

THABANI TSHUMA

And

HIGHER OCTANE SUPPLIERS (PVT) LTD

Versus

ZIMBABWE ENERGY REGULATORY AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 22 JANUARY 2020

Urgent Chamber Application

MAKONESE J: On the 15th February 2019 I granted an order on an urgent basis in the following terms:-

“INTERIM RELIEF GRANTED

Pending the final determination of this matter on the return date, the applicants be and are hereby granted the following relief:-

1. The respondent or any of its representatives, upon service of this order, be and is hereby directed to break the seals and allow the applicants to resume trading immediately upon the granting of this order.
2. Failing paragraph (1) above the applicant be and is hereby authorized to break the seals and resume trading.”

I have been requested to provide written reasons for granting the order. These are my reasons:

On 15th February 2019, the applicants filed an urgent chamber application seeking urgent relief. The 1st applicant is a director of Higher Octane Suppliers (Pvt) Ltd, a duly registered company in terms of the laws of Zimbabwe. The respondent was cited in these proceedings as Zimbabwe Energy Regulatory Authority (ZERA), a statutory body established in terms of section 3 of the Energy Regulatory Authority (Chapter 13:23). The functions of the respondent are *inter alia* to regulate the procurement, production, transportation, distribution, importation and exportation of energy derived from any energy source. The respondent is also mandated with the task of licensing and regulating the energy industry.

Any functions exercised by the respondent should be in terms of the express provisions of the Act. 2nd applicant has been operating a service station at 137a Fife Street, Bulawayo, under the name and style, Busuman Motors (Pvt) Ltd. The principal business at the service station is the sale of fuel. The respondent has routinely granted applicants a licence for the operation of the service station in accordance with the Act. Sometime in 2018 the applicants took a decision to expand their operations and take over a fuel station adjacent to Busuman Motors. 2nd applicant entered into a lease agreement with one Chinamatira who was previously leasing the service station to Total Zimbabwe. 2nd applicant invested a total sum of US\$14 000 and installed new fuel pumps at the new service station. 2nd applicant immediately made an application to the Environmental Management Agency (EMA) for a certificate. A shop licence was also issued from the City of Bulawayo. Payment for the ZERA licence was made on the 1st February 2019.

2nd applicant took on board a total of ten employees to commence operations at the service station. The respondent assured the applicants that a licence would be issued in the shortest possible time. On the strength of this assurance 2nd applicant ordered fuel for the service station in preparation for commencement of operations. Much to the dismay of the applicants on 31st January 2019, the respondent through its inspectors seized the pumps on allegations of contravention of section 29 of the Petroleum Act (Chapter 13:22). The section provides as follows:

“

- (1) No person other than a petroleum company licensed under this Part shall procure, sell or produce any petroleum product.
- (2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level nine or to imprisonment not exceeding five years or to both such fine and such imprisonment.”

It is clear the penalty provision of a contravention of section 29 of the Petroleum Act provides for the prosecution of the offender and the payment of a fine. The respondent, however without an order of the court took the drastic step of closing down the service station. For the 14 days the service station was closed the 2nd applicant lost a total of US\$45 000 in revenue. The closure of the service station came at a time when the country was going through an acute shortage of fuel. It was my considered view that the respondent had various remedies in terms of the Energy Regulatory Authority Act and the Petroleum Act to enforce the law. There was no reasonable cause for the total closure of the service station.

In terms of section 3 the Administrative Justice Act (Chapter 10:28) it is provided that:

“

1. An administrative authority has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectation of any other person and 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 period within a reasonable period after being requested to take action by the person concerned.....”

In section 2 of the same Act it is provided that for an administrative action to be taken in a fair manner adequate notice of the nature and purpose of the proposed action, and a reasonable opportunity to make adequate representations shall be given to the person concerned.

For the foregoing reasons, I granted the provisional order as prayed in the Draft Order.

Ncube and Partners, applicants' legal practitioners