INDIGENOUS PETROLEUM ASSOCAITON OF ZIMBABWE
versus
ZIMBABWE ENERGY REGULATORY AUTHORITY
and
MINISTER OF ENRGY & POWER DEVELOPMENT
and
ZIMBABWE REVNUE AUTHORITY

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 18 May 2020 & 27 May 2020

Urgent Application

I Chagonda, for the applicant HC 3009/20
F Nyani, for the applicant HC 2280/20
J R Tsivana, for the 1st respondent
L T Muradzikea, for the 2nd respondent
E Mukucha, for the 3rd respondent

CHITAPI J: INTRODUCTION: The two urgent chamber applications cases HC 3009/20 and HC 2280/20 were by consent of the parties consolidated for purposes of hearing. The consolidation was well advised because albeit the applicants in the two cases being different, the respondents were common and the relief sought materially similar.

THE PARTIES

The applicant in case HC 3009/20 is a voluntary association with legal status to sue and be sued. It is constituted as a grouping of indigenous fuel importers within Zimbabwe. The members in terms of the constitution which creates and regulates their operations provides *inter alia* that a person qualifies for membership of the association if the person is a holder of a fuel importers' licence issued by the first respondent herein.

The applicant in case No. HC2280/20 is much the same as the applicant in case No. HC 3009/20. It is also a group of indigenous fuel importers constituted in terms of its constitution and is a juristic person with power to sue and be sued. There is no specific

requirement in the applicant's constitution that a member should be licensed by the first respondent first to qualify for membership.

The first respondent is the regulatory authority for the petroleum industry. It is a body corporate created by the Petroleum Act, [*Chapter 13:22*]. It licences fuel industry players. Section 29 of the said Act, provides that:

> "29 (1) No person other than a petroleum company licenced 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 imprisonment for a period not exceeding five years or to both such fine and such imprisonment."

The second respondent is the Minister under whose administration the Petroleum Act is assigned whilst the third respondent is the tax authority that controls the importation of fuel into the country by levying necessary duties and ensuring compliance with laws governing goods importation.

The second and third respondents, especially the second respondent have no direct involvement in the dispute between the applicant and the first respondent.

RELIEF SOUGHT

The applicant in case No. HC 3009/20 set out the terms of the provisional order sought as follows:

> **"TERMS OF FINAL ORDER SOUGHT**
> That you show cause why a final order should not be made in the following terms:
> 1. The 1st respondent's Notice headed "Licensing of Petroleum Sector Operations in 2020 date stamped 9 March 2020 be and is hereby declared null and void.
> 2. The 1st respondent's board is not properly constituted in accordance with the enabling Act and all its actions be and is hereby declared null and void.
> 3. 1st respondent to pay costs of suit.
>
> **INTERIM RELIEF SOUGHT**
> Pending confirmation or discharge of this Provisional order, the applicant is granted the following interim relief:
> 1. The first respondent be and is hereby interdicted from giving effect of the Notice headed "Licencing of Petroleum Sector Operations in 2020" dated stamped 9 March 2020.
> 2. The applicant's members be and are hereby allowed to continue operating on their current licences as approved by first respondent.
> 3. Costs shall be in the cause.
>
> **SERVICE OF PROVISIONAL ORDER**
> Applicant's legal practitioners are hereby authorised to serve the provisional order on the respondent.

The applicant in case No. HC 2280/20 set out the terms of the provisional order sought as follows:

"TERMS OF FINAL ORDER

That the respondent show cause, if any, why a final order should not be made in the following terms:

1. That the 1st respondent notice to the 3rd respondent dated 5 May 2020 and headed "2020 Licenced Fuel and LPG Importers" be and is hereby declared null and void.
2. That the 1st respondent pays costs of this application on a legal practitioner and client scale.

TERMS OF THE INTERIM RELIEF GRANTED

Pending confirmation or discharge of this Provincial Order, the applicant is granted the following interim relief:

1. The Notice issued by the 1st respondent dated 5 March 2020 and headed "2020 Licenced Fuel and LPG Importers" be and is hereby suspended.
2. The 1st and 3rd respondents be and are hereby interdicted from giving effect to the notice referred to in (1) above.
3. The applicant's members be and are hereby allowed to continue operating using their 2019 licences.

SERVICE OF THE ORDER

The applicant's legal practitioners be and are hereby authorized to serve this order upon the respondent."

As evident from the terms of the provisional order in both applications, the dispute in issue concerns the licencing of the applicant's members such licencing being a requirement imposed by s 29 of the Petroleum Act, before any person can deal in fuel in any of the manner set out in subsection 1 of s 29 as quoted hereinbefore.

BACKGROUND AND ANALYSIS

In the exercise of its functions as provided for in the Petroleum Act, to licence fuel players, the first respondent on 9 March 2020 issued and published a notice directed at the Petroleum Sector setting out licencing requirement for 2020. The material content of the notice is reproduced hereunder:

"ZERA
PETROLEUM SECTOR NOTICE
LICENSING OF PETROLEUM SECTOR OPERATORS IN 2020
Petroleum sector operators are advised of the 2020 licensing fees and conditions as follows:

a. Licence fees:

	CATEGORY	**ZWL**
	Annual licence fee: procurement licence	2 000.000
	Annual licence fee: retailing licence (urban area0	10 000
	Annual licence fee: retailing licence (rural area)	4 000
	Annual licence fee: wholesale licence	122 400
	Annual licence fee: blending licence	76 500
	Annual licence fee: production	306 000
	Annual licence fee: production licence biodiesel	306 00
	Bi-annual licence fee: LPG Retail	1 530
	Bi-annual licence fee: LPG Wholesale	30 600

b. Other conditions

i) A procurement licensee shall have a supply contract from a trader at the time of application for a licence;

ii) A procurement licensee shall have/own at least 25 sites and should provide evidence of such ownership.

iii) A procurement licensee should provide a performance bond with a value of ZWL 30 million before licensing.

iv) All retail sites should be branded for identification purposes.

v) A procurement licensee shall have control over its retail sites.

On the requirement for retail sites, the following was agreed:

a. That out of their company owned retail sites, procurement licensees must only run at most 3 of them directly, the rest should be run as company owned-dealer operated (CODCO).

b. That retail sites should be contract to specific OMCs and branded.

c. Commencement of the licensing process for 2020

Petroleum sector operators are advised to start the process of submitting their applications for licensing for 2020. Other licensing requirements remain the same.

The notice set out the fees for various classes of fuel licences as shown on the details in the notice. The applicant's members in both cases HC 3009/20 and HC 2280/20 are in the business of importing fuel for sale in Zimbabwe. The fees and certain of the conditions imposed proved to be too onerous on the would be licencees and other affected persons. The first respondent by notice issued on 13 March, 2020 amended the notice of 9 March, 2020. The details of the contents of the amendment notice were as follows

"

ZERA

PETROLEUM SECTOR NOTICE

AMENDMENT OF THE PETROLEUM SECTOR NOTICE ISSUED ON MONDAY 9 MARCH 2020

Following submissions from stakeholders in the Petroleum Sector, on the notice referred to above, ZERA hereby makes the following statements:

- Section b of the said Notice which refers to procurement licences is hereby withdrawn to allow ZERA to fully consider the representations made by Petroleum Sector Stakeholders.
- Revised procurement licence conditions will be published in due course.
- Petroleum Sector Stakeholders have further made representations pertaining to certain provisions contained in S. I 65, Petroleum (Direct Fuel Imports and Marking of Fuel) Regulations, 2020. These will receive consideration from ZERA with the view to address those concerns when the regulations take effect."

From the contents of the amendment notice read together with the amended notice, the effect of the amendment was to do away with all the conditions set out in part (b) of the original notice of 9 March, 2020. What therefore remained of the notice was part (a) which

set out the category licence fees amounts. Part (c) also remained wherein fuel section operators were advised to start the licencing process for 2020 by submitting their applications. The amendment notice was specific that "other licensing requirements remained the same." If the licensing requirement in part (b) were removed, then the only requirement remaining was payment of the licence fee as prescribed for the type of licence which an operator intended to operate on.

The amendment notice for its part advised that the withdrawal of condition (b) on the first notice would allow time and opportunity for the first respondent to "fully consider the representation made by Petroleum Sector Stakeholders." Significantly, the notice advised that "revised procurement licence conditions will be published in due course." The amendment notices also acknowledged that the Petroleum sector stakeholders had made representations in regard to certain unidentified provisions of S.I 65/2020 being the "Direct Final Imports and Marking of fuel Regulations 2020". The first respondent advised on the notice that it would consider the representations with a view to addressing concerns raised.

On 13 March, 2020, the applicant in case No. HC 3009/20 filed an urgent application against the first and second respondents herein under case No. HC 1895/20. The application was set down before MUSAKWA J who disposed it by way of a consent order. The terms of the provisional order issued on 18 March, 2020 were as follows:

> "**TERMS OF THE FINAL ORDER SOUGHT**
> That you show cause why a final order should not be made in the following terms:
> 1. That 1st respondent's Notice headed "Licensing of Petroleum Sector Operators in 2020" date stamped 9 March 2020 be and is hereby declared null and void.
> 2. That 1st Respondent's board is not properly constituted in accordance with the enabling Act and all its actions be and are hereby declared null and void.
> 3. 1st Respondent to pay costs of suit
>
> **INTERIM RELIEF SOUGHT**
> Pending confirmation or discharge of this Provisional Order, the applicant is granted the following interim relief:
> 1. That the following provisions of the 1st respondent's Notice headed "*Licensing of Petroleum Sector Operators in 2020*" date stamped 9 March 2020 be and are hereby suspended.
>   a) The requirement of twenty-five (25) branded service stations;
>   b) The requirement of a performance bond with a value of $30 000 000.00; and
>   c) The requirement to pay $2 000 000.00 as the fee for a procurement license."
>
> **SERVICE OF PROVISIONAL ORDER**
> Applicant's legal practitioners are hereby authorized to serve the provisional order on the respondent."

The basis of the application HC 1895/20 was to seek the setting aside of the notice issued by the respondent on 9 March, 2020 by declaration of invalidity of the notice. Additionally, the applicant seeks another declaration that first respondent's board is improperly constituted and its purported existence a nullity. The provisional order revisited the notice of

9 March, 2020 and in the interim relief three conditions were suspended by order of court as shown on the order.

It is not clear from the papers as to whether or not the amendment notice of 13 March, 2020 was made part of the application HC 1895/2020. It is not on record in any of the papers filed. It is therefore not clear whether conditions set out in the notice (b) which the first respondent had suspended pending consideration of representations and a republication of new conditions done had been reinstated. I however recognize the terms of the interim relief which were made an order of court by MUSAKWA J. Notably if the requirement to pay a licencing fee of $2 000 000.00 for a procurement licence was suspended, then it essentially means that given that the fee had not been suspended by the amendment notice of 13 March, the effect of the interim relief was that no licence fee was set for a fuel procurement licence for 2020.

It is important therefore to consider the impact of the interim order granted by MUSAKWA J. In my understanding, from the filed papers, the suspension of the procurement fee of $2 000 000.00 implied that there remained no licence fee fixed for 2020. The suspension holds until the making of a final order on the return date in case No. HC 1895/20. On the return date, a determination will be made whether or not the notice dated 9 March, 2020 fixing licencing requirements for 2020 should be declared null and void as well as a determination being made on the validity of the constitution of the first respondent's board.

Although the provisional order in case No. HC 1895/20 was granted on 18 March, 2020 none of the parties has taken further steps to have the matter prosecuted or otherwise disposed of in any other competent manner. Therefore, as far as case NO. HC 1895/20 is concerned, the notice of 9 March, 2020 stands suspended in part to the extent set out in the order. In the current application the applicant averred that the first respondent agreed to engage the applicant and that in the event that there was no agreement reached, the applicant would consent to the first respondent filing its opposing papers out of time.

By letter dated 5 May, 2020 and addressed to the third respondent, the first respondents Chief Executive Officer notified the third respondent that only 14 companies listed on an attachment to the letter should be allowed to import fuel. The letter further noted that any company not listed should not be allowed to clear or import fuel into Zimbabwe. It is this directive which has led to the institution of the current application by the applicant on behalf of its members.

THE APPLICANTS CASE

The applicant in case No. HC 3009/20 averred in the founding affidavit that following on the grant of the provisional order in case no. HC 1895/20, there was consensus that there should be consultations made to resolve the impasse concerning licencing conditions. The applicant's legal practitioners' consequent on the grant of the provisional order by consent wrote a letter on 18 March, 2020 addressed to the first respondent's legal practitioners confirming that parties had agreed to attempt an amicable resolution of the matter and that in the event that the process of settlement failed, the applicant would agree to an upliftment of bar. The first respondent in its opposing affidavit did not dispute the applicant's assertion. It admitted that there were negotiations which took place on 30 March, 2020 at which to quote from the first respondent's affidavit, "… some of the applicants' proposals being accepted and others rejected."

The applicant averred that despite the consultations not having been ended by a communication by the first respondent to that effect, the first respondent proceeded to instruct the third respondent to bar fuel importations by the applicant's members. The applicants aver that there was no communication made to them prior to the first respondent issuing an instruction to bar fuel imports by other fuel players' other than companies listed in the letter to the third respondent. The applicant in this regard averred that after the meeting of 30 March, 2020, it was necessary for the applicant to consult its membership in regard to proposed conditions and requirements which the first respondent intended to impose. The first respondent proceeded nonetheless to write the letter to the third respondent without advising the applicants of such decision and in the process took them by surprise.

The applicant averred that the actions of the first respondent having been done unilaterally without notice had the effect that the applicant's member's trucks were caught up

by the ban whilst in transit. The trucks are parked at the border incurring demurrage costs and other ancillary charges.

It is also the applicant's contention that the first respondent subsequent to the provisional order of MUSAKWA J did not set new licensing conditions. Alternatively, the applicant averred that even if it is accepted that new conditions were set, they were not communicated to the applicant and other stakeholders. The applicant submitted that the position in relation to licensing for 2020 was therefore in limbo on account of the extant provisional order by MUSAKWA J. The applicant in case No. HC 2280/20 argues to the same effect.

FIRST RESPONDENT'S DEFENCE

The first respondent raised a point *in limine* challenging the authority of the deponents to the founding affidavits in both applications HC 2280/20 and HC 3009/20 to represent the applicants respectively. It is not necessary to dwell on this point other than noting that such objection was made. The deponents provided confirmation of their authorities and counsel for first respondent abandoned the objections.

The first respondent averred that the applicant failed to establish a legal basis is for the interdict it seeks. The same argument was raised in relation to case No. HC 2280/20. The first respondent averred that s 36 (1) of the Petroleum Act, [*Chapter 13:22*] gave power and authority to the 1st respondent to prescribe licence terms and conditions and to determine the same from time to time depending on prevailing circumstances. The first respondent further averred that it is not obliged to consult the applicants or agree with them when setting out the conditions.

I must observe that the issue in this application does not concern the powers of the first respondent as given in the Act. The first respondent in the exercise of its functions has a duty as an administrative authority to act reasonably and not in a dictatorial manner. It seems to me that I have to be restrained in what I say because these are issues which arise for determination on the return date in both cases before me and on the return date in case No. HC 1895/20 wherein MUSAKWA J issues a provisional order. I must avoid making pronouncement which may compromise the court which will decide on the final relief on the return date.

The first respondent submitted that the applicants did not have a *prima facie* right to be consulted and that for that reason they did not have a *prima facie* right to the interdict sought. This argument is inconsistent with what the first respondent stated in its notice of 13 March, 2020. In any event the first respondent engaged the applicant as admitted by it on 30 march, 2020. Further, the court in case No. 1895/20 did issue a provisional order suspending conditions set by the first respondent for licensing fuel players for 2020. It is an elementary principle of the law that administrative conduct can be challenged on review by an affected person. The first respondent's point on the non-existence of a *prima facie* case by reason must fail. The first respondent cannot act like a loose cannon which simply imposes its powers on affected persons without accountability. To do so does not accord with accepted norms of administration in a democratic society. Fortunately, the first respondent despite the point it took that it does not have to engage affected parties when setting out conditions for hearing, did the corrected thing in engaging them.

The first respondent submitted that the provisional order in case no. HC 1895/20 did not "compromise the first respondents' normal function to prescribe licensing conditions it deems necessary but simply to hear out the applicant as we had agreed to do." The first respondent's contentions are correct. A court does not superintend the functions of an administrative body. What the court does is to exercise powers of review of the decisions of administrative bodies. The powers of review are provided for in s 26 as read with section 27 of the High Court Act, [*Chapter 7:06*]. In short if the first respondent conducts itself unreasonably it can expect to have its decisions subjected to review.

The first respondent averred in para 13 of its opposing as follows:

> "(13) Ad Para 16-17
> At no point did we expect to reach an agreement with the applicant but simply to hear their views on the proposed conditions which we did."

The hearing of views before taking a decision is a salutary practice because an informed decision can only be reached if all relevant information is to hand. For example, getting the views of stakeholders assists an administrative authority to determine the impact assessments of its proposed decision before making it.

It is clear from the papers in this case that the first respondent did not publish what it called the new conditions set after the meeting of 30 March, 20202. The first respondent did not set out the conditions in the opposing affidavit. I was left in the dark on what the

conditions are. The first respondent in the amendment notice published 0n 13 March, 2020 stated that revised procurement licence conditions would be published in due course. The fact that publication had to be by notice as done on 9 and 13 March, 2020 must be a given fact.

When I enquired from the first respondent's legal practitioner as to whether there had been publication of the new conditions, counsel submitted that there had been such publication. When I enquired further on the nature of the publications, counsel made a startling submission that the first respondent had published the licencing conditions via whatsapp. I was not told anything further nor shown the whatsapp messages or to whom they were directed. Counsel made a bare submission that there had been communication through whatsapp. In this regard, I would suggest that the first respondent surely can do better than using whatsapp as official communication.

There was a half-hearted attempt made by the first respondent to argue that the application was not urgent. Of course it was and remain urgent. Whether or not an application is urgent is a value judgment made by the judge before whom the application concerned is placed for consideration and determination. The fuel industry is a strategic industry for the country to operate. The first respondent regulates a key area in the matrix of the economic wellbeing of the country. It is an open secret that the country has a fuel shortage. The case before me concerns the barring of fuel imports over a licencing dispute. It was alleged by the applicants without denial by the first respondent that trucks laden with fuel were caught up in transit by the first respondent's directive to the third respondent not to allow fuel imports by applicant's members save listed company's given to the third respondent. The matter is urgent also in that the applicants filed the application in case No HC 3009/20 on 8 May, 2020 following the first respondent's directive to the third respondent made on 5 May, 2020.

As regards case No. HC 2280/20, it was filed on 13 May, 2020. The applicant therein indicated that it only saw the notice to the third respondent on 6 May 2020. It decided to first attempt a dialogue route. In this regard, it wrote to the second respondent to intervene. When this overture failed, the applicant then filed the application. I am persuaded that the application HC 2280/20 is also urgent because the applicant did not sit on its laurels but petitioned the second respondent first before coming to court. Its conduct was understandable and there was no inaction on its part.

The first respondent's counsel submitted that the applicant in case No. HC 2280/20 was a stranger to it since it never entered into dialogue with it. I do not consider that the fact that there may have been no dialogue between the applicant and the first respondent is fatal to the applicant's case. This argument would have been otherwise had the position been that the applicant's members are not players in the fuel sector. The first respondent's directive affects them too. The applicant in terms of its constitution is a juristic person with power to sue and be sued. The relief sought by the applicant in case No. HC 3009/20 is similar to what is sought in case No. case HC 2280/20.

I must, before pronouncing my determination take note of the second respondent's position in the matter. The position which the Honourable Minister took is commendable. He suggested dialogue between the applicants and the first respondent. He did not see the need for involving courts in what is clearly a fuel industry or sector stake holders dispute with the regulatory authority. These are matters which end up being ego fights and retrogressive to the country's economy. In postponing the matter for judgment I suggested that parties should continue to dialogue but it seems no agreement was reached. I must also note that the second and third respondents essentially will abide the court's decision.

Disposition:

The dispute in this matter is straightforward. In case No. HC 1895/20 this court granted a provisional order whose contents have been discussed or noted. The provisional order remains extant. It was up to any affected party to anticipate its return date. The provisional order granted suspended procurement fees and some conditions imposed by the first respondent. It was agreed that engagements with the first respondent would be held. In a notice issued on 13 May, 2020, the first respondent published a public statement suspending s (h) of the conditions for licencing for 2020 to allow it to consult. The first respondent undertook to then publish new conditions after consultations. It did not do so. It instead unilaterally directed the third respondent to deny permission to applicants' members to clear their imported fuel into Zimbabwe on the basis that the applicants' members are not licenced. The new conditions were not produced to the court and were allegedly published through whatsapp.

The applicants in both cases have established a *prima facie* case for the relief sought or as may be varied by the judge. The applicants on the papers have established a cause of

action on which they would be entitled to judgment in their favour in the absence of a successful rebuttal. The first respondent's conduct in just directing the third respondent to bar fuel imports by applicants' members on account of their not being licenced when no licensing conditions relating to them had been published was grossly unreasonable. The balance of convenience favours the granting of an interim interdict to regulate the impasse.

The following provisional order shall issue in both applications HC 3009/20 and 2280/20:

(i) The letter issued by the 1st respondent (Ref FAD/LN/yg/20/303) dated 5 May, 2020 advising the 3rd respondent not to allow any other fuel importer to import fuel other than the ones listed on the annexure to the letter is hereby suspended.

(ii) The respondents herein are interdicted from giving effect to the letter aforesaid.

(iii) The position on fuel imports which obtained before the issuance of the suspended letter to third respondent shall obtain.

Atherstone & Cook, applicants' legal practitioners
In case No. HC 3009/20
Nyangani Law Chambers, applicant's legal practitioners
In case No. HC 2280/20
Sawyer & Mkushi, 1st respondent's legal practitioners
Civil Division of Attorney General's Office, 2nd respondent's legal practitioners
Zimbabwe Revenue Authority Legal Services, 3rd respondent's legal practitioners