REPORTABLE: (63)

ZVISHAVANE TOWN COUNCIL
v
ZIMBABWE ELECTRICITY TRANSMISSION AND DISTRIBUTION (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA JA & KUDYA AJA
HARARE: 24 SEPTEMBER 2020 & 24 JUNE 2022

T Magwaliba and P Ncube, for the appellant

T Mpofu and T L Mapuranga, for the respondent

KUDYA AJA: On 31 October 2018, in Case No. HC 6622/17, the High Court granted the main claim sought by the respondent less the agreed amount against its claim to the appellant, and dismissed the appellant's counterclaim. In this appeal, the appellant seeks a reversal of that order and its substitution by the relief embodied in the counterclaim.

THE FACTS

The parties proceeded *a quo* by way of a stated case, in terms of Order 29 of the High Court Rules, 1971.

The appellant is a local authority established in terms of the Urban Councils Act [*Chapter 29:15*] (the primary Act). It is responsible for running the affairs of the town of Zvishavane.

The respondent is a limited liability company incorporated in terms of the laws of Zimbabwe, whose mandate is to transmit and distribute electricity. It is a subsidiary of the Zimbabwe Electricity Supply Authority Holdings (Private) Limited which, together with other companies, emerged from the unbundling of the Zimbabwe Electricity Supply Authority that was done in terms of s 68 (1) of the Electricity Act [*Chapter 13:05*] (the relevant Act).

The respondent sued appellant for the unpaid electricity bills for the period between and 31 May 2016, in the sum of US$4 646 348.60, together with interest and costs of suit.

The appellant admitted owing the amount but counter-claimed for unpaid way leave charges and rates in the cumulative sum of US$15 310 916.10 (comprised, *inter alia*, of way leaves of US$4 750 167 inclusive of 15% VAT), incurred during the period extending from 1 January 2011 to 30 June 2016. The appellant sought to set-off the main claim and prayed for the payment of the remaining credit balance of US$10 664 567.50, interest and costs of suit.

The respondent disputed owing the counter-claimed way leave charges. In the alternative, it pleaded prescription in respect of one-half of the claim to 30 June 2013, being the retrospective period in excess of 3 years from the date on which the counter-claim was served.

In the statement of agreed facts, the respondent admitted owing the appellant the sum of US$720 984.53 in rates and other services other than way leave charges. It agreed to

set off this amount against the main claim and thus sought payment of the balance of US$3 889 835.35.

The parties further agreed that the way leave charges were levied in terms of Part IV of the Zvishavane (Incorporated Area) (Mandava High Density) (Amendment) Supplementary By-Laws (No. 8) Statutory Instrument 68 of 2011 as amended by the Zvishavane (Incorporated Area) (Mandava High Density) (Amendment) By-Laws (No. 10) SI 33 of 2015.

The way leave charge falls under the general heading of "Rates for Commercial Properties" and specifically targets ZESA, Telephone and NRZ to be the paying entities. Appended just below way leaves is a "Recognition fee" chargeable against ZESA, Netone and NRZ. The unnamed Telephone entity, therefore appears to be an oblique reference to Netone.

THE CONTENTIONS *A QUO*

The respondent contended *a quo* in the main that it was not liable for the way leave charges because they were imposed under an enactment that was promulgated in contravention of the relevant Act. In the alternative, it contended that the sum of US$2 375 083.50 constituting one-half of the total way leaves claimed had prescribed having been sought after the extinctive expiration period of 3 years circumscribed for such claims by s 15 (d) of the Prescription Act [*Chapter 8:11*] *(*the Act*).*

The appellant made the contrary contention that the way leave charges were lawfully promulgated under the primary Act, which reposes the power on the Minister of

Local Government to promulgate revenue generation enactments in favour of local authorities. It, therefore, submitted that the way leave charges were lawfully due and payable from the respondent. Regarding the alternative contention, it argued that the claim had not prescribed as it was in the nature of a tax, which, in terms of s 15 (a) (iii) prescribes after a period of 30 years.

THE FINDINGS OF THE COURT A QUO

The court *a quo* made 3 findings on prescription. Firstly, that "the parties agreed that the cause of action affected by prescription arose in 2011". Secondly, that the special plea was not controverted in the replication and is at law deemed to have been conceded. Thirdly, that way leaves were not a tax and therefore prescribed after 3 years instead of 30 years. That, in any event, the appellant by seeking a vatable way leave amount, implicitly conceded that the way leave charges were not a tax as a tax cannot, in our law, be taxed. Further that it would be against the public policy tenets of legal certainty and finality in the relationship between the local authority and ratepayers for a debt arising from way leaves to subsist for 30 years.

Regarding the way leave charges, the court *a quo* held that while they were procedurally promulgated under the primary Act, they were legally unsustainable in that they were made contrary to the statutory command decreed in s 70 (5) as read with s 44 of the relevant Act. It also held that these provisions enjoined the respondent to install equipment, sub-stations and power transmission lines without paying any charges to the landowners. It further held that even though the by-laws were extant, they would, by virtue of the doctrine of "objective invalidity" be void *ab initio* and, therefore, incapable of conferring any rights on the appellant.

The court *a quo* issued the following order:

"1. The plaintiff's special plea of prescription is upheld.

2. The defendant's claim for way leave charges is hereby dismissed in its entirety.

3. Judgment is entered in favour of of the plaintiff in the sum of US$3 889 835.35 together with interest at the prescribed rate from 1 June 2016 to date of full payment.

4. The defendant shall bear the costs of suit.

Aggrieved by these findings, the appellant appeals to this Court on the following grounds of appeal.

"1. The court *a quo* erred in law and misdirected itself in holding that appellant's way leave claim of US$2 375 083.50 was prescribed and that it is not a tax.

2. The court *a quo* erred in holding that such charge should have been claimed "within a reasonable time" despite the 30-year period prescribed by the Prescription Act [*Chapter 8:11*].

3. The court *a quo* erred in law and misdirected itself in holding that appellant ought to have filed a replication to the special plea raising the defence that its claim was covered by s 15 (a) (iii) of the Prescription Act.

4. The court *a quo* erred in holding that the Zvishavane (Incorporated Area) (Mandava High Density) (Amendment By-Laws) (No. 10) SI 33 of 2015 and Zvishavane (Incorporated Area) (Mandava High Density) (Amendment) Supplementary By-Laws (No. 8) SI 68 of 2011 were *ultra vires* the primary legislation and was thus invalid."

It seeks the success of the appeal with costs, the setting aside of the decision *a quo* and its substitution with the dismissal of the special plea of prescription, the award to the appellant of US$9 360 984.88, comprised of way leave charges in the sum of US$4 750 167, rates and other service charges of US$4 610 817.88], and a further sum of US$860 333.65 together with interest at the prescribed rate from 19 August 2016 to the date of payment in full and costs.

The issues that arise from these grounds are as follows:

1. Whether the court *a quo* erred in holding that the by-laws were *void ab initio* and of no force or effect.
2. Whether the court *a quo* erred in holding that one-half of the way leaves charges claim had prescribed.

THE ARGUMENTS ON APPEAL

Mr *Magwaliba*, for the appellant, made the following contentions. The portion of the claim preceding 30 June 2013 had not prescribed as taxation prescribes after 30 years. Alternatively, as the appellant was a part of the State and as a debt due to the State prescribes after 6 years, the said amount had not prescribed. The court *a quo*, improperly relied for its

decision on prescription on the doctrine of objective invalidity and public policy. The doctrine of "objective invalidity" is inapplicable to administrative acts and the subsidiary legislation under which they are made, as these remain valid until set aside on review. The law does not require a replication to a special plea. The by-laws are not *ultra vires* any law, and, in any event the Electricity Act is not the primary Act.

Per *contra*, Mr *Mpofu*, for the respondent, argued that: the filing of a replication to a special plea is a mandatory requirement of the law, otherwise the special plea is treated as unopposed. A statement of agreed facts neither constitutes a defence to a special plea nor substitutes it. A way leave charge is not a tax. It is an ordinary impost, which is afflicted by ordinary extinctive prescription. The finding of the court *a quo* was therefore unassailable.

Further that: the contention that the appellant was eligible to a minimum prescriptive period of 6 years because it was a part of the State was neither pleaded nor argued *a quo.* Such a contention could, therefore, not be properly raised before the court. Even though it was not raised, it is devoid of merit. That, although the primary statute is the Urban Councils Act and not the Electricity Act, the provisions of s 227 (1) as read with the Third Schedule of the primary statute under which by-laws were promulgated, does not permit the imposition of way leave charges. Section 44 of the relevant Act, which granted way leaves over land to the respondent's predecessor did not provide for the payment of way leave charges to local authorities or authorize them to charge such a payment. The status *quo ante* was preserved and carried forward by s 70 (5) of the relevant Act. The by-laws are therefore *ultra vires* both the primary and relevant Acts. Lastly, way leaves are not a service provided by the appellant to the respondent but a free statutory right imposed by the legislature.

THE APPLICATION OF THE LAW TO THE FACTS

Whether the by-laws were void ab initio

Mr *Magwaliba* argued that the finding *a quo* that the by-laws were *ultra vires* the relevant Act was a gross misdirection. He premised his argument on two aspects. The first was that the by-laws were procedurally and lawfully enacted in terms of s 227 (1) of the primary Act. The second was that the primary Act was not subordinate to the relevant Act.

Per contra, Mr *Mpofu* argued that while the by-laws were procedurally enacted, they were void *ab initio* for breaching the relevant provisions of the relevant Act, which he contended prevail over the provisions of the primary Act.

The court *a quo* found favour with the position taken by Mr *Mpofu*. In the process the court a *quo* made some gratuitous pronouncements, which did not arise from the statement of agreed facts, to the effect that since the advent of Cecil John Rhodes to the time of judgment, way leaves have always been exercised and treated as a free statutory servitude.

I agree with Mr *Magwaliba* that the pronouncements were incorrect. Firstly, they do not arise from the statement of agreed facts. Secondly, they are not borne out by any historical survey of all the Electricity Acts going back to the Federal Act. A reading of s 35 of the Electricity Act *[Chapter 282*], which was promulgated in 1962 and s 44 of the relevant Act, which came into effect in 2003, indubitably demonstrates that way leaves were not a free statutory servitude.

The two sections are substantially similar. Section 44 (1) of the relevant Act provided that:

> "**44. Way leaves over land**
>
> **(1)** **Subject to this section,** an authorised undertaker **may** place any transmission line or water-pipeline, whether above or below ground, into, out of or across any land, including State land.
>
> **(2) …**
>
> **(3)** Part III, V and VII of the Land Acquisition Act [*Chapter 20:10*] **shall apply** *mutatis mutandis* **to the exercise of any rights in terms of this Section" (my emphasis)**

The use of the word "may" shows that the exercise of a s 44 (1) statutory servitude by an authorised undertaker was optional and not compulsory. It was made subject only to the other three subsections of s 44. Of those subsections only subs (3) dealt with the question of compensation to the land owner. It decreed that any question of compensation was to be dealt with in terms of Part III, V and VIII of the subsisting Land Acquisition Act. Part III of that Act dealt with the "Procedure for Compulsory Acquisition of Land", Part V dealt with "Claims for and Assessment and Payment of Compensation while Part VIII dealt with "Special Provisions Relating to the Administrative Court", and before 1971, the Compensation Court.

In the circumstances, the imposition of a statutory servitude by s 44 (1) was in terms of s 44 (3) subject to the payment of compensation. It was not for free.

The nub of Mr *Magwaliba's* attack was, however, that the finding *a quo* that the by-laws were *ultra vires* the relevant Act was incorrect. He argued that the court *a quo* could not properly rely on the doctrine of objective invalidity to declare the by-laws invalid. He submitted that the doctrine only "applies to the validity of legislation in relation to the

Constitution" and not to administrative law-based conduct, which, he further argued, is governed by judicial review.

The court *a quo* invoked the doctrine by asserting that:

> "It is therefore clear that the invalidity of the by-laws does not have to be declared before they can be invalid. They were invalid the moment they were promulgated in breach of the Electricity Act."

The doctrine of objective invalidity of legislation, in the constitutional context, was enunciated by MALABA DCJ, as he then was, in *Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ 12/15 at p 47 thus:

> "The rule of invalidity of a law or conduct is derived from the fundamental principle of the supremacy of the Constitution. Section 2(1) of the Constitution provides that the Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with its provisions is invalid to the extent of the inconsistency**. A court does not create constitutional invalidity. It merely declares the position in law at the time the constitutional provision came into force or at the time the impugned statute was enacted.** The principle of constitutionalism requires that all laws be consistent with the fundamental law to enjoy the legitimacy necessary for force and effect. It is for this Court to give a final and binding decision on the validity of legislation." (My emphasis).

In my view, the doctrine of objective invalidity, cannot be limited to constitutional disputes just because it has invariably been invoked in the resolution of such disputes. It seems to me that it is a doctrine of universal application whose force of reasoning equally applies in the resolution of legislative tension between, as in this case, concurrent statutes or between a primary statute and a subsidiary enactment. See *City of Harare v Mukungurutse & Ors* SC 46/18 at para [9] and *Matanhire v BP Shell Marketing Services (Pvt) Ltd* 2005 (1) ZLR 140 (S) at 147F-G.

I, therefore, find that the court *a quo* was correct to invoke the doctrine in determining whether the by-laws were void *ab initio* and of no force or effect.

Mr *Mpofu* submitted that the by-laws are *ultra vires* both the primary Act and the relevant Act. He contended that the nature of the by-laws that the appellant is entitled to enact is enumerated in the Third Schedule of the Act. He argued that way leaves do not form part of that list. He further contended that as way leave charges were not chargeable under the Electricity Act, they could not constitute matters for which the appellant could, in terms of s 227 (1) of the primary Act, make by-laws.

Section 227 (1) provides that:

> "(1) A council may make by-laws in terms of this Part in relation to any matter specified in the Third Schedule or anything which is incidental to or connected with a matter so specified or for any matter for which in terms of this Act provision may be made in by-laws."

The exercise of the way leave statutory servitude is not one of the matters that is specified in the Third Schedule. I, therefore, agree with Mr *Mpofu* that the appellant could not lawfully levy way leave charges in terms of s 227 (1) of the primary Act.

I have already found that s 44 (1) of the relevant Act, which created way leaves was only subject to the other provisions of s 44 and not to any other statute. The only payment that could be made to the landowner under that provision would be compensation determinable in terms of Part III, V and VIII of the Land Acquisition Act. The subsection was not subject to the Urban Councils Act. The appellant could not, therefore lawfully impose way leave charges on the respondent. In addition, s 227 (1) of the primary Act does not confer any power on the appellant to impose a charge on the use of a way leave.

Consequently, I am satisfied that the by-laws could not be grounded on the primary Act or on the relevant Act. They were, therefore, *ultra vires* both Acts, from the date of inception.

The fourth ground of appeal is, therefore, devoid of merit.

My finding that the by-laws were *void ab initio*, is dispositive of the appeal. A nullity does not confer legal rights on any one. In the circumstances, the question of prescription to which the first, second and third grounds of appeal relate would not arise. The appeal must therefore fail.

COSTS

There is no reason why costs should not follow the result. The respondent is therefore entitled to its costs on the ordinary scale.

DISPOSITION

Accordingly, the appeal is dismissed with costs.

GUVAVA JA: ` I agree

MAVANGIRA JA: I agree

Coghlan & Welsh, appellant's legal practitioners

Chihambakwe, Mutizwa & Partners, respondent's legal practitioners