawful termination of his employment. Furthermore, the unlawfulness had not been undermined by such domestic remedies, for the grievance procedure had not been resorted to. Finally, no special circumstances or good reasons were advanced by the Respondent for approaching the High Court. He maintained silence.
> It follows that I can find no warrant for not enforcing the requirement that the Respondent ought to have exhausted the remedies available to him under the domestic legislation. It is on this ground that the appeal succeeds."

In *casu*, the respondents did not show any special circumstances that necessitated the making of an application for review before they had exhausted the domestic remedies in the form of the appeal that was already pending before the Minister in terms of s 49 of the ZINWA Act. Section 49 (1) of the said Act gives an aggrieved party the right and opportunity to note an appeal to the Minister. In their heads of argument in the court *a quo*, the respondents attempted to explain why they had chosen to apply for review against the appellant`s decision instead of pursuing the appeal that they had filed with the Minister in terms of s 49 of the ZINWA Act. They stated the following:

> "The respondent avers that it is entitled to fix the charges for the sale of raw water in terms of section 30 (1) of the Zimbabwe National Water Authority Act [*Chapter 20:25*] ("the Act"). It claims that before doing so it is obligated to seek the approval of the Minister.
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> It therefore follows that the appeal lodged by the applicants to the Minister is an appeal to the same person who approved the increases of the tariffs before they were announced by the respondent. Effectively therefore, the Minister will be reviewing her own decision when the appeal against the tariffs are brought to her.
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> It admits of no doubt that the Minister is therefore *functus officio*. This is borne by the fact that section 30(1) of the Act requires that the respondent in applying for the approval of any charges must do so in writing, setting out the full details of the proposed charge or increase and the basis of the proposal.
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> …
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> This being so, there is no meaningful result that will come out of the appeal that was filed. The Minister has already exercised her mind over the issues which are raised in the appeal. Even if she is regarded as not having considered the factors, she is *functus officio*."

The respondents` contention that the appeal before the Minister would bear no meaningful result is unfounded. It does not constitute sufficient cause for departure from the general rule that the respondents ought to have exhausted the domestic remedies available to them before instituting an application for review. In any event, the Minister`s decision is not

the final word on the matter. Section 49 (4) of the ZINWA Act gives an aggrieved party the right to appeal to the Administrative Court against any order made by the Minister.

These are legal avenues which were available to the respondents if they had chosen to pursue their domestic remedies. It therefore follows that the respondents` argument in the court *a quo* that the appeal to the Minister was or would be in vain has no merit. Even if there was a possibility that no meaningful decision could be made by the Minister, which contention has not been proven and remains speculative, the respondents had available to them the avenue of an appeal to the Administrative Court against that decision.

There being no reason for the respondents not to prosecute to finality the appeal procedure provided for in s 49 of the ZINWA Act and the appeal that they noted not having been decided upon or withdrawn, the said appeal was still pending thus bringing to the fore the principle of *lis alibi pendens*.

Generally, *lis alibi pendens* is a defence that is brought where an action is brought against one party notwithstanding the fact that the same matter is pending before a court of competent jurisdiction. Cilliers AC, Loots C and Nel HC *Herbstein & Van Winsen***,** *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th edn, Juta & Co Ltd, Cape Town, 2009) at page 310 express the following view:

> "If an action is already pending between parties and the plaintiff brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether on the same or in a different court, it is open to the defendant to take the objection of *lis pendens*, that is, that another action respecting the identical subject matter has already been instituted. Thereupon the court, in its discretion, may stay one action pending the decision of the other."

The requirements of *lis alibi pendens* are described as follows by the learned authors:

> "The requisites of a plea of *lis pendens* are the same with regard to the person, cause of action and subject matter as those of a plea of *res judicata*, which, in turn, are that the two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded upon the same cause of complaint."

A plea of *lis alibi pendens* is ordinarily applicable to court proceedings but in principle can be extended to quasi-judicial proceedings before an administrative authority. In *Nestle (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA), at para [16], cited with approval in *Ntombizakhe Theodora Mcaba v Police and Prisons Civil Rights Union & Anor* Case No. 10731/11, the following was stated:

> "The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated *(lis alibi pendens)*." (The emphasis is mine.)

That the requirements of *lis alibi pendens* were met in the present matter is not in doubt. The appeal before the Minister was between the same parties. The upward review of the water tariffs is the cause of complaint for both the appeal before the Minister and the review in the court *a quo*. It is common cause that the appeal and the review were based on the same subject matter.

Of particular note is the fact that when a plea of *lis alibi pendens* is filed, the court has a discretion to stay one action pending the determination of another. It is settled law that an appeal court will not lightly interfere with the exercise of discretion by a lower court unless it is shown that the discretion was exercised unreasonably or irrationally. In *Makintosh v The*

Chairman Environmental Management Committee of City of Harare & Anor SC 12/14 ZIYAMBI JA held as follows:

> "An appeal court will only interfere with a decision which involves the exercise of discretion by a lower court in very limited circumstances. These were set out by this Court in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at p 62-63, where the Court said:
>
> > "The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first – one which clearly involved the exercise of a judicial discretion – may only be interfered with on limited grounds. See *Farmers' Co-operative Society (Reg.) v Berry* 1912 AD 343 at 350. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court".

The same principle was also enunciated in *Malimanjani v Central African Building Society* 2007 (2) ZLR 77 (S)**.**

The question for determination is whether the court *a quo* exercised its discretion judicially in dismissing the preliminary point raised by the appellant. To this end, the court held as follows:

> "During submissions, counsel for the applicants drew the court's attention to the existence as well as the contents of Statutory Instrument Number 48 of 2016. The instrument became operative on 6 May 2016. It, in essence, confirmed what the respondent had communicated to the applicants as contained in Annexure A which is dated 17 December, 2015.
> It follows from the foregoing that, whether or not the appeal is pending as the applicants filed it, the Minister's mind has already been made up. What he or she promulgated remains law until it is either set aside by him/her or it is, in some way or other, repealed. The Minister cannot, under the stated circumstances, change his or her mind and rule in favour of the applicants when he or she considers the appeal which is before him/her."

The finding that the Minister could not change his or her mind because he or she had promulgated Statutory Instrument 48/2016 (S.I. 48/2016) is neither here nor there and is of no assistance to the respondents' case. As already stated above, if the respondents were to be dissatisfied with the Minister`s decision, they would have had available to them the remedy of an appeal to the Administrative Court in terms of s 49 (4) of the ZINWA Act.

In any event, from a perusal of the record of proceedings it appears that it was only during oral argument that that the respondents' counsel first raised or made reference to S.I. 48/2016. The argument that a legal point may be raised at any point of proceedings is in this case countered by the important and pertinent observation that the said statutory instrument was only promulgated on 6 May 2016, way after the appellant`s letter of 17 December 2015. The statutory instrument was never part of the original dispute and it ought not to have been relied upon by the court *a quo* in its determination of the matter that was before it.

Furthermore, the important observation must also be made that S.I. 48/2016, which was a supplement to the Zimbabwe Government Gazzete dated **6 May 2016,** provided in part as follows:

> "2. These regulations shall come into operation on the date of publication in the Gazette."

Thereafter, S.I. 97/2016, which was a supplement to the Zimbabwe Government Gazette dated **26 August 2016,** repealed and substituted s 2 as follows:

> "The effective date of application of these tariffs shall be as from 1st December, 2015."

Thus, as at **18 August 2016** when the court *a quo* rendered its judgment the statutory instrument did not purport to operate retrospectively. It was only on 26 August 2016, a week later, that S.I. 48/2016 was corrected by the deletion and substitution of s 2.

The court *a quo* was therefore influenced by extraneous and irrelevant considerations in this respect. It ought to have upheld the point *in limine*. No special circumstances were placed before it or proven to exist which entitled the respondents to approach the High Court on review before they had exhausted domestic remedies provided for under s 49 of the ZINWA Act.

In view of the above findings it becomes unnecessary to deal with the merits of the matter as raised in the second ground of appeal. The appeal must be allowed.

In the result, the following order is made:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

> "1. The point *in limine* be and is hereby upheld.
> 2. Accordingly, the application for review be and is hereby dismissed."

PATEL JA: I agree

UCHENA JA: I agree

Dondo & Partners, appellant`s legal practitioners

Scanlen & Holderness, respondents' legal practitioners