BSKY ENERGY (PVT) LTD
versus
MINISTER OF ENERGY AND POWER DEVELOPMENT
and
ANOTHER

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE 8th October 2009

Mr. Samukange and Mrs. Wood, for the applicant.
Mr. Chaunoita, for the Respondents.

Urgent Chamber Application

BHUNU J: The applicant is a dully registered company in terms of the laws of this country. It is in the business of importing and marketing fuel in terms of licence number 000228 issued by the Respondent Ministry on the 2nd of January 2009

It is common cause that on the 4th of September 2009 a consignment of 476 427 litres of diesel was imported into the country from Sasol South Africa through the Beitbridge boarder post

The diesel was delivered to Zimbabwe in train wagons to be off loaded at NOCZIM, Beitbridge but destined for Chiredzi. The transporter was unable to off load the product on the instructions of the second respondent a director in the 1st respondent's ministry.

The 2nd respondent' functions include:

1 .Managing, monitoring and reviewing all government initiated or sponsored liquid fuel supplies contract and all fuel safety and quality standards and
2 Providing leadership and facilitating the strategic management process to guide the operation of the Petroleum Department and the oil industry.

The applicant's complaint is basically that the 2nd applicant is abusing his authority and has taken the law into his own hands by placing an embargo on the product when there is no law which authorizes him to do so.

The responsible Minister in the respondent's ministry has since filed an affidavit dated 8th October 2009 ratifying the 2nd respondent's conduct. In that affidavit he acknowledges responsibility for his conduct in the following terms:

"4. On the 14th September 2009 I ordered the return of substandard diesel imported by a company called BSKY because it did not meet the quality specifications that we have determined. The level of 4400ppm imported by BSKY was too high and thus unacceptable.

5. More so, is the fact that the high sulphur content of 50ppm to 500ppm is a regional standard that has been agreed upon by South Africa, Zimbabwe, Tanzania, Mozambique, and Malawi. This position has been approved by cabinet.

6. This Cabinet position is known and was communicated to the oil industry leading to the setting up of the National procurement Committee to enforce quality and prices monitoring and sometimes control.

7. Soon after we liberated the importation of fuel the rule of practice in the industry to set the quality has now been breached by BSKY

8. There is no understanding the damage that can be caused by high sulphur diesel being imported in the knowledge of the serious corrosive effect.

9. The imported diesel is hazardous to property and I believe as Minister of the State of Zimbabwe I have a duty flowing from the constitution to protect our citizens and property posed by such dangers knowingly caused by a licensed company because it believes there may be a gap in the law in terms of quality level stipulation by statutory instrument.

10. I am reliably informed that the diesel is a hazardous substance therefore is limited in its use as it damages the environment.

11. I am informed in terms of the environmental (Hazardous substances Pesticides and Other Toxic Substances} Regulations, 2007 such substance(s) can only be imported under notification and license from the Environmental Management Agency.

12. I am also informed that counsel for the applicant has failed to produce the same under law.

13. The licence issued by my ministry is not for the importation of the substandard fuel."

Upon placing an embargo on the fuel in dispute the ministry constituted an investigating team comprising Ministry and NOCZIM staff. The team's terms of reference were to inspect the product by way of reading documents or breaking seals and taking samples for testing. Thereafter the team would gather information and report on the quality of fuel being imported by various companies through the Beitbridge boarder post.

In discharging its mandate the team was supposed to work in conjunction with ZIMRA staff. ZIMRA however objected to the intended investigations particularly the breaking of seals and taking of samples pointing out that it was unlawful. With much reluctance ZIMRA management finally granted the team access to the relevant documents. The team then proceeded to discharge its mandate by restricting itself to perusing the documents without breaking the seals and analyzing samples. In its written report the investigating team made the following findings:

"Findings

- We found that all fuel from SASOL was of the high sulphur type **(0.5/500ppm).** This is far above Zimbabwe spec.
- All companies importing SASOL products were dumping its product on poor countries (Zambia, Zimbabwe, DRC and other countries.
- ZIMRA had no legal mandate to check fuel quality as there was no instrument to that effect.
- We have always been using high sulphur diesel in our engines, so there is no new harm that can be done now.
- Ministry in collaboration with EMA and ZIMRA to draft an instrument on fuel specifications that is legally binding.
- ZIMRA to act on the basis of the instrument on fuel specifications so that they deny product on entry.
- SASOL to be advised of Zimbabwe's required fuel specifications.
- BSKY fuel is released as demurrage charges may be charged ton the Ministry upon losing its case.
- Fuel samples should be collected at destinations as companies may possibly change their paper work without changing their product quality.

Options

Option one

Stopping high product entry

Implication of option one

It has some legal implications as there is no instrument to that effect.

This may also result in critical fuel shortage….

Option two

To continue business while putting the required legislation in place

Implications of option two

This will ensure a smooth change over to agreed specs without interrupting product inflow into the country."

The above report is expertly written and presented such that one cannot imagine a better report or recommendations. What emerges quite clearly from the report is that Zimbabwe has no legal instrument which entitles the respondents or anyone to regulate the quality of fuel being imported into the country. This stark reality has left both the Minister and the 2nd respondent groping in the dark for legal authority to justify what is clearly unlawful conduct.

Both the 1st and 2nd respondents have conveniently made no reference to the above report in their detailed opposing affidavits. As things stand one can not but surmise that they have deliberately sought to steer away from the report because it is not to their liking and yet they are unable to challenge its findings. That kind of conduct smacks of a deliberate attempt to mislead the Court by silence particularly on the part of the 2nd respondent whose function includes advising the Minister on policy issues such as these.

On the facts before me it is doubtful that the report was drawn to the Minister's attention before he endorsed the order to place an embargo on the fuel in dispute or at the time he executed his opposing affidavit.

The attempt to conceal the investigating team's report tends to confirm the applicant's allegation that the 2nd respondent was motivated by some improper motive, malice or ill will in placing an embargo on its fuel when its competitors were importing the same fuel without let

or hindrance from the same respondents. The applicant's managing director makes the telling point in paragraph 10 of the applicant's founding affidavit when he says:

> "It will also be seen from the letter from Sasol dated 1st October 2009 that apart from the applicant, fifteen other companies are importing the same diesel as the one imported by the applicant in this case. These other companies have been allowed to have their diesel imported into the country without any obstruction. I must point out that Redan, the largest private importer and retailer of fuel in Zimbabwe are importing the same Sasol diesel. This can be seen from the letter from Sasol mentioned above and which I attach as **Annexure "E"**
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> The letter from Sasol reads in part:
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> "As from the 29th of September 2009 Sasol Oil sold approximately 1500m3 of Diesel 5000ppm into Zimbabwe. This is to let you know that Diesel 5000ppm is also sold in Zambia and the DRC in considerable quantities. The following companies all moved diesel500ppm into Zimbabwe for the month of September 2009: UTEC, Nettrade Marketing, Redan, FX International, Petrotrade, Tradimex, Imvuselelo, Cargo Carriers, Lydon, Lemino, Zelda, Stoner Trading, Khumbulani and Bojas."

That much is common cause as the respondents have not been able to challenge those factual dispositions.

In his opposing affidavit the 1st respondent nevertheless deposed that in imposing the embargo he was exercising his constitutional mandate to give general direction and control over his ministry and departments in terms of section 31D of the Constitution which provides that:

> "(3) Subject to the provisions of this Constitution and any Act of Parliament, where any Minister has been charged with responsibility for any Ministry or department he shall exercise general direction and control over that Ministry or department and, subject to such direction and control, any such Ministry shall be under the supervision of a Secretary"

It must be noted that the constitutional mandate restricts the minister's authority to his ministry in so far as the section states that, *"... he shall exercise general control and direction over <u>that</u> <u>Ministry</u>"* And not any other ministry.

While it is correct for the 1st respondent to say as minister he has a constitutional duty to exercise general direction and control over <u>his ministry</u> or <u>departments</u>, that constitutional mandate must be exercised within the strictest confines of the law. It cannot and must not be

used as a vehicle to act outside the strict confines of the law. The words of professor Feltoe in his booklet, *A Guide To Administrative Law* at page 22 are instructive when he says:

> "All administrative powers (other than those exercised by domestic tribunals) derive from statute and the nature and extent of those powers are to be found in the statutory provisions whereunder these powers have been granted. Such powers are not unlimited. The legislature will not give unlimited power but instead it will give power for specific purpose only, or subject to special procedures or with some other kinds of limits. In other words, the limits upon the power are to be discovered by examining the statutory provisions in order to determine what powers the legislature has expressly or impliedly granted. The exercise of a power by an administrative official or body will be invalid unless the official or body is authorized to exercise that power. If an administrator purports to exercise a power he does not have or acts in excess of a power he possesses, his action will be invalid on the basis that it is *altra vires*" (*My emphasis*)

Thus the 1st respondent cannot use the general powers granted to him by the constitution to arrogate to himself specific administrative powers which have not been granted to him by the legislature.

His resort to cabinet authority and directives as justification of his unlawful conduct is equally misplaced and without merit because cabinet has no legislative authority. It is trite that laws are made in Parliament and not in cabinet.

The 1st respondent also sought to argue that as a government Minister he placed the embargo on the diesel in the public interest because it constituted a harmful substance in terms of the *Environment Management Act [Chapter 20:27*] as read with the *Environment Management (Hazardous Substances, Pesticides and other Toxic Substances) Regulations, Statutory Instrument 12 of 2007.*

In other words the 1st respondent is claiming that he has authority to administer the *Environmentl Management Act* simply because he is a government Minister. Section 2 of that Act however, defines Minister in the following terms:

> "Minister" means the minister of Environment and Tourism or any other minister to whom the President, may from time to time, assign the administration of this Act."

What that means is that for the purposes of administering that Act, the law does not recognize any other Minister other than the Minister of Environment and Tourism or any other Minister specifically assigned the task of administering that Act by the President.

In this case it is common cause that the 1st respondent as Minister of Energy and Power Development he is neither the Minister of Environment and Tourism nor has he been assigned by the President the right to administer the Act. For that reason he cannot assign to himself the power to administer the Act without usurping both the President and the Minister of Environment and Tourism's functions.

That being the case, 1st respondent's conduct in assuming responsibility over the Act without presidential authority was unconstitutional and to that extent unlawful. In legal parlance his conduct was *altra vires* the Constitution as read with the Act and Regulations.

Looked at from a different angle, a perusal of the Constitution, the Act and Regulations shows that nowhere do they authorize any minister to place an embargo on any fuel on the basis that its specifications constitute a hazardous substance or is harmful to motor vehicles. This explains why the responsible Minister, that is to say, the minister of Environment and Tourism has wisely chosen not to interfere with the importation of the diesel in question.

Resorting to the *Constitution,* the *Environment Management Act* and *Regulations* could not assist the Respondents achieve their purpose considering that in the case of *Minister of Justice and Law and Order and Another v Musarurwa and Others* 1964 RLR 298 the Appellate Division held per Beadle CJ that:

> "(3) When several Acts are used together for the single purpose of producing a desired result, all the Acts must be looked at together as comprising one scheme, If in its pith and substance such scheme is unlawful, what was done under each Act must be regarded as having been unlawfully done"
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> In the same case Qu'enet JP weighed in with the observation that:
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> "'In exercising his powers of restriction The Minister was not influenced by a desire to give effect to the purpose of s. 50 (1) (b) of the Law and Order (Maintenance) Act [Chapter 39], but by a desire to achieve a result not contemplated by the section, viz, to regulate the visits of other persons to the area of restriction. The existence of such ulterior motive invalidated the orders."

In this case the Minister's resort to Section 72 0f the *Environment Management Act* was not motivated by a desire to advance the purpose of that section but to bar the applicant from importing the diesel in circumstances where others were importing such diesel without let or hindrance. I come to that conclusion because the section does not authorize anyone to bar the importation of such diesel. It reads:

"72 **Hazardous waste**

(1) The Standards and Enforcement Committee shall, in consultation with the Agency, recommend to the Board standard criteria for the classification of hazardous wastes with regard to determining—

(*a*) Hazardous waste;

(*b*) Corrosive waste;

(*c*) Flammable waste;

(*d*) Toxic waste;

(*f*) Radioactive waste;

(*g*) any other category of waste the Board may consider necessary.

(2) The Board shall, on the recommendation of the Standards and Enforcement Committee, issue guidelines and recommend to the Minister the making of regulations for the management of each category of hazardous waste determined under subsection (1).

(3) Regulations referred to in subsection (2) may prescribe the procedure and criteria for:

(*a*) The control of imports and exports of toxic and hazardous chemicals and materials permitted to be so imported or exported;

(b) The distribution, storage, transportation and handling of chemicals and materials."

As can be seen the section simply authorizes the responsible minister to make regulations controlling the importation of hazardous waste. Diesel with a high sulphur content is however not waste. The section does not prohibit the importation of substandard fuel The general rule of law is that

what is not prohibited is allowed. As the importation of substandard fuel is not prohibited by law it means its importation is legally permissible.

It follows therefore, that the Investigating Committee and ZIMRA were absolutely correct in advising the 2nd respondent that his conduct was unlawful. He disregarded that sound advice at his own peril. His conduct becomes especially malicious and objectionable if one takes into account that he singled out the applicant for victimization in circumstances where 15 others were not penalized at all and continue not to be penalized for the same alleged misdemeanor. This discriminatory conduct offends both against the *Constitution* and all notions of justice and fairness.

Being an adviser to the 1st respondent, the 2nd respondent appears to have misled his principal by concealing and deliberately not disclosing to him the Investigating Committee's report.

That kind of conduct cannot be tolerated by these courts. By consciously ignoring sound advice, thereby deliberately straying into the wilderness of costly illegality the 2nd respondent cannot cry foul when he is personally visited with adverse costs.

Granted the 2nd respondent was acting in the course of duty as a civil servant but while going about his duties he was not entitled to act unlawfully thereby trampling on other people's rights. A civil servant or any other employee for that matter who acts unlawfully in the course of duty attracts personal liability for the simple reason that he is not employed to discharge his duties contrary to law. People must not cause harm to others under the guise of executing official duties. There is therefore no merit in the 2nd respondent's objection to being sued in his personal capacity.

While the importation of substandard fuel is undesirable and harmful to public interest, there is absolutely nothing the respondents can do about it in the absence of the necessary legal instruments as recommended by the investigating committee. This is what the cherished rule of law is all about.

It is accordingly ordered that a provisional order be and is hereby granted in the following terms:

TERMS OF THE FINAL ORDER SOUGHT

Pending the final determination of this matter, Applicant is granted the following relief:

That you show cause to this honourable Court why a final order should not be made in the following terms:

a) That the respondents pay demurrage costs to the amount of South African R308 660. 00.

b) That the respondents pay costs of suit on an attorney client scale

INTERIM RELIEF GRANTED

Pending determination of this matter The Applicant is granted the following relief:

a) That the Respondents release to the Applicant diesel or its agent fuel held at Beitbridge being a total of 476 427 litres without any conditions.

b) That the Respondents are interdicted from unlawfully frustrating or preventing Applicant from carrying out its business of trading in fuel including importing and distributing fuel in the country

Venturas & Samukange, the Applicant's Legal Practitioners

Civil Division of the Attorney General's Office, the Respondents" legal practitioners.