CHENGETEDZAI DEPOSITORY COMPANY LIMITED

Versus

SECURITIES AND EXCHANGE COMMISSION OF ZIMBABWE

And

ZIMBABWE STOCK EXCHANGE LIMITED

And

MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 11 July 2022 & 1 March 2023

Opposed review application

A. Mugandiwa for the applicant
V.B. Sibanda, with *N. Ndengwa* for first respondent
A.B.C. Chinake for second respondent
No appearance for third respondent

CHILIMBE J

BACKGROUND

[1] This dispute involves a securities depository ("CDC"), a securities commission ("SECZ"), a stock exchange ("ZSE") and the "Minister of Finance". CDC seeks a review of a directive issued by SECZ on 15 October 2021 on the basis that SECZ (a) acted *ultra vires* the law[1] and (b) failed to observe procedural fairness in issuing the directive[2].

[2] In addition to costs of suit; CDC prays for the following intervention; -

In the main

[1] (i) the Securities and Exchange Act [Chapter 24:25] ("SECZ Act"); (ii) the Administrative Justice Act [Chapter 10:23] ("the Justice Act") and (iii) the Constitution of Zimbabwe ("the Constitution").

[2] Again, the same laws in footnote 1 above.

1. That Directive to Securities Market Intermediaries on Migration of Registers between Central Securities Depositories, Directive No SS 15/10/21, dated 15 October 2021 and issued by 1st Respondent on the 19th of October 2021 be and is hereby declared unlawful and be and is hereby set aside.

Alternatively

1. That the 1st Respondent`s decision that the Directive to Securities Market Intermediaries on Migration of Share Deposits between Central Securities Depositories, Directive No SS 15/10/21, shall be complied with and published in the gazette be and are hereby set aside.

2. That the 1st Respondent be and is hereby directed to comply with section 111 of the Securities and Exchange Act [Chapter 24:25] by affording the Applicant and other stakeholders an opportunity to make representations on the proposed directive within 14 days of this order and to thereafter comply with the provisions of Section 118 of the Securities and Exchange Act [Chapter 24:25] in order to operationalise any subsequent directive that may be issued in connection with the same subject matter.

THE DISPUTE

[3] The applicant CDC is a company incorporated in terms of the laws of Zimbabwe. Its chief executive officer Mr. Campbell Vincent Musiwa deposed to the founding and opposing affidavits in this matter. He related the following story; - CDC was a licenced security[3] depository and had, since 2014, been the nation`s sole provider of securities depository services. This monopoly terminated on 19 October 2021 when SECZ issued the "Directive to Securities Market Intermediaries on Migration of Share Deposits between Central Securities Depositories, Directive No SS 15/10/21" ("the Directive"). The Directive facilitated the migration of securities from CDC to the ZSE.

[3] Including, if not mainly in electronic or "dematerialised" format.

[4] In issuing the Directive, SECZ committed a series of transgressions. These ranged from violation, or non-observance of mandatory statutory processes, to infringement of contractual and constitutional rights property. CDC also viewed the ZSE as an undeserving beneficiary of SECZ`s misdeeds. CDC had also lodged an appeal against SECZ`s conduct with the Minister. The Minister was, according to Mr. Musiwa, unsympathetic and or indifferent to CDC`s grievances. He declined to call SECZ to order by dismissing CDC`s appeal.

[5] The first respondent SECZ is a statutory body incorporated in terms of the SECZ Act. It is the regulatory commission which oversees capital and securities markets in Zimbabwe. In that capacity, it enjoys a spectrum of powers to regulate, licence, monitor and control its area of jurisdiction. Its chief executive officer and deponent to the first opposing affidavit, Mr. Tafadzwa Chinamo outlined the circumstances surrounding issuance by SECZ of the Directive. Its principal aim was, among other objectives, to operationalise measures to open up the market to more players offering securities depository services. The Directive was issued in the proper exercise of progressive regulatory discretion and authority and offended neither law, standard nor custom. It was his contention that the application for review was an insincere attempt by CDC to retain market monopoly in the securities depository space.

[6] The second respondent the ZSE is a limited liability corporate licenced by SECZ to operate a securities or stock exchange (its traditional function traceable to the 1890s), as well as a securities depository. The ZSE`s chief executive officer, Mr. Justin Bgoni, essentially attacked CDC`s application as ill-founded at law, blighted by desperation and "forum shopping"; and indicative of an intent to cling to a monopoly enjoyed in the yester-year.

[7] The affidavits in the papers before me are bristling with indignation and disagreement. The chief executives of these three entities in the securities and exchange industry liberally traded allegations of malpractice, misunderstanding the true import of the Directive, as well general ill-will. As I understood him, Mr. Musiwa of CDC condemned the action taken by SECZ in issuing the Directive as a propitious, heavy-handed, violation of legal rights and statutory obligations. As I also understood them, both Messrs Chinamo of SECZ, and Bgoni of the ZSE urged the court to disregard CDC`s accusations and review application as nothing but the pointless consequences of a commercial tantrum.

[8] Possibly just a simple case of each side insisting on calling a spade a spade. Or as the elders say- each side has refused to conceal the thick stick meant to chastise the bad dog. However, my reference to these exchanges (in all their intensity) is not just a passing commentary on temperance. It is a relevant accentuation of the issue at the very core of this dispute. This issue being; - what is the appropriate standard to apply in reviewing SECZ`s conduct? And is such conduct (a) *ultra vires* the law and or (b) does it qualify as procedurally fair? Further, this issue of parties throwing the proverbial live snake at each other also raises the immediate question of onus. As shall be seen in the succeeding paragraphs, the disposition of this application will largely turn on the issue of proof.

[9] Finally, the third respondent herein is the Minister. He exercises overall responsibility to administer the SECZ Act. In the processes, he also enjoys supervisory and appellate powers over the decisions and conduct of SECZ. The Minister initially opposed the relief sought. An opposing affidavit was filed by his Permanent Secretary, Mr. George Tongesai Guvamatanga. Barred for want of filing heads of argument, the Minister however took no further part in this broil.

THE DIRECTIVE ITSELF

[10] The Directive was titled "Directive to Securities Market Intermediaries on Migration of Registers between Central Securities Depositories. It was dated 15/10/21 and published on 19/10/21. It was directed, as per its title, to "*Securities Market Intermediaries'*. This term was not defined in the Directive, nor is it provided for in the SECZ Act. It is however, safe to assume that it was aimed at those persons licenced in terms of section 38 of the SECZ Act- being securities dealers, investment advisers, investment managers, securities trustees, custodians, transfer secretaries in addition to central securities depositories as well as stock exchanges. Importantly, this Directive was also targeted at those corporate entities which issued listed securities; - namely shares traded on stock exchanges.

[11] The Directive indicated, in its preface, that it had been issued in terms of paragraph 21 of the First Schedule as rea with section 4 of SECZ Act. Section 4 of the SECZ Act sets out the broad powers, objectives and authority of SECZ as a regulator. These powers are amplified in Schedule 1 paragraph 21 of which invests SECZ with the power; -

> 21. To issue written guidelines and notices—
> (*a*) explaining its policies and practices;
> (*b*) for the proper conduct of licensed persons, registered securities exchanges and central securities depositories;
> (*c*) for any other purpose that it considers will facilitate the achievement of its objectives or the exercise of its functions or otherwise give effect to this Act.

[12] According to Mr. Chinamo in his opposing affidavit; -

> "The Directive simply gives guidelines on how issuers [of securities-namely companies] that wish to migrate from one depository to another should act so that there is a smooth transfer of data and maintenance of market integrity[4]."

[13] This averment was fiercely disputed by Mr. Musiwa for CDC. He argued that the Directive was what exactly it was; -a mandatory regulatory prescription that demanded immediate compliance. It forcibly deprived holders of securities of their right to exercise freedom of choice regarding where their dematerialised securities could be deposited. It was not at all a set of "guidelines" or recommendations. It is for this reason that CDC insisted the Directive amounted to "Rules" as defined by section 2 as read with section 118 of the SECZ Act.As such, issuance of the Directive ought to have followed the procedure prescribed by section 118 (5) and (6) of the SECZ Act. This procedure entails wider consultation with market players as well as approval by the Minister and gazetting before implementation.

[14] The Directive provided for the following [paraphrased]; -

1. *The Migration Process*-this was specifically directed corporates or participating issuers of listed securities to maintain registers of such shares.

2. *Required approvals* -the Directive (a) stipulated the internal governance processes required and (b) directed corporates to appoint or change a depository "to maintain its electronic share register."

[4] Paragraph 19 of the opposing affidavit by SECZ at page 195 of the bundle.

3. *Electronic Transfer of Securities*-dealt with the modalities of transferring securities between a retiring and assuming depository.

4. *Charges imposed for the transfer of securities*-provided for the expenses associated with migration of securities between depositories. The fees payable were capped at ZWL 500,000 per issuer.

5. *Reconciliation of investor records*-provided for reconciliations and certifications of the migration process.

6. *Linkages between CSDs*-a goodwill clause exhorting fair, open and non-discriminatory provision of depository services on appropriate but non-restrictive risk considerations.

THE GROUNDS FOR REVIEW

[15] The grounds of review fall under two heads being (a) that SECZ acted *ultra vires* enabling law and Constitution and (b) that SECZ failed to observe procedural fairness. These heads were elaborated in the following paraphrased terms; -

1. The Directive, being "rules" in terms of section 2 as read with section 118, was incorrectly issued under section 4 as read with paragraph 21 of Schedule 1. This was in circumvention of requirements of section 118 (6) of the SECZ Act.

2. The Directive interfered with property rights, and was *ultra vires* (i) section 71 (2) of the Constitution, (ii) as read with sections 72 and 78 of the SECZ Act.

3. The Directive misinterpreted section 218 of the Companies and Other Business Entities Act [Chapter 24:31] ("COBE"). As such, it wrongly granted company directors the right to decide where shareholders` securities could be reposed.

4. SECZ did not sufficiently consult the market or interested stakeholders prior to issuing the Directive, as required by section 111 of the SECZ Act.

5. The Directive, being "rules" was invalid by failure of SECZ to obtain the Minister`s prior approval and gazetting as prescribed by 118 (6) of the SECZ Act (As read with section 134 (e) of the Constitution).

6. The Directive violated sections 78 and 72 of the SECZ Act as read with "the CSD Rules" in that it interfered with the right of shareholders to voluntarily deposit or withdraw their securities.

[16] The above represent a reconstruction of the grounds for review as discerned from the CDC`s founding affidavit. With respect, the grounds were not crisply set out. Whilst a party applying for the review of inferior tribunals or action is at liberty to dilate from the grounds of review set out in section 27 of the High Court Act [Chapter 7:06], it is necessary to distil the grounds upon which the review is sought.

[17] This is the guidance issued by the Supreme Court in *Arafas Mtausi Gwaradzimba N.O. v Gurta A.G.* 2015 (1) ZLR 402 (S), where GWAUNZA JA (as she then was), referred to sections 26 and 27 of the High Court Act and stated as follows [at page 408 F -G]; -

> " ……. s 26 of the High Court Act [Chapter 7:06] which reads as follows; -
> "PART V; POWERS OF REVIEW
> 26 Power to review proceedings and decisions
> Subject to this Act and <u>any other law</u>, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe.
> 27 Grounds for review
> (1) Subject to this Act and <u>any other law,</u> the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
>
> > (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> > (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;

(c) gross irregularity in the proceedings or the decision.

(2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities. (My emphasis)"

My understanding of this provision is that the High Court Act contemplates and permits review proceedings that are brought before it in terms of "any other law." Specifically, judicial review may be done in terms of another statute, for instance the Administrative Justice Act, as happened in casu. Further to this, and as clearly indicated above in subsections (1) and (2) of s 27, grounds for review are not limited to those particularised in that section. Other laws can properly dictate the consideration of, or specify, other grounds on the basis of which proceedings of a lower court or tribunal may properly be reviewed."

POINTS IN LIMINE

[18] A number of points *in limine* were raised by both SECZ and the ZSE.It was agreed and I believe properly so, that the arguments adopt a rolled-up approach in dealing with them. Indeed, because in my view, the points *in limine* attach themselves intrinsically to the key issues on the merits. As such the points will be disposed of together with the merits. The points so raised [once more, paraphrased] went thus; -

1. That the CDC had no *locus standi* to launch and sustain the proceedings

2. That the CDC had approached the court in haste before exhausting domestic remedies provided for under the SECZ Act and that the CDC was pursuing selective jurisdiction options or forum shopping.

3. That CDC seeking as they did, to champion the rights of others whose rights CDC alleged had been infringed by the Directive, ought to have proceeded under, and observed the requirements of the Class Action Act [Chapter 8:17].

4. That the relief sought, being in the nature of a declaratur was incompetent in a review application.

5. That the High Court possess no authority to grant a final order of constitutional invalidity.

VALIDITY OF THE DIRECTIVE

[19] In dealing with both the grounds and points *in limine*, the following will be the main considerations; -

1. Was the Directive validly issued?
2. If so, is it impugned by some defect at law?
3. What is the extent or effect of that defect?
4. What intervention is required of this court?

[20] Was the Directive validly issued? - Lawfulness of administrative conduct is fundamental. This position has been laid down in numerous authorities including *Secretary for Transport & Anor v Makwavarara* 1991 (1) ZLR 18 (S); *Tsvangirai & Anor v Registrar General & Ors* 2002 (1) ZLR 251 (H); In *Vorster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province, and Others* 2006 (5) SA 291 (T) held as follows;

> "[18] Lawfulness is relevant to the exercise of all public power, whether or not the exercise of such power constitutes administrative action. Lawfulness depends on the terms of the empowering statute. If the exercise of public power is not sanctioned by the relevant empowering statute, it will be unlawful and invalid….. According to the provisions of s 6(2)*(f)*(i) of the Promotion of Administrative Justice Act, the Court has the power to judicially review an administrative action if the action itself contravenes a law or is not authorised by the empowering provision. Lawfulness lies at the heart of administrative justice and underpins the whole of the Constitution. It is a fundamental principle of the rule of law. The exercise of public power in whatever form can only be legitimate where it is lawful, and the rule of law, at least to the extent that it expresses this principle of legality, is accepted to be a fundamental principle of constitutional law. This has been so understood internationally (not necessarily in South Africa) before the advent of the new constitutional dispensation, and certainly thereafter…… it was held that it was central to our constitutional order that the Legislature and Executive, in every sphere, are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. The common-law principles of *ultra vires* remain under the new constitutional order, however, in the context of the

> constitutional principle of legality. In the context of 'administrative action', the principle of legality is enshrined s 32(1) of the Constitution of 1996."

[21] The above dictum is affirmed by section 3 as read with section 4 of the Justices Act. These 2 sections themselves draw strength from section 68 of the Constitution. This court per HUNGWE J (as he then was) described the import of sections 3 and 4 of the Justice Act in the following terms in *Bayer AG v Animal Health Zimbabwe* (Pvt) Ltd 2019 (2) ZLR 378 (H) at 385 A; -

> "The right of individuals to administrative conduct that is lawful, fair and reasonable has been elevated to a constitutional right."

[22] And further to that, sections 3 and 4 of the Justice Act are reiterated in section 111 of the SECZ Act dealing with "Observance of rules of natural justice". Which means that the right to procedural fairness is a significant entitlement which imposes appropriately serious obligations on administrative authority in the exercise of their mandate. Which also means that in dealing with, or responding to any allegations of failure to meet such standard, administrative authorities must treat such complaints with the requisite degree of gravity-save perhaps in extremities of spurious and vexatious challenges.

[23] In the same breath, a party alleging failure by an administrative body to act within the confines of the law must proffer sufficient proof of its claims. Of course, in some instances, the failure to act *intra vires* will be an obvious matter of fact, or law. But where such fact or law cannot be objectively ascertained, or are contested, then the applicant must discharge of its onus of proof. In the present dispute SECZ`s discretion is challenged over (a) its choice to issue the Directive under section 4 rather than section 116 of the SECZ Act and (b) its decision to limit consultations prior to issuance of the Directive. These challenges raise discretionary issues which have to be ventilated accordingly. It being remembered as stated above that there were severe contestations of facts in a matter brought as motion proceedings.

[24] I returning briefly to the rights discussed in [20] and [21] above. These rights and corresponding obligations, in the context of this application, mean that the first and fifth points *in limine* cannot sustain. It cannot be seriously disputed that CDC had a direct and

substantial interest in the issuance of the Directive (See *Makarudze & Anor v Bungu & Ors* 2015 (1) ZLR 15 (H)). Similarly, the argument by SECZ and ZSE that the CDC sought an order of Constitutional invalidity appears misplaced. CDC`s complaint was that the infringement by SECZ of the SECZ Act and Justices Act offended constitutional standards. That does not necessarily amount to a challenge of constitutional invalidity. In any event, the argument by CDC was that the Directive was an invalid instrument lacking the force of law. Section 175 (1) of the Constitution provides that; -

> **175 Powers of courts in constitutional matters**
> (1) Where a court makes an order concerning the constitutional invalidity of any law or any conduct of the President or Parliament, the order has no force unless it is confirmed by the Constitutional Court.

ALLEGED VIOLATION OF PROPERTY RIGHTS

[25] CDC contended that the Directive was *ultra vires* because it offended proprietary rights defined in section 71 (2) as read with section 71(1) of the Constitution. Section 71 (2) says; -

> 71 (2) Subject to section 72, every person has the right, in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others.

[26] Mr. *Mugandiwa* (for CDC) referred me to Silberberg and Schoeman[5] which by implication, elaborates section 71 (2) into the following rights and entitlements; - *ius utendi* (right to use and enjoy); *ius fruendi* (right to enjoy the fruits); *ius possidendi* (right to possession); *ius disponendi* (right to alienate); *ius vindicandi* (right to reclaim); and *ius negandi* (right to resist unlawful invasion). Counsel did not however, specifically (a) tick which of these rights had been violated by the Directive (b) how they had been violated and most importantly (c) whose rights exactly.

[27] He however proceeded into what I understood to be an additional argument, and drew attention to section 78 as read with section 72 of the SECZ Act. Section 78 of the SECZ Act

[5] "The Law of Property 5th Edition

gives holders of securities the right "*subject to the rules of the depository concerned [and] on application*" to withdraw any securities lodged in a depository. The same holder of securities is assured, by the proviso to section 72, of their right to retain "full control" of their securities and may refuse the conversion of such shares into a dematerialised format.

[28] Counsel then developed his argument by stating that the Directive wrongly reposed the authority to decide where shares are kept in directors of a company. In his own words counsel argues; -

> "The crisp issue raised by the Applicant is, insofar as listed securities are concerned, who has the legal right to decide where such securities, shares should be deposited. Is it the shareholders (the owners of the shares) or the directors of the issuer companies?"[6]

[29] In dealing with this argument, it is necessary to recognise firstly, that enjoyment of rights in property is subject to rules and restrictions as may be variously imposed by law, custom and practice, and necessity. Sections 78 and 72 of the SECZ Act recognise and qualify the exercise of rights to securities. Section 78 clearly stipulates that any enjoyment of such rights is subject to depository rules. By implication, these rights are also subject to the broader authority of SECZ as a securities and exchange regulator. SECZ`s discretion in interfering with this right can only be impugned if it is proven to have been exercised *ultra vires*, or inconsistent with procedural farness.

[30] Secondly, it is necessary to recognise that vast and complex is the area of rights associated with securities. The COBE dedicates extensive chunks of its provisions to the definition, calibration and qualification of not just rights in shares but the wider spectrum of the creation, exchange, deposition and retirement of shares. CDC`s application did not do sufficient justice to the argument that the Directive was invalid because "it interfered with rights to/in shares".

[31] On the same point, I note that CDC did not then descend to articulate the nature, purpose and character of the Directive as an interim measure targeting migration of securities from one depository and another. This was an important aspect given that the question of

[6] Paragraph 103 of CDC`s heads of argument page 366-7 of the record.

impact or interference with rights was key. Associated with this fact is the ever-revolving issue of whose rights exactly are under consideration. Counsel for CDC`s contention is that the right to decide where securities can be deposited was wrested from holders to the directors running the issuer entities. This brings to fore the exercise of rights of the various parties affected by the Directive. Apart from CDC, who else has come forth to complain that their rights were trampled on by the Directive? That matter cannot be presumed. Yes, forceful were Mr. *Mugandiwa*` s arguments that SECZ had no such right but the argument was predicated on the alleged lack of procedural fairness or adoption of incorrect procedure. It was never argued that SECZ regulated on matters outside scope of mandate.

[32] The SECZ Act clearly sets out the jurisdiction of SECZ as regulator of capital and securities markets in Zimbabwe. That authority came from the legislature. This court can only interfere with SECZ`s decision if it was reached through exercise of mandate outside the circumscription of section 111 of the SECZ Act, section 3 of the Justices Act and section 68 of the Constitution. It is the rationality or propriety of the exercise by SECZ of its powers to issue the Directive that may be questioned but not their primary authority. In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490, the Constitutional Court of South Africa articulated this point in the following terms; -

> [45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact C of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds D of reasonableness as required by the Constitution.

[33] On that basis, I would disallow the first grounds of review as unsubstantiated. I am further fortified in this conclusion by the fact that CDC did not, (as a holder of securities on its proprietary portfolio), demonstrate how exactly the Directive had affected their choice of

where to deposit their securities. This point is importunateness and the ZSE in fact argued that in as far as the relief sought by CDC was concerned, the ship had sailed. It was necessary to confirm that the matter had not been rendered moot. I say this well-mindful of course that the application was premised on the *ab initio* invalidity of the Directive. But then there was an alternative prayer for rectification.

[34] Additionally, the argument by CDC takes matters into the realm of contract law. If the Directive interfered with property rights, then it would be such rights between (a) a holder of securities and the issuer, and (b) the holder of securities and the issuer as against the depository. Between these parties will be terms and conditions governing the issuance, trade, exchange and retention of securities. It would therefore take the party whose rights were specifically offended to articulate how the Directive impacted their rights. Which brings in the point *in limine* on class action.

[35] It is indisputable that CDC, despite protestations to the contrary, is effectively seeking to champion the rights of others. Its papers before the court are replete with averments to that effect. It speaks of stakeholders and injured parties including the parties who instituted an urgent application in this court under case number HC 5923/21.Paragraph 11.2 of the answering affidavit of Mr. Musiwa, as an example, mentions, in broad terms, the desire by CDC to call SECZ to order because SECZ had transgressed from mandate to the detriment of the market. CDC cannot purport to speak on behalf of third parties who are not associated with it in the present suit.

[36] This is the very reason why the Constitution by section 85, and the Class Actions Act [Chapter 8:17] create a facility for third parties to champion or join in the cause of others. It is quite important to note that this Directive impacted corporate entities forming the mainstay of Zimbabwean economy. It is also safe to presume that it impacted what are commonly known as high-net-worth individuals in the jurisdiction. These persons are best placed to articulate how their rights were impacted by the Directive rather than CDC. The point *in limine* raised by SECZ and the ZSE regarding non-adherence with the Class Actions Act is upheld to the extent that CDC sought to prosecute the rights of third parties. That notwithstanding, the point *in limine* is not dispositive of the matter. The pointed argument by CDC (that the Directive was not lawfully issued for want of procedural fairness) remains alive.

WAS THE DIRECTIVE A "RULES" OR A "GUIDELINE"?

[37] CDC`s next argument was that the Directive amounted to "rules" as defined in section 118 (2) of the SECZ Act. For that reason, CDC contended that SECZ ought to have followed the procedure laid down in section 118 (6) for promulgating rules. In terms of such, SECZ was obliged to submit the rules in draft form for the Minister`s approval and gazetting before the rules became effective. CDC accuses SECZ of short-circuiting the process by disguising the rules as a "directive" issued under section 4 as read with paragraph 21 of Schedule 1 of the SECZ Act.

[38] SECZ`s response was simple. It was in fact, spoilt for choice as regards whether to issue "rules" in terms of section 118 (6) of the SECZ Act, or a "directive" under the powers prescribed in section 4 as read with Schedule 1 of the same Act. Further, SECZ argued the Directive did not amount to rules. A reading on the SECZ Act suggests that SECZ can indeed elect to flex its regulatory authority through the use of rules or directives. The argument tendered by Mr. *Mugandiwa* in seeking to persuade the court that the Directive amounted to rules went no further than arguing that the Directive was not a recommendation but an obligatory instrument that demanded immediate compliance. Counsel did not refer to the wording of the statute in order to distinguish the circumstances in which a "rules" or "directive" could be issued.

[39] I had anticipated argument from Mr. *Mugandiwa* regarding some gainsay from, if not onus shift to SECZ. There was need for SECZ to explain, if not justify the issuance of a Directive under one provision (section 4 as read with Schedule 1 paragraph 21), as opposed to the other (section 118 (5) and (6)) in the SECZ Act. Given that its exercise of discretion in observing procedural fairness had been challenged, it was necessary for SECZ to defend the correctness of choice of procedure in issuing the Directive.

[40] Mr. Chinamo in his opposing affidavit disputed that the Directive amounted to rules because it did not order migration of securities. It merely prescribed the process to follow

when such migration took place[7]. At the base of this statement is the simple admission by Mr. Chinamo that the Direction did in fact amount to a compulsory instruction. And that was the primary complaint by CDC. Mr. *Sibanda* (for SECZ) offered no further insights on this point from his client`s corner. He instead, reinforced SECZ`s position that it acted as it did because it wielded the authority. It was entirely up to SECZ to decide whether to issue "rules" or "directives".

[41] That in my view, is not how administrative authority ought to be exercised in terms of the law. (See paragraph [20];[21] AND [22] above). That aside, CDC was the applicant and had an onus to discharge. It was notified of this clearly inadequate response and attitude toward the choice of "rule" or "directive" by SECZ in the opposing affidavit. Yet CDC`s answering affidavit, lengthy as it was, did not venture forth to express the distinction, consideration and qualifications that governed choice of section 4 or 118 of the SECZ Act. CDC did not proffer sufficient grounds to justify interference with the exercise by SECZ is issuing the Directive under section 4 and as such these grounds for review fails.

THE QUESTION OF PROCEDURAL FAIRNESS

[42] The last ground for review was the averment that the Directive failed to meet the standards set by section 3 of the Justice Act as read with section 111 of the SECZ Act. Sections 3 and 4 of the Justice Act state that; -

> **3 Duty of administrative authority**
>
> (1) 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 the action by the person concerned; and

[7] Paragraph 54 page 200 of the opposing affidavit and letter from SECZ`s legal practitioners dated 30 November 2022 at page 172.

(*c*) where it has taken the action, supply written reasons therefor 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.

(2) In order for an administrative action to be taken in a fair manner as required by paragraph (*a*) of subsection (1), an administrative authority shall give a person referred to in subsection (1)—

(*a*) adequate notice of the nature and purpose of the proposed action; and

(*b*) a reasonable opportunity to make adequate representations; and

(*c*) adequate notice of any right of review or appeal where applicable.

(3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if—

(*a*) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or

(*b*) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including

(i) the objects of the applicable enactment or rule of common law;

(ii) the likely effect of its action;

(iii) the urgency of the matter or the urgency of acting thereon;

(iv) the need to promote efficient administration and good governance;

(v) the need to promote the public interest.

[43] Likewise, section 111 of SECZ Act affirms the above rights; -

111 Observance of rules of natural justice

Without derogation from any other provision of this Act or any other law, in exercising their functions

under this Act

(*a*) the Commission and every employee or agent of the Commission; and

(*b*) the board of every registered securities exchange; and

[Paragraph amended by Act 2 of 2013]

(*c*) the operator of every central securities depository; and

(*d*) every inspector; and

(*e*) persons and entities vested with powers in terms of rules referred to in section 118(2)(*k*1);

> shall ensure that the rules commonly known as the rules of natural justice are duly observed and, in particular, shall take all reasonable steps to ensure that every person whose interests are likely to be affected by the exercise of the functions is given an adequate opportunity to make representations in the matter.

[44] It is common cause that engagements over this Directive were not, on the face of it, extensive. SECZ itself admits so. It argues however, that the consultations were sufficient for the purposes of section 111 of the SECZ Act. Mr. *Sibanda* submitted that the following incidents in fact demonstrate how SECZ exercised procedural fairness to the extent prescribed in the section 68 of the Constitution, sections 3 and 4 of the Justice Act and section 111 of the SECZ Act; -

> [applicant admitted that]

i. It was availed a draft copy of the Directive
ii. It was called for a consultative meeting
iii. It attended the consultative meeting
iv. It made contributions and
v. It even threatened the 1st Respondent with litigation.

[45] Counsel went as far as advancing the principle that these acknowledgements should be taken as formal admissions as defined in *Mining Industry Pension Fund v Dab Marketing (Pvt) Ltd* SC 25-12. For that reason, CDC must be taken as having accepted that consultation took place and impliedly that there was procedural fairness. Mr. C*hinake* (for the ZSE), boldly associated himself with this same argument.

[46] With respect, these arguments were misplaced. The complaint by CDC went beyond mere idle argument on mundane procedure. For that reason, the authority cited was off the point. It is clear that although CDC acknowledged the engagements, it immediately and persistently rejected them as inadequate. CDC's application is based on allegations of breach of the statutory duty of procedural fairness. Mr. *Sibanda* also submitted in argument that the notice period on one month given by SECZ was more sufficient for the purposes. And therein lay a helpful submission because it touched the crux of the matter. Were the consultations sufficient or insufficient? Given the matters at hand?

[47] To that extent, the opposing affidavit of Mr. Bgoni furnished context to the issuance of the directive. The Directive was, according to him, in fact issued in terms of COBE and provided for issuers of securities to arrange for management of their share registers. In addition, all those involved in the handling of scrip (From issuers to depositories, from exchanges, dealers and all others) had a mandate to act with promptness. As such, readiness to mobilise with swiftness was an expected attribute of players in the securities and exchange industry.

[48] These contentions by Mr. Bgoni suggest the very standards or indicators which I expected the CDC and SECZ to put before the court and earnestly interrogate. These are the very matters which ought to have detained the court as observed in the *Bato Star Fishing* case. But such did not occur, and the court is constrained in properly establishing the correct standard constituting procedural fairness. I may stress that the marked disagreement earlier referred to raised extensive questions surrounding the nature, import and operational implications of the Directive. These factual disparities question (a) the relevance of motion proceedings as an expression of CDC`s causa and (b) the necessity of domestic facilities. (See also paragraph [46] below).

[49] Further, I do note that CDC, in its argument, also stressed the need for SECZ to have "engaged stakeholders". [See paragraph 10.5.1 to 10.5.2.5 of the answering affidavit]. CDC attempts, in those paragraphs to define what would amount to the correct standard of engagement on the part of SECZ. But the challenge is that CDC then speaks on behalf of third parties. It becomes difficult for CDC to speak on behalf of parties who have not joined the proceedings to confirm to the court the exact nature of the prejudice they suffered as a result of SECZ`s alleged inadequate notice. Accordingly, CDC`s grounds for review on this basis falls.

EXHAUSTION OF DOMESTIC REMEDIES

[50] Which brings me, for completeness, to the last two outstanding points *in limine*. It was argued that CDC ought to have exhausted domestic remedies and that by filing the present application [at a time] when an appeal was pending before the Minister, CDC embarked on

forum shopping. The authorities dealing with exhaustion of domestic remedies all carry one conditionality; - that the remedies in question should deliver efficacious relief.[8] I may also mention in passing that there are tribunals or statutes which create well-established internal processes which were created for purposes of sifting matters before such can be escalated to the courts. The labour space is one such example. The SECZ Act only provides one option; - an opportunity to appeal to the Minister in terms of section 108 and if dissatisfied with the result, an appeal to the Administrative Court. The Minister`s interventions on appeal are not specified in section 108 of SECZ Act.

[51] I am satisfied that CDC were well within its rights to approach this court given the grievance that burdened the bosom; -namely that SECZ had issued an instrument *ultra vires* the law. In any event, this court has in many instances, effectively implemented the "domestic remedy" facility by referring matters back to the administrative authority or tribunal as was held in *ANZ & Anor v Minister of Information and Publicity* 2007 (1) ZLR 272 [at page 277 G]

> "It goes without saying that a court does not exercise administrative functions and that it cannot imbue itself with such power without legal justification. This is why in its draft order the applicant has prayed that this court grant an order declaring that the applicant be deemed to have been registered in terms of the Act. If indeed the court had the legal justification to do such administrative acts, except in rare and exceptional situations, the applicant would have sought an order in its draft that the court grants the applicant substantive registration in accordance with the provisions of AIPPA. The fact that it did not and sought instead an order wherein the court would deem it to have been duly registered is an acknowledgment that the court cannot register the applicant as a mass media operator under the AIPPA. In the event, can the court still deem the applicant as registered in terms of the AIPPA? I do not think that the applicant seriously disputes the principle that a court will not interfere in the sphere of administrative actions or decisions except in very exceptional situations. It settled law that a court will normally interfere in the administrative sphere in the following circumstances…."

[8] See *Tutani v Minister of Labour & Ors* 1987 (2) ZLR 88 (H); *Musandu v Chairperson Cresta Lodge Disciplinary and Grievance Committee* HH 115-94; *Murowa Diamonds v Union Makumbe* SC 16-09.

[52] In the same vein, I perceive no abuse of process in CDC`s election to file this application during the pendency of the appeal to the Minister. Different relief was being pursued and CDC explained that it initiated the present application in a bid to avoid expiry of the dies. Finally, I was not persuaded by the point *in limine* arguing that declaratory relief in not available on review. There is sufficient authority to confirm that this argument is incorrect. (See *Kwete v Africa Community Publishing Development Trust & Ors* HH 226-98; *Khupe v Officer in Charge Law and Order Bulawayo Central Police & 2 Ors* HB 15-05; *Geddes Ltd v Tawonezvi* 2002 (1) ZLR 479.)

DISPOSITION

[53] The applicant had obligation to prove that first respondent SECZ acted outside the law. It has not been able to discharge the onus on the grounds that it raised. It will not therefore not access the relief prayed for. And so apart from stating that this dispute does not justify calls by either side for punitive costs; -

It will therefore be ordered; -

That the application be and is hereby dismissed with costs.

Wintertons-applicant`s legal practitioners
Mawere Sibanda Commercial Lawyers-first respondent`s legal practitioners
Kantor & Immerman-second respondent`s legal practitioners

CHILIMBE J_____ [01/03/23]