

MAKROMED (PRIVATE) LIMITED

t/a CATECHO ENTERPRISES

Versus

MEDICINES CONTROL AUTHORITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE

MATHONSI J

BULAWAYO 24 FEBRUARY 2011 AND 3 MARCH 2011

Ms Gororo, for the Applicant

Ms Njerere, for the Respondent

OPPOSED APPLICATION

MATHONSI J: After hearing submissions made by counsel in this matter I dismissed the application with costs and said the reasons will follow. These are the reasons.

This is an application in terms of section 4 of the Administrative Justice Act, Chapter 10:28. Applicant seeks an order declaring the Respondent's failure to renew its wholesale dealer's permit as constituting an unreasonable and unfair administrative action in breach of section 3 of the Administrative Justice Act and directing the Respondent to forthwith renew its permit.

The Applicant has been conducting business as a wholesale dealer in medicines and pharmaceutical products since 2002. Such business is conducted by virtue of a wholesale dealer's permit issued by the Respondent and is valid for a period of 1 year. Accordingly, the Applicant is enjoined to renew that permit annually before it expires. Applicant's last permit No. 02193 expired on 31 March 2009 without the Applicant submitting an application for its renewal.

By letter dated 30 April 2009 the Respondent notified the Applicant of the expiry of the wholesale dealer's permit. The Applicant responded by letter of 6 May 2009 apologising for failure to renew its permit and seeking an indulgence to submit a renewal application and pay the requisite fee out of time. By letter dated 13 May 2009, the Respondent acceded to the request and gave the Respondent until 31 May 2009 to submit the application. That letter reads in part as follows:

'RE: AUTHORISATION TO PAY RENEWAL FEES BY 31ST MAY 2009

We refer to the representations you made to the Authority in your letter dated 6 May 2009 with respect to the extension of the deadline for payment of renewal fees for wholesale dealer's permits.

The matter was tabled at a meeting of the Legal Committee held on the 13th May 2009. The Committee considered it unacceptable that you waited until the Authority had written to you regarding the lapsing of your permit before you came forward with your representations.

The Committee however noted the compelling reasons you put forward i.e that there would be no prejudice to the Authority should the full renewal fees be paid in full by the 31st May 2009. The committee therefore agreed to extend the period of renewal of your permit to 31st May 2009, on condition that the full renewal fee of US\$1 750-00 subject to the payment of the renewal fees in full by that date (sic)

Thereafter, the Authority will not entertain any further discussion on this matter."

(Emphasis added)

There is need to dispose of the implications of that letter before going further. There is no provision in both the Medicines and Allied Substances Control Act, [Chapter 15:03] and the Drugs and Allied Substances Control (General) Regulations S.I150/91 which empower the Authority to extend the renewal date of an expired permit. The purported extension was therefore a legal nullity from which nothing flowed.

Be that as it may, the Applicant failed to submit an application for renewal even after the extension. Instead, the Applicant busied itself with forging a wholesale dealer's permit and trading using the forged permit. Its luck ran out in October 2009 when an inspection was carried out at its premises and it was discovered that the Applicant had supplied medicines using that forged permit. The Applicant then quickly deposited the renewal fee of US\$1750-00 into the Respondent's account and submitted an application for renewal in Form D.C 7 dated 26 October 2009 attached to a letter of the same date in which it argued that it had failed to meet the 31 May 2009 date line because the notification of the extension was only sent by email on 29 May 2009.

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It is pertinent to note that this was the first communication the Applicant sent to the Respondent since the letter of 13 May 2009 giving the extension of time. Also, it was the first time that a formal renewal application was made since the permit expired on 31 March 2009. The Respondent did not entertain the application and requested Applicants banking details in order to refund the money paid by the Applicant unsolicited.

Section 3(1) of the Administrative Justice Act, [Chapter 10: 28], provides:

"An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall-

(a) act lawfully, reasonably and in a fair manner, and

(b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take action by the person concerned, and

(c) Where it has taken the action, supply written reasons therefore within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.”

Section 4 of that Act, allows any person who is aggrieved by the failure of an administrative authority to comply with section 3, to apply to this Court.

Ms Gororo for the applicant submitted that the Respondent has failed to make a decision on the application for a permit since the application was made in May 2009. She went on to submit that the Applicant had a legitimate expectation that a permit will be issued and accordingly it is entitled to the relief provided for in section 4 of the Administrative Justice Act. When it was drawn to her attention that no application was made at all until October 2009, she took the view that the representations made by Applicant in the form of letters should be taken as an application. In her view, the Applicant should be issued with a permit. She relied on the case of *N & B Ventures (Pvt) Ltd t/a Nesbitt Castle Hotel v Minister of Home Affairs & Another* 2005 (1) ZLR 27 (H) in which CHEDA J ordered the release of liquor which had been forfeited to the state for trading without a licence because the licensing authority had taken 2 years to renew a liquor licence.

In my view that case is clearly distinguishable from the present in that the Applicant had submitted a formal application for renewal but the liquor licensing Board had taken 2 years to renew the licence. In this case no application for renewal of the permit was made at all until the permit expired. To say that representations made by the Applicant in May 2009 amounted to an application is simply disingenuous and cannot be taken seriously.

In terms of both the Act and the regulations an application for a renewal of a permit can only be made before the expiration of the permit. Section 60 of the Medicines and Allied Substances Control Act [Chapter15:03] reads:

“(1) A licence issued in terms of this part shall, unless cancelled or suspended, be valid for such period as may be prescribed and may be renewed before its expiry.

(2) An application for the renewal of a licence shall be made in such form and manner and within such period as may be prescribed and shall be accompanied by such fee as may be prescribed.”

The spirit of those provisions is also captured in the regulations S.1 150/91 as amended. A wholesale dealer’s permit is issued in terms of section 23 of the regulations. Section 24 provides:

"Any permit issued in terms of section 23 or renewed in terms of section 29 shall be valid for a period of one year from the date of its issue or renewal as the case may be."

Section 29 reads;

"(1) A permit issued in terms of section 23 may be renewed before its expiry.

(2) Any person who wishes to renew his permit issued in terms of section 23 shall make an application to the Registrar in triplicate in Form D.C. 7."

It is apparent that an application for renewal of a permit can only be made in Form D.C.7 accompanied by the prescribed fee. No such application was made by the Applicant before its permit expired on 31 March 2009. The communication between the parties which came after that did not constitute an application for renewal which the Respondent was required to consider.

A permit cannot be renewed after it has expired. Can it therefore be said that the Applicant had a legitimate expectation that its permit would be renewed in May 2009 or in October 2009 when it submitted form D.C.7 with the renewal fee? The law does not protect every expectation it only protects a "legitimate" one. *National Director of Public Prosecutions v Phillips* 2002 (4) SA 60 (W).

It was stated in *Administrator v Traub* 1989 (4) SA 731 (A) at 756 I that:

"Legitimate or reasonable expectations may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

In *Health Professions Council v McGown* 1994 (2) ZLR 329 (S) at 334B-C Gubbay CJ stated:

"In short, the legitimate expectation doctrine, as enunciated in *Traub*, simply extended the principle of natural justice beyond the established concept that a person was not entitled to a hearing unless he could show that some existing right of his had been infringed by the quasi-judicial body (see at 761 D-F) Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard. (see 758 G-759 A)."

The Applicant had been renewing its wholesale dealer's permit from 2002 in accordance with the provisions of both the regulations and the Act. At no time was he allowed to renew the permit after it had expired or without submitting Form D.C.7. Therefore there was no general promise that renewal would be made out of time. Even the specific promise to renew the permit if the application was made before 31 May 2009, which I have declared a nullity, was not complied with.

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There was really nothing the Respondent was expected or required to do. For that reason the remedy provided for in section 4 as read with section 3 of the Administrative Justice Act is not available to the Applicant.

Accordingly, the application is dismissed with costs.

Maronedze, Mukuku, Ndove & Partners, Applicant's Legal Practitioners

Messrs Honey & Blankenberg, Respondent's Legal Practitioners