ZIMBABWE ELECTRICITY TRANSIMISSION AND
DISTRIBUTION COMPANY (PVT) LTD
versus
ZVISHAVANE TOWN COUNCIL

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 23, 24 October 2018 & 31 October 2018

Civil Trial

T Mpofu with *A Demo,* for the plaintiff
E Ndlovu, for the defendant

MATHONSI J: The plaintiff is an incorporation whose business is the distribution of electricity to all parts of Zimbabwe. It is a subsidiary of ZESA Holdings (Pvt) Ltd charged specifically with electricity transmission and the provision of electricity services throughout the country. The defendant on the other hand is a statutory body constituted and operating in terms of the Urban Councils Act [*Chapter 29:15*] and is the local authority running the affairs of the town of Zvishavane which is situated in the Midlands Province of this country.

The plaintiff sued the defendant for payment of the sum of $4 646 348.60 together with interest from 1 June 2016 to date of payment and costs of suit in respect of charges for electricity supplied to the defendant at its special instance and request. The plaintiff averred that the defendant had, despite demand for payment, failed or neglected or refused to pay the said amount. The defendant contested the action but admitted in its plea that the amount claimed by the plaintiff was indeed owed by it. It averred however that it was owed by the plaintiff a sum of $15 310 916.10, a sum well above what it owed to the plaintiff and as such pleaded set off.

The defendant then counter-claimed for payment of the sum of $10 664 567.50 being the balance due in respect of rates and service charges as well as way leave charges after discounting

from the total charge of $15 310 916.10 the sum of $4 646 348.60 it owes to the plaintiff for electricity charges. The plaintiff denied owing the defendant all that money the bulk of which consists of what the defendant has levied as what is called "way leave charges," a term coined by local authorities for a levy on transmission lines and substations belonging to the plaintiff which either pass through or are located in areas under their jurisdiction.

At the commencement of trial Mr *Demo* who then appeared for the plaintiff made an application for a postponement of the trial until such time that an application for a declaratur, which it made against all local authorities in this country in HC 3446/17, has been heard and determined by this court. In that application the plaintiff seeks a declaration that the levying against it by local authorities of "way leave charges" is outside the provisions of the Urban Councils Act and is therefore unlawful. The plaintiff also seeks a declaration that reference to way leave and recognition fees in the Zvishavane (Incorporated Area) (Mandava High Density) Amendment By-Laws, 2012 (No. 9) S.I. 59 of 2012 is contrary to the law and accordingly null and void.

The application for a postponement was opposed by Mr *Ndlovu* for the defendant on the basis that it had no legal foundation as the 2 matters are not connected. In addition, the said application had been set down for hearing before CHIKOWERO J on 22 October 2018 but the plaintiff sought and obtained its removal from the roll for one reason or the other.

This court is fast becoming a postponements court. While it is reeling under the weight of a heavy backlog of causes awaiting trial, quite often when these matters are set down giving the parties ample time to organize themselves in preparation for trial, legal practitioners wait for the day of reckoning to come and make endless applications for postponement of matters. This is particularly so in respect of trials which, by their very nature, demand more time and one cannot help but sense a reluctance by legal practitioners to commence trials presumably because they consume a lot of time. Surprisingly, it is the same legal practitioners who are quick to issue summons but start dragging their feet when the time for trial comes. As a result, because our litigation is party driven, so many causes remain pending due to a lack of willingness to get on with the business of conducting trials and yet parties are usually intransigent and unwilling to even settle these matters.

It is time to remind the profession that this court is not a harbour for pending litigation. Matters should be filed for the sole purpose of having them resolved and not for any other reason.

In addition, matters are set down in order that they are dealt with by the court and finalised. Legal practitioners should desist from the habit of attending court to seek a postponement but should strive to prepare their cases and get on with the business of completing cases. This court will not countenance a situation where the legal term drags on and on with matters being pushed forward on spurious grounds thereby perpetuating the backlog.

It should be understood that a postponement is not there for the asking. It is only when there is a genuine reason why a litigant is unprepared or unable to proceed with the trial that the indulgence of a postponement, for an indulgence it is, will be granted. The following passage in *Hughber Petroleum (Pvt) Ltd & Anor* v *Brent Oil Africa (Pty) Ltd* 2014 (1) ZLR 200 (H) at 205 F-G, 206A is apposite:

> "Now, the court has a discretion, which should be exercised judiciously, to grant or refuse a postponement. The court would be slow to refuse a postponement where the reason for a party's non-preparedness has been fully explained and the inability to proceed is not due to delaying tactics. However, as stated in *Myburgh Transport* v *Botha* 1991 (3) SA 310 (NSC) at 315 C-D,
> an application for a postponement must be made timeously as soon as the circumstances justifying it become known. It must always be *bona fide* and not used simply as a tactical manoeuvre for the purposes of obtaining an advantage. Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the court will be exercised."

I have no reason to depart from that reasoning. I should add however that the explanation for lack of preparedness or inability to proceed must be a reasonable one and must satisfy the court before the discretion to postpone a matter properly set down is triggered. No satisfactory explanation was given by the plaintiff at all. It is a matter in which the plaintiff sued and would ordinarily be expected to be agitating for the finalisation of the matter.

The application which the plaintiff would want to prosecute first was filed on 20 August 2017, exactly a year and a day before the pretrial conference in the present matter was held before a judge on 21 August 2018. Mr *Demo* conceded that the issue of having the application for a declaratur resolved first was never raised at all before the judge at the pretrial conference. It is at the pretrial conference that all housekeeping issues are dealt with. Parties should not be bringing such issues to the trial which is conducted in accordance with an agreed pretrial conference minute. The business of the court at the trial is to take the evidence of the parties and finalise the matter.

It occurs to me that the application for a postponement lacks *bona fides* and that it was made simply as a tactical manoeuvre to gain an advantage. The application sought to be pursued

does not even stand in the way of the present trial at all as it is unconnected to it. It is for these reasons that I refused the application and directed that the trial should commence. The moment that happened Mr *Demo* submitted that the parties had in fact settled most of the issues for trial and desired to proceed by way of a stated case, a sure sign that the postponement had been sought for the wrong reasons. The matter then proceeded in terms of Order 29 of this court's rules by way of a statement of greed facts which were duly admitted and Mr *Mpofu* argued the matter on behalf of the plaintiff.

The statement of agreed facts signed by the parties reads:

"1. Agreed facts
(a) That the defendant is liable to the plaintiff in the sum of $4 610 817.88.
(b) That the plaintiff's power lines on the defendant's land covers 137 686m^2.
(c) That if the defendant's by-laws on way leaves are valid, the total way leave charges for the period extending from January 2011 to 30 June 2016 is US$4 750 167.00, inclusive of 15% Value Added Tax (VAT).
(d) That if the plaintiff's defence of prescription on way leaves succeeds, the value of way leave charges that would have prescribed as at 1 June 2013 is US$2 375 083.50.
(e) That the plaintiff owes the defendant a sum of US$720 984.53 in rates and service charges.
(f) That the way leave charges, were charged in terms of Zvishavane (Incorporated Area) (Mandava High Density) (Amendment) By-Laws (No 10) (S.I. 33 of 2015) and Zvishavane (Incorporated Area) Mandava High Density) Amendment) Supplementary by-laws, 2011 (No 8) SI 68 of 2011.
2. Issues
(a) Whether the defendant's counter claim for the period preceding 30 June 2013 has prescribed, as alleged or at all?
(b) Whether the defendant's by-laws authorising it to claim way leave charges from the plaintiff are valid, as alleged or at all?"

The parties agreed further that the cause of action affected by prescription arose in 2011 and that it affects the sum of $2 375 083.50 being claimed by the defendant as way leave charges. They also agreed that in light of the plaintiff owing the defendant the sum of $720 984.53 for rates and service charges that amount should be set off against whatever is owed to the plaintiff for electricity supplied to the defendant. I have to decide therefore whether the defendant's claim for $2 375 083.50 in way leave charges is prescribed and whether the defendant should be paid the balance of $2 375 083.50 in way leave charges.

Mr *Mpofu* for the plaintiff submitted that at the time of service of the counter claim on 19 August 2016 the defendant's claims was prescribed by virtue of the provisions of the Prescription Act [*Chapter 8:11*] given that the claim is for a debt as defined in s 2 of that Act. That section defines a debt to include anything which may be sued for or claimed by reason of an obligation

arising from statute, contract, delict or otherwise which definition is wide indeed. In terms of s 14 (1) after the lapse of the period which in terms of the relevant law applies in respect of the prescription of a debt, such debt shall be extinguished completely together with the right vested in the creditor. See *Standard General Insurance Co Ltd* v *Veroun Estates (Pty) Ltd* 1990 (2) SA 693 (A) at 699B-C, *Coutts & Co* v *Ford & Anor* 1997 (1) ZLR 440 (H) at 443B.

Mr *Ndlovu* for the defendant conceded that indeed the defendant's claim is for a debt and that such a claim prescribes after the relevant time fixed for the prescription of debts has lapsed. He however, submitted that the prescriptive period was not 3 years as submitted by Mr *Mpofu* but 30 years because the claim arises from taxation imposed or levied by or under an enactment. In this case, the enactment is the by-laws made by the defendant, that is, S.I. 68 of 2011 and S.I. 33 of 2015. Section 15 (a) provides:

> "The period of prescription of a debt shall be thirty years, in the case of–
> (i) a debt secured by mortgage bond;
> (ii) a judgment debt;
> (iii) a debt in respect of taxation imposed or levied by or under any enactment;
> (iv) a debt owed to the state in respect of any tax, royalty, tribute, share of profits or other similar charge or consideration payable in connection with the exploitation of or the right to win minerals or other substances."

Therefore I have to decide whether the way leave levies in question constitute "taxation" within the meaning of s 15 (a) (iii) of the Prescription Act. If this court finds that the levies constitute a tax then the thirty year prescriptive period applies and as such the defendant's claim would not have prescribed. On the other hand, if the levies are found not to be a tax then the 3 year prescriptive period would apply to them meaning that the claim has prescribed by operation of law given that the claim falls under the definition of a debt in s 2.

There is no definition of a tax or taxation in the Prescription Act and as such the meaning must be established using the rules of statutory interpretation. The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the law giver from the language employed in the enactment. In constructing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to an absurdity, inconsistency, hardship or anomaly which, from a consideration of the enactment as a whole the court is satisfied the law giver could not have intended. See *Poswa* v *Member of the Executive Council for Economic Affairs Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) at para 10.

The characteristics of a tax were set out in *Nyambirai* v *National Social Security Authority and Anor* 1995 (2) ZLR 1 (S) at B-C:

> "From these authorities the following features which designate a tax may be said to emerge:
> (i) it is a compulsory and not an optional contribution,
> (ii) imposed by the legislature or other competent public authority,
> (iii) upon the public as a whole or a substantial sector thereof,
> (iv) the revenue from which is to be utilised for the public benefit and to provide a service in the public interest."

I am not satisfied that the third or indeed the fourth requirement of a tax are met by the way leave levies that form the subject of the present case. They are only levied against the plaintiff and not the public as a whole and how they are utilised has not been expressed in the pleadings. There is however an even more compelling reason why they do not pass the test of a tax. It is, as argued by Mr *Mpofu*, that the defendant itself has not even treated them as a tax because it is levying value added tax on them. In terms of s 6 of the Value Added Tax Act [*Chapter 23:12*] VAT is charged, levied and collected for the benefit of the Consolidated Revenue Fund as a tax on the supply of goods and services.

The point is made by TSHABALALA JP in *The Maize Board* v *Epol (Pty) Ltd* (9874/2007)[2008] ZAKZHC 99; 2009 (3) SA 110 (D) at para 27.3:

> "A very good point was made by defendant's counsel that there can be no tax on tax, and since vat is applicable to the levy and special levy they cannot be a tax."

Indeed VAT is only payable on the supply of goods and services and clearly taxes do not involve the supply of goods and services. If one were to allow for VAT to be applied on tax, when VAT itself is a tax that would amount to having tax on tax which is unconscionable by any standard. Therefore to the extent that the defendant imposes VAT on the way leave levies, they cannot possibly be classified as a tax within the meaning of s 15 (a) (iii).

Apart from that there are policy considerations militating against constructing the charges as a tax. They are that they should simply be subjected to extinctive prescription even though the statutory instrument introducing them is actually an enactment within the meaning of s 15 (a) (iii). This is because there should be legal certainty and finality in the relationship between local authorities and those that they provide services to. It would be a sad day indeed were local authorities to be allowed to pursue such levies 30 years later

That is precisely the point made by MALABA J, as he then was, in *Maravanyika* v *Hove* 1997 (2) ZLR 88 (H) at 95C-D where the learned judge remarked:

> "That is as it should be. There should be legal certainty and finality in the relationship between parties, after a lapse of a period of time. It would be against public interest for a person who holds a complete cause of action against his or her debtor to refrain from exercising the right of action indefinitely. Wessels *The Law of Contract in South Africa* vol 11 para 2766 says:
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> > 'Creditors should not be allowed to permit claims to grow stale because thereby they embarrass the debtor in his proof of payment and because it is upsetting to the social order that the financial relations of the debtor towards third parties should suddenly be disturbed by the demanding from him payment of forgotten claims?'"

Whichever way, either on the basis that way leave charges a subjected to value added tax which would be taxation of another tax, or because public interest demands that once the charges are levied they should be claimed within a reasonable time and not 3 decades later, defendant's attempt to bring its claim under the prescriptive period of 30 years must fail. That then resolves the special defence of prescription because it is common cause that half of the defendant's claim for way leave charges, namely $2 375 083.50 arose more than 3 years before the counterclaim was made. I therefore have to uphold the special plea of prescription in that regard.

Even if I were wrong in arriving at that conclusion, the defendant's opposition to the special plea would still not succeed for yet another reason. It is that the defendant did not file a replication to the special plea raising the defence relied upon by Mr *Ndlovu* that its claim is covered by s 15 (a) (iii) of the Prescription Act. In fact the defendant did not file anything in response to the special plea and therefore lost the opportunity to contest it. The requirement of a replication to a special plea was settled by the Supreme Court in *Nexbank Investments (Pvt) Ltd & Anor* v *Global Electrical Manufacturers (Pvt) Ltd & Anor* SC 43-09 (unreported) where at pp 8-9 SANDURA JA said:

> "If Global wished to rely upon the alleged interruption of the running of prescription, it should have filed a replication to the special plea. In the absence of a replication, the issues between the parties were to be found in the pleadings as they stood. Those issues did not include the issue of whether the running of prescription had been interrupted. The importance of carefully pleading one's case cannot be over-emphasised. As KUMLEBEN JA ET NIENABER JA stated in *Imprefed (Pty) Ltd* v *National Transport Commission* 1993 (3) SA 94 (A) at 107 C-E:
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> > 'At the outset it need hardly be stressed that:
> >
> > > "The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed."'

(*Durbach* v *Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082).
This fundamental principle is similarly stressed in Odger's *Principles of Pleading and Practice in Civil Actions in the High Court of Justice* 22 ed at 113:
"The object of pleading is to ascertain definitely what is the question at issue between the parties, and this object can only be attained when each party states his case with precision."

In the present case, as it was common cause that Global had not filed a replication to the special plea, the learned judge should have ignored the submission by Global's legal practitioner that the running of prescription had been interrupted, and should have upheld the special plea and dismissed the claim by Global and Mahlatini."

That is what I intend to do.

I now turn to deal with the remainder of the defendant's way leaves claim. It is common cause that the plaintiff has made a challenge against all local authorities in HC 3446/17 regarding whether way leave charges are claimable against the power utility as a matter of law and that the application for a declaratur is yet to be determined. However the parties herein placed before me for determination the issue whether the defendant's by-laws authorising it to claim way leave charges from the plaintiff are valid. I agree that this issue can be resolved without necessarily declaring an invalidity because once this court finds that the by-laws are a nullity they cannot be used to prosecute a lawful claim for payment. In which event the claim by the defendant based on the instrument imposing way leave charges will simply be dismissed. On the other hand, if a finding is made that the instrument is valid then the plaintiff should be made to pay what is due in terms of that instrument.

In advancing the argument that the statutory instrument introducing way leave charges is a legal nullity Mr *Mpofu* relied on the provisions of s 70 (5) of the Electricity Act [*Chapter 13:19*] which appears in Part VIII of the Act, the Part dealing with transitional provisions, repeals and savings following the unbungling of the Zimbabwe Electricity Supply Authority (Zesa) into successor companies including the present plaintiff, whose mandate is to distribute electricity. It reads:

"Any licence, permit or authority held by the Authority under any enactment immediately before the relevant transfer date shall continue in force on and after that date as if it had been issued or granted to the appropriate successor company to which it was transferred, in terms of subsection (3), and may be amended, renewed or terminated accordingly."

It was through that provision that the authority of Zesa was transferred to the plaintiff.

Ever since the advent of civilisation Zesa and its predecessors had always held the mandate, reposed to it by the state, to distribute electricity throughout the country. In doing so it installed equipment including sub-stations and power transmission lines strutting the whole country and passing through land falling under the jurisdiction of local authorities without being required to pay anyone, not even local authorities or private land owners, for those installations.

The installations were done in accordance with a primary distribution licence to construct, operate and maintain a distribution system and facilities as provided for in s 44 of the Act.

It is that licence, permit or authority which was transferred, as it was, to the plaintiff following the unbungling of Zesa in terms of s 70 of the Act. Clearly there is nowhere in the Act where the plaintiff is required to pay for the construction, operation and maintenance of the distribution system and facilities. There is a reason why that is so. It is that the provision of electricity is a critical requirement and that responsibility lies with the state. I tend to agree with Mr *Mpofu* that the entire security of the state lies in the provision of electricity. No civilised society can exit without the provision and distribution of electricity. Hence that function is statutorily governed. The plaintiff, as a state controlled incorporation, has been delegated the mandate to handle that portfolio.

Enter the defendant which in 2011 promulgated a statutory instrument requiring the plaintiff to pay way leave charges in regard to all its transmission equipment located within its area of jurisdiction. It did so without regard to the Electricity Act which empowers the plaintiff to perform its statutory mandate without having to pay any land holder or owner for its equipment. As I have said the defendant's claim is predicated upon that statutory instrument which has been impugned by the plaintiff on the ground that it is *ultra vires* the parent Act governing the provision of electricity. When making the statutory instrument, the defendant was clearly exercising delegated legislative authority given to it by Parliament.

In fact in defending the regulations Mr *Ndlovu* for the defendant submitted that the defendant has law-making powers bestowed to it by the Urban Councils Act [*Chapter 29:15*] and that s 227 of that Act sets out the procedure for doing so including consulting interested parties on whom the regulations would apply. As the interested parties were consulted, Mr *Ndlovu* took the view that the regulations pass the test of legality, are valid and binding on those that they apply to including the plaintiff. It should therefore simply pay the way leave charges and shut up. The

making of the regulations is also backed by s 276 (2) (a) of the constitution which empowers local authorities to make by-laws, regulations or rules for the effective administration of the areas for which they are established.

I think Mr *Ndlovu* missed the point and adopted a simplistic approach to the issue at hand. The question is not whether the defendant has power and authority to make by-laws and other subsidiary legislation because it obviously has the power and authority to do so. Neither is the question whether the procedure for making those by-laws set out in s 227 of the Urban Councils Act was followed. It is whether it is lawful to make by-laws imposing a charge on power transmission lines and other equipment located on any land in Zimbabwe including land controlled by local authorities. Mr *Ndlovu* did not point to any provision in the Electricity Act, which regulates the business of supplying electricity, authorizing the imposition of that charge.

It is beyond doubt that the Electricity Act reposes upon the plaintiff, as a transmitter of electricity, a statutory servitude over any land. It is a servitude which is not dependent on the payment of charges and as Mr *Mpofu* put it, it is authority which took effect by clear statutory command. In light of that, can a local authority like the defendant, using delegated legislative authority, change that position by statutory instrument? The power of any local authority to govern the local affairs of the people within the areas for which they are established, including the power to make by-laws, regulations and rules, is made subject to the constitution "and any Act of Parliament" by virtue of s 276 of the Constitution.

To that should be added the fact that while parliament can delegate its powers to legislate, it cannot delegate the making of primary legislation to anyone else. That power can only be exercised by parliament alone. The fact that the defendant cannot make by-laws the effect of which is to repeal or alter primary legislation is a jurisprudential statement which is cast in stone in our jurisdiction. There can be no doubt either that the imposition of a charge on power transmission equipment by the defendant effectively alters the Electricity Act which permits the construction, operation and maintenance of a distribution of electricity system and facilities without charge. Therefore the by-laws imposing that charge are clearly *ultra vires* the Electricity Act.

Mr *Ndlovu* submitted that the by-laws in question are still part of our law. They have not been struck down or set aside. For that reason they are enforceable against the plaintiff until set aside. I do not agree. In the very recent case of *City of Harare* v *Makungurutse and Ors* SC 46-18,

a case involving the lawfulness or otherwise of the demolition of respondents' houses in Budiriro 4, Harare in the absence of a court order, the Supreme Court had occasion to determine the question: at what stage does the invalidity of existing legislation inconsistent with the constitution occur? The appellant contended that an invalidity occurs when it is pronounced as such by the court while the respondents took the view that it occurred upon the coming into effect of the constitution.

Delivering the unanimous judgment of the court ZIYAMBI AJA reasoned that to the extent that the law which the appellant relied upon in demolishing the houses was inconsistent with the constitution, that inconsistent provision became invalid on the date the constitution came into force and not at the time the fundamental right is said to be infringed or which an order of invalidity is pronounced by the court. See also *Mudzuru & Anor* v *Minister of Justice, Legal & Parliamentary Affairs N.O. & Ors* CCZ 12/15.

That view was also expressed by ACKERMAN J in *Ferreira Levin Vryengoek* v *Powel* 1996 (1) SA 984 (CC), 1996 (1) BCLRI, in the following:

> "The fact that a dispute concerning inconsistency may only be decided years afterwards, does not affect the objective nature of the invalidity. The issue of whether a law is valid or not does not in theory therefore depend on whether, at the moment when the issue is being considered, a particular person's rights are threatened or infringed by the offending law or not"
> Quoted with approval in *City of Harare, supra*.

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 same principle was applied by the Supreme Court in respect of an invalid court order in *Matanhire* v *B P Shell Marketing Services (Pvt) Ltd* 2005 (1) ZLR 140 (S) where at 147 F-G the court stated:

> "Whilst it is true that there was no appeal against the judgment of MAVANGIRA J and this court is not seized in this appeal with the correctness or otherwise of that judgment, the fact of the matter is that MAVANGIRA J's Judgment is not only patently wrong, it is also patently irregular in that it was purportedly made in terms of Order 23 which does not authorise her to grant such order. I have already stated that in terms of Order 23 she could only have given directions in respect of matters pending in the High Court and not in other fora. The first ground of appeal cannot succeed as it is predicated on a court order that was patently incompetent and irregular."

In my view the by-laws were irregularly promulgated as they are *ultra vires* the primary legislation. The claim for payment of way leave charges premised on it cannot succeed as it is

based on irregular subsidiary legislation. It cannot be enforced in a court of law. Therefore the rest of the claim for way leaves which is not prescribed must also fail.

The parties agreed that the defendant owes the plaintiff $4 610 817.88 and that the plaintiff owes the defendant $720 984.53 in rates and service charges which must be set off against what is due to the plaintiff. The plaintiff is therefore entitled to the balance of $3 889 833.35.

In the result, it is ordered that:

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 the plaintiff in the sum of $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.

Chihambakwe, Mutizwa & Partners, plaintiff's legal practitioners
Mabundu & Ndlovu, defendant's legal practitioners