

OK ZIMBABWE LTD

Versus

**ZIMBABWE ELECTRICITY TRANSMISSION &
DISTRIBUTION COMPANY (ZETDC)**

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 14 NOVEMBER 2017 & 18 JANUARY & 1 FEBRUARY 2018

Urgent Chamber Application

P. Madzivire for applicant

R. Ndlovu for respondent

TAKUVA J: This is an urgent chamber application in which the applicant seeks the following interim relief:

- “1. That the respondent be and is hereby ordered to immediately restore and or stop disconnecting electricity to the applicant’s premises being stand 907 and 922 NSSA Complex, Gwanda.
2. That pending finalisation of this matter, respondent and its employees and assigns be and are hereby interdicted from interfering with applicant’s possession of the premises by interfering with or terminating electricity supply.
3. Costs on a punitive scale.”

Applicant has premised its case on the following facts:

1. Applicant installed a smart meter for electricity in terms of section 4(1) of SI 44A of 2013 at its supermarket in Gwanda.
2. On 15 August 2012, applicant received correspondence indicating that its smart meter had passed the test in that it complied with respondent’s requirements.
3. On 20 August 2017, respondent inspected the installation and listed defects which required attention but more importantly the report stated that the meter had been installed illegally.

4. This led to a restated amount of US\$72 319,16 which applicant disputes as there is no proof of illegality, misrepresentation, fraud and or clerical error which a court of law has made a definitive decision on. Respondent is therefore illegally resorting to self-help.
5. Applicant has now received a notice to disconnect electricity which applicant is in peaceful possession of. The threatened disconnection will take effect from the 7th day of November 2017.
6. Applicant will suffer irreparable harm if this order is declined in that;
 - (i) its perishable goods will be destroyed leading to financial loss;
 - (ii) applicant will lose business.
7. Applicant has no alternative remedy other than to pray for an interdict.

During the hearing, applicant argued that the respondent was taking the law into its own hands by threatening to disconnect electricity without a court order. Further it was submitted that since the restated amount was in dispute, the respondent should first obtain a court order before it can even start to threaten applicant. Applicant relied on the case of *Mushoriwa v City of Harare* 2014 (1) ZLR 517 (H) where the facts were that the respondent council sent the applicant a bill for water supplied. The applicant flatly disputed owing the amount claimed or indeed any other amount. He maintained that he had always paid his bills in full and on time and provided proof of payment. He argued that the amount claimed pertained to a bulk meter not connected to his premises. Nonetheless, the council without any further ado disconnected water supplies to the applicant's premises prompting him to file an urgent chamber application for an order directing the council to restore water services pending resolution of the dispute by the court. The order was granted by consent, but in spite of the order the council again disconnected the applicant's supply. It took the intervention of the court and threats of imprisonment for contempt of court for the council authorities to restore water to the applicant's premises.

The issue arose whether the disconnection was lawful and what should happen if there is a dispute regarding payment, would the council be entitled to resort to self-help and to cut off water supplies unilaterally to a citizen without recourse to law?

It was held *inter alia* that the “right to water is a fundamental right enshrined in section 77 of the Constitution of Zimbabwe. Under s44 of the Constitution, the state and every institution and agency of the Government at every level must respect, protect and fulfill the rights and freedoms set out in the Declaration of Rights. The council, as a public body and institution of local government, cannot deny a citizen water without just cause. Section 8 of the Water Regulations contradicts both the Constitution and the enabling statute in more respects than one: firstly, it authorizes the council to arbitrarily deprive citizens of their fundamental right to water without compensation, contrary to s85 of the Constitution, which entitle an aggrieved person to appropriate compensation whenever his fundamental human rights have been violated; and secondly, in the event of a disputed bill, it unlawfully confers the respondent with the sole jurisdiction to arbitrarily determine the dispute without recourse to the courts of law, contrary to par 69 of the Third Schedule to the Act, as read with s165(1)(c) of the Constitution. By so doing the by-law allows the council to be the sole arbiter in its own case, contrary to the well-established common law maxim that no one should be a judge in his own cause. While the council has a right to collect its debts, it cannot do so by resorting to unlawful means: for every person, including the council, is subject to the law.”

In casu, it is not the applicant’s argument that section 4(1) of the Zimbabwe Electricity Supply Authority (Miscellaneous Charges) By Law Statutory Instrument 155 of 1988, that respondent threatened to use is *ultra vires* the Constitution. Its argument is, applicant wants to resort to self-help where the bill is disputed. The relief sought has nothing to do with the constitutionality of the regulations.

Respondent on the other hand submitted that it did not resort to self-help or take the law unto its own hands but it simply used its rights provided for by the law i.e. SI 155/88. It contended further that the *Mushoriwa* case is distinguishable on the grounds that firstly *Mr*

Mushoriwa had paid his debt and had provided evidence that he was paying his bills. Secondly, he produced documents showing that there was a dispute between the parties unlike in the present case where applicant has failed to show that he is up to date with his payments or that the dispute is real and genuine.

Further respondent argued that applicant has not paid his bill. There is a substantial amount that is owing even if the US\$66 000,00 is put aside. This position is confirmed by Annexure I.

The requirements of an interdict are well-known. They are;

- “(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear is *prima facie* established though open to some doubt;
- (b) that if the right is only *prima facie* established, there is well grounded apprehension of irreparable harm to the applicant if their interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the balance of convenience favour the granting of interim relief; and
- (d) that the applicant has no other satisfactory remedy.” See *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511(S).

It is trite that an interim interdict is an extra-ordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief.

In the present case, the applicant argued that the respondent has an obligation to supply it with electricity as long as that electricity is paid for. It further argued that “applicant is in peaceful and undisturbed possession of the electricity supply and respondent has not shown any lawful right which enables it to dispossess applicant through disconnection.” Also by citing *Mushoriwa’s* case applicant equated the right to electricity to the right to water. This is clearly incorrect because the latter is specifically provided for in the Constitution while the former is not. The rationale being that there are substitutes to electricity as a form of energy. Be that as it may, interdicts are based upon rights, namely rights which in terms of the substantive law are sufficient to sustain a cause of action.

Therefore *in casu* applicant's right arises out of a contract with respondent and has nothing to do with the Bill of Rights in the Constitution. However, this right can sustain a cause of action only where the applicant has performed its obligations in terms of the contract by paying for the electricity used. Put differently, the applicant does not have a right to continue to enjoy power that it is not paying for.

As regards irreparable harm it is trite that the onus lies upon an applicant to establish that there exists an actual or well-grounded apprehension of injury. Therefore, the fact that the applicant may have a genuine or *bona fide* apprehension is not conclusive. The court must decide whether, from the circumstances such apprehension is well-grounded. In the present case, the applicant contends that its goods which are perishable will be destroyed resulting in financial loss to it and its shareholders. It also argued that if electricity is disconnected, it will lose business as its business activities will be at a standstill.

I take the view that applicant's apprehension is not well grounded for the following reasons:

Firstly, the respondent gave applicant a seven day notice to disconnect supplies. Applicant had sufficient time to transfer perishables to other branches or arrange alternative sources of power like generators or solar energy. Electricity has substitutes which prudent business people resort to in the event of its non-supply.

The balance of convenience does not favour that applicant continues to enjoy power that it has not paid for. To order otherwise would be against public policy. As regards an alternative remedy, this is a case where applicant can sue for damages for loss of income if at all it suffers financial or other loss as a result of respondent's conduct.

In my view the applicant's contention that respondent by threatening to disconnect supply is resorting to unlawful self help has no merit for the following reasons;

- (a) the respondent is authorized in terms of section 4(1)(a) of SI 155/88 to disconnect electricity to a consumer for non-payment of bills. Applicant has not paid its bill – see annexure I.
- (b) there is no dispute between the parties as regards the outstanding bill in that it is clear on Annexure D of the application and Annexure G attached to the notice of opposition that the meter was installed illegally and that it was subsequently tampered with by the respondent's employees.
- (c) after discovering the tampering, respondent corrected the anomaly and charged applicant a sum of US\$720,00 for working on consumer installation which fee applicant voluntarily paid. Applicant was advised that the prejudice to respondent would be calculated in terms of conditions inscribed at the back of each and every invoice.
- (d) respondent then calculated the prejudice in terms of the condition that authorizes it to calculate bills based on average consumption. The condition states "Zimbabwe Electricity Transmission and Distribution Company reserves the right to issue interim electricity accounts or accounts based on average consumption for various reasons e.g. faulty meters, locked premises where customers are consuming power and other factors."
- (e) from the 23rd day of August 2017 the applicant has been billed monthly and it did not complain or dispute the figure.

Equally unmerited is applicant's reliance on section 71 of the Constitution that deals with property rights. The fallacy of this argument is laid bare when one considers the fact that electricity belongs to the respondent. Applicant enjoys it as it comes. It is not applicant's property.

Also applicant's contention that respondent must establish the amount by due process, namely by "going to court" has no merit in that respondent resorted to a procedure agreed upon by the parties and applicant has failed to supply or to show that there is a genuine dispute

between the parties. See *Hove v Harare City Council* 2016 (1) ZLR 271 (H) where MUREMBA J held that the “right to water under s77 of the Constitution does not prohibit disconnections of water services for non-payment provided the disconnection is not arbitrary. It was held further that where water charges are genuinely disputed, it would be contrary to s77 of the Constitution to disconnect water supplies without affording the consumer a reasonable opportunity of redress through the courts. *In casu* the applicant was not genuine and a disconnection without a court order would not infringe his right to water.” (my emphasis)

It is for the above reasons that I am of the view that the application should be dismissed. Accordingly, it is ordered that;

The application be and is hereby dismissed with costs.

Messrs Joel Pincus, Konson & Wolhuter, applicant’s legal practitioners
R. Ndlovu & Company, respondent’s legal practitioners