HIPPO VALLEY ESTATES
and
TRIANGLE LIMITED
versus
ZIMBABWE NATIONAL WATER AUTHORITY

HIGHCOURT OF ZIMBABWE
MANGOTA J
HARARE, 20 July and 18 August 2016

Opposed Matter

T Magwaliba, for the applicants
J Dondo, for the respondent

MANGOTA J: The Applicants are operators in the commercial agriculture (estates). They grow sugar-cane from which they produce sugar. They are based in the low veld area of Zimbabwe. They depend on raw water which the respondent supplies to them for irrigation of their sugar-cane fields.

On 17 December, 2015, the respondent, a statutory body which is charged with the mandate of, among other matters, water pricing addressed a letter to the applicants. The letter reads, in part, as follows:

> "RE: REVIEW OF RAW WATER TARRIFS
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> This serves to advise that Government through the recent National Budget Pronouncement has reviewed raw water tariffs for Commercial Agriculture [Estates] from $9.45 per megalitre to $12 per megalitre.
>
> The new tariffs are with effect from December 1, 2015
>
> ----------
> You are therefore advised to take note of this development in your plans."

The contents of the letter remained a cause of concern to the applicants. They moved the court to review the decision of the respondent. They submitted that the decision of the respondent was tainted with:

(i) gross irregularity;
(ii) gross unreasonableness
(iii) unlawfulness and unfairness

(iv) irrationality – and/or

(v) discrimination.

They stated that they were not consulted when the decision which adversely affected them was made. They attached to their application copies of water supply agreements which they concluded with the respondent or the latter's predecessors. They called them Annexures B1 and B2. They averred that the annexures provided that, whenever the respondent wanted to review the water tariff, it was enjoined to consult the affected parties who would negotiate the new tariff with it. They said the respondent's failure to consult and offer them an opportunity to make representations constituted a breach of the agreements. They insisted that the retrospective application of the tariff showed that the respondent's conduct was not lawful, reasonable or fair. They remained of the view that Government, and not the respondent, made the decision to hike the water tariff by 27%. They said the discriminatory nature of the decision was evident from the fact that all other users of raw water got a reduced tariff or no tariff at all. They moved the court to set the respondent's decision aside.

The respondent opposed the application. It stated, *in limine*, that the applicants were improperly before the court. It submitted that the appeal which they filed with the Minister was pending determination. It stated that the applicants had not exhausted the domestic remedy which they had chosen to pursue. It insisted that the application was, therefore, premature and irregular. It stated, on the merits, that it was entitled to fix charges for the sale of raw or treated water from water works which it operated or controlled at any stage. It said that was what it did in the case of the applicants. It argued that there was nothing irregular or unreasonable in the manner that it conducted itself *in casu*. The applicants, it averred, remained oblivious to s 39 (7) of the Water Act. It stated that it had no obligation to consult affected parties whenever it sought to increase the water tariffs. It said the fact that it consulted the applicants in the past did not enjoin it to do so all the time. It stated that provisions of the Water Act superseded the agreements which the applicants referred to as Annexures B1 and B2. It submitted that whether the increase was made by Government or by itself was not the issue. It said it applied s 30 (2) of the ZINWA Act when it decided to increase the water tariff. It averred that it was fair, reasonable and justifiable for it to come up with different tariffs which were determined on a case by case basis. That, it said, demonstrated the fact that it was seriously applying its mind to what was then before it. It insisted that the application was devoid of merit. It moved the court to dismiss it with costs.

The respondent purported to have acted in terms of s 30 of the Zimbabwe National Water Authority Act [*Chapter 20:25*] ["the Act"] when it hiked the water tariff in respect of the applicants from $9.45 to $12.00 per megalitre. However, the contents of the letter, Annexure A, showed that the contrary was the case. The respondent appeared to have acted at the spur of the moment, as it were. It acted on the impulse, so to speak. It conducted itself on the basis of the national budget pronouncement.

Increase of water tariffs in terms of s 30 of the Act enjoins the respondent to comply with clearly defined processes and procedures which ensure fairness, reasonableness and rationality because of checks and balances which are embedded in the section. The section reads:

"WATER AND OTHER CHARGES

(1) the Authority may, with the approval of the Minister and subject to the Water Act [*Chapter 20:24*] fix charges for-

(a) the sale of raw or treated water from water works operated or controlled by the Authority; and

(b) ……; and

(c) ……; and

(d) …….

(2) When seeking the approval of any charge in terms of subsection (1) or an increase in any charge, the Authority shall apply to the Minister in writing setting out the full details of any proposed charge or increase therein and the basis of the proposal.

(3) The Minister shall forthwith consider any application made in terms of subsection (2) and if he is satisfied that the proposed charge or increase therein is fair and reasonable having regard to –

(a) the cost of providing, operating or maintaining the service concerned; and

(b) any proposed improvements to any service or facility provided by the Authority; and

(c) any other relevant economic factors justifying the proposed charge or increase therein:

he shall approve the charge or increase therein sought.

(4) If, after due consideration, the Minister is not satisfied in respect of any of the matters specified in sub section (3), he shall not grant the approval:

Provided that, before refusing to grant approval in terms of this subsection, the Minister shall notify the Authority of his intention to do so and of his reasons therefor and shall give the Authority a reasonable opportunity to make representations in the matter." [emphasis added].

The applicants argued that the respondent did not follow the above outlined procedure when it increased the water tariff. They insisted that government, and not the respondent, made the decision which affected their budget in a very adverse manner.

The respondent produced no evidence which showed that it complied with the section. All it did was to make some bold and unsubstantiated assertions which were to the effect that it increased the water tariff in terms of the cited section of the Act. It did not produce the application, if any, which it made to the Minister. It did not produce reasons, if any, justifying the intended increase. It did not produce the Minister's approval of the increase. It, in short, failed to discharge the *onus* which the applicants shifted to it to establish that it acted in terms of, and within, the law.

Section 2 of the Act is the interpretation part of the same. It defines the word *Minister* to refer to the Minister of Rural Resources and Water Development or any other Minister to whom the President may, from time to time, assign the administration of the Act. It is evident that the respondent should have directed its application, if any, to the *Minister* as defined in the Act or to any such Minister as the President assigned the administration of the Act. The Minister, as defined in the Act, should have considered the respondent's application, if any, and should have either approved or declined to approve, it with reasons. Nothing of such stated matters ever took place *in casu.*

It was totally unwarranted for the respondent to write on 17 December, 2015 and advise the applicants that the new tariffs were effective from 1 December 2015. That was tantamount to penalizing the applicants for conduct which they were not made aware of.

The respondent did not challenge the existence and/or the validity of the agreements, Annexure B1 and B2, which it concluded with the applicants. Clause 8 of the first agreement, B1, makes reference to what the parties referred to as Review and Amendment of charges And Variation of Allocation. It reads, in part, as follows:

> "8. The [water] charges described in clause 7 shall be subject to review in accordance with the following provisions:
>
> (a) ……. Upon such review the said charges shall be fixed by agreement between the parties and failing such agreement shall be determined by the Minister.
>
> (b) …….. the said charges may be reviewed at any time at the instance of either party prior to the end of each year commencing with the period ending on 31 March …… upon such review -
>
> (i) The said charges shall be determined by the Minister and any variation of the said charges consequent upon such review <u>shall take effect from the beginning of the next succeeding year.</u>" [emphasis added]

Clause 9 of the second annexure, B 2, makes reference to what the parties termed Review and Amendment of charges. It reads:

> "That ZINWA may review the price of water supplied, including the water levy, at any time. The consumer shall be advised, in writing, of any such variation in charges consequent upon such review and the said variation in charges shall take effect after a notice period of two months" [emphasis added]

Annexure B 1 envisaged a situation where the applicants and the respondent had to discuss and agree upon the increase before such was introduced. Where they failed to agree, the Minister, guided by submissions from both parties, would make a determination of an appropriate increase in water tariff.

Both agreements were or are clear on the point that no increase would operate in retrospect as occurred in *casu*.

The court noted, with disquiet, that the respondent made up its mind to, and did actually, flout the agreements which it concluded with the applicants. A *fortiori* when those agreements were both subsisting and valid. Its statement which was to the effect that the agreements were superceded by provisions of the Water Act remained anyone's guess.

The respondent's assertion, which was to the effect that it had no obligation to consult the applicants when it increased the water tariff in a manner which adversely affected the applicants' budget was misplaced. It had a contractual obligation to consult, at least, the first applicant. It had a clear duty not to make the increase which it imposed upon the applicants to operate retrospectively as it did.

The respondent violated the agreements which defined its relationship with the applicants in a most shameful manner. A contract is, by its definition, a legally enforceable agreement: Innocent Maja: *The Law of Contract in Zimbabwe*, p 20. It is, if a comparison is favoured, an agreement which is intended to be enforceable at law.

The definition of the word contract says it all. It is on the basis of that definition that the applicants sued the respondent. They did so with a view to bringing it to book and compel it to observe as well as comply with what they agreed upon as parties who, in their sound and sober senses, concluded the agreements, B1 and B2. The respondent cannot, under the circumstances, be heard to assert as it did, that the provisions of the Water Act superceded the contents of the agreements. Its assertions in the mentioned regard were, in any event, not developed beyond where it left that aspect of its case. It made up its mind to, as it were, hide behind a finger when it refused to acknowledge what was obvious.

The respondent spent a great deal of its time in an effort to establish that the court should deny jurisdiction to the applicants. It argued that the applicants' appeal to the Minister was pending determination. It insisted that they should exhaust that domestic remedy which was available to them before they sought review of its decision of 17 December, 2015.

During submissions, counsel for the applicants drew the court's attention to the existence as well as the contents of statutory Instrument Number 48 of 2016. The instrument became operative on 6 May 2016. It, in essence, confirmed what the respondent had communicated to the applicants as contained in Annexure A which is dated 17 December, 2015.

It follows from the foregoing that, whether or not the appeal is pending as the applicants filed it, the Minister's mind has already been made up. What he or she promulgated remains law until it is either set aside by him/her or it is, in some way or other, repealed. The Minister cannot, under the stated circumstances, change his or her mind and rule in favour of the applicants when he or she considers the appeal which is before him/her.

The court remains of the firm view that the Minister did not act out of his or her own volition when he or she introduced Statutory Instrument 48 of 2016 into law. The respondent must have influenced him/her to promulgate the regulations. It must have realised the unpalatable situation which it created for itself and must have sought to have the irregularity which flowed from its irrational decision to increase the water tariff rectified. It, therefore, wanted to have the irregular situation regularized by the instrument which the Minister introduced as number 48 of 2016.

There is no doubt that the respondent acted irrationally, unfairly and unreasonably when it increased the water tariff for the applicants by a margin of 27%. It clutched on straws to prop up a defenceless situation. It failed, in a dismal way, to justify its conduct and/or the rationality of the same.

The applicants' case was not devoid of merit. They established, on a balance of probabilities, that theirs was a water-tight case which called for the court's intervention. The application is, accordingly, granted with costs.

Scanlen and Holderness, for the applicants
Dondo and Partners, for the respondent