ANDREW RANGARIRAI CHIGOVERA
versus
THE MINISTER OF ENERGY & POWER DEVELOPMENT
and
ZIMBABWE ELECTRICITY TRANSMISSION & DISTRIBUTION COMPANY

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE March 19 March and 25 July, 2019

Opposed Application

A Dururu, for applicant
T Shumba, for 1st respondent
Z T Zvobgo, for 2nd respondent

CHITAKUNYE J. The applicant owns Stand number 1898 Mabelreign Township, Harare also known as number 2 Cerne Road, Mabelreign, Harare. He leased the property to Crossland Mupfurutsa (herein after referred to as the Tenant) from 13 June 2013 to August 2017. During the period of tenancy, the tenant entered into a contract with second respondent, Zimbabwe Electricity Transmission and Distribution Company for the supply of electricity. The electricity account was in the tenant's name. The tenant accrued arrears such that at the time he vacated the property such arrears had not been liquidated.

In September 2017 a prepaid meter was installed at the property. The applicant alleged that he was surprised that the tenant's unpaid bill was now transferred into his name. Upon inquiry with second respondent he was advised that the second respondent had applied the provisions of section 3 of Statutory Instrument 44A of 2013. That section provided, *inter alia*, that:

> "(1) Any electricity charges outstanding on the date on which a prepaid meter is installed shall be debts of the property in which that prepaid meter was installed and shall be reflected as a debt in the installed prepaid meter.
> (2) Any person who owns the property upon which a prepaid meter has been installed has the right to recover the debts of the property from any person who is responsible for incurring the debt.
> (3) An owner of a property may enter into an agreement with any person who intends to occupy the property regarding the manner in which they will make payments towards the unpaid bill in the prepaid meter."

What the above section entailed is that each time applicant paid for electricity for his prepaid meter second respondent would deduct a certain percentage of the amount tendered towards the arrears left behind by the tenant. This irked the applicant such that on the 3rd September 2018 he filed this application for a declaratory order in terms of section 14 of the High Court Act, [C*hapter 7:14]*.

That section provides that:

> "The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

In *Masuku* v *Delta Beverages* 2012 (2) ZLR 112(H) at 116E-G CHEDA J aptly stated the legal position in an application for a declaratory under section 14 in these words:

"The position was clearly laid down in *Johnson* v *AFC* 1994 (1) ZLR 95 at 98 where CHIDYAUSIKU J (as he then was) stated:

> "Firstly the applicant must satisfy the court that he is a person interested in an existing future or contingent right or obligation. If satisfied on that point, the court then decides a further question of whether the case is a proper one for the exercise of the discretion conferred on it."

The learned Judge, indeed laid down three requirements being that:

> "(1) the person instituting the proceedings must be an interested person;
> (2) the court must inquire and determine an existing future or contingent right or obligation, and
> (3) the case must be the proper one for the court to exercise the discretion conferred on it."

In casu, the applicant sought an order that:

> "It is declared that:
> 1. Section 3 of Statutory Instrument 44A of 2013 is ultra vires to the enabling or parent Act, which is the Electricity Act, chapter 13:19 and is accordingly declared null and void
> 2. Applicant is not indebted to the 2nd Respondent and the 2nd respondent shall cease to deduct any electricity payments made by Applicant.
> 3. The Respondents be and are hereby ordered to pay costs of suit on an attorney and client scale.

The applicant averred that section 3(1) is *ultra vires* section 65 of the Electricity Act under which the Statutory Instrument was made. In this regard he argued that; firstly, the provisions of section 3 of SI 44A are inapplicable as they seek to place a debt on a property which is an inanimate object with no legal capacity to sue or be sued and that section 65 of the Act does not contemplate or purport to give the Minister such powers. It is in this regard that he argued that section 3 is *ultra vires* the enabling Act and so must be declared null and void.

Secondly, that section 3 violates the common law principle of privity of contract as it seeks to burden applicant with a debt arising from a contract between the Tenant and second respondent to which applicant was not privy.

The first respondent did not file any opposing papers but a Mr T Shumba appeared on behalf of the first respondent in response to a notice of set down served on the first respondent. He asked to be allowed to just sit in whilst the parties who had properly filed papers in contestation agued the matter.

The second respondent opposed the application essentially contending that section 3 of the Statutory Instrument was not *ultra vires* section 65 of the Electricity Act and that it was reasonable in the circumstances.

The applicant in his answering affidavit whilst persisting with his prayer for a declaratory order alluded to the fact that he had discovered that SI 44A of 2013 had in fact been repealed on 1st June 2018.

It was thus clear to all that as at the 3rd September 2018 when this application was filed the SI in question had long been repealed by section 12 of Statutory Instrument 85 of 2018. That section provides that:

> "The Electricity (Unpaid Bills, Prepayment Meters and Smart Meters) Regulations 2013 published in Statutory Instrument 44A of 2013 are repealed."

It is clear that in as far as applicant is the owner of immovable property and he is being asked to pay a debt left by his tenant, it is apt to hold that he is an interested party. It is trite that the rights that he seeks court to make a determination on pertain to a repealed SI. This dovetails into the question as to whether the application is a proper one for court to exercise its discretion in his favour more so as he seeks court to declare null and void a provision that was repealed.

The first issue to decide on is on the effect of the repeal on this application.
It is trite that once a piece of legislation is repealed it essentially ceases to have any legal validity.

Section 17 of the interpretation Act provides that:-

> "(1) Where an enactment repeals another enactment, the repeal shall not—
> (*a*) revive anything not in force or existing at the time at which the repeal takes effect; or
> (*b*) affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or
> (*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed; or
> (*d*) ……; or

> (*e*) …….
> (2) Nothing in subsection (1) shall be taken to authorize the continuance in force, after the repeal of an enactment, of any statutory instrument made under that enactment.
> (3) Where an enactment repeals and re-enacts, with or without modification, any provision of any other enactment, all proceedings commenced under any provision so repealed shall be continued under and in conformity with the provision so repealed

Thus whilst section 17(c) provides that the repeal shall not affect any right, privilege, obligation or liability acquired , accrued or incurred under the repealed enactment, it does not give validity to the repealed enactment. In any case anyone seeking to rely on it must allege and show that the right, privilege, obligation or liability acquired, accrued or incurred during the period of validity of the repealed legislation. The repealed enactment, serve for the accrued rights and obligations, ceases to be part of the country's legislation. See *Vukutu [Pvt] Ltd* v *Pride Kwinje and Another* HH 364-16 and *Barclays Bank Zimbabwe Ltd* v *Nyahuma 2004(2) ZLR 248 (S).*

It follows that court cannot be called upon to declare such a repealed enactment as ultra vires the enabling statute. This, in my view, is not proper as the legislature has by the repeal removed such legislation from the country's laws. The repealed enactment is now a nullity and cannot be a basis to institute new action. In my view any new matter cannot be founded on the repealed legislation unless it is on rights or obligations that accrued during its lifetime. It follows that:-

> "… every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

per Lord DENNING in *McFoy* v *United Africa Co. Ltd* [1961] 3 ALL ER 1169 (PC) at 1172. See also *Ndlovu and Another* v *Ndlovu and Another* SC 133/02

It is clear to me that as of 1st June 2018 when SI 44A 0f 2013 was repealed, the section complained of ceased to be of legal validity. Thus as at 3rd September 2018 when applicant filed this application he was seeking to have a nullity declared ultra vires the enabling Act. There was virtually nothing for this court to declare as ultra vires the enabling Act.

Unfortunately despite discovering that he had sought a declaratory order of a provision that was no longer part of our law, applicant persisted in seeking the declaratory order based on the cause of action as stated in the founding affidavit. For instance in paragraph 26 (iv) of his answering affidavit after acknowledging that SI 44A had been repealed by SI 85 of 2018 applicant stated that:

> "It is therefore in the interests of justice that this Honourable Court publicly declares that Statutory Instrument 44Aof 2013 is invalid and of no force or effect."

As a consequence of such insistence applicant prayed for the application to be granted in terms of the draft order referred to above.

In as far as the fulcrum of the applicant's application was for an order declaring section 3 of SI 44A of 2013 *ultra vires* the Electricity Act and thus null and void I am of the view that such application was improper as that SI had already been repealed by the time applicant filed this application.

Whilst indeed applicant may feel aggrieved by the actions of second respondent in making him liable for his tenant's debt, it is my view that applicant ought to have decided on a proper cause of action especially after learning that the SI in question had been repealed. As it is clause 2 of his prayer in which he seeks to be declared not indebted to second respondent, is premised on this court first declaring the section in question as ultra vires the enabling Act. It is only after such a declaration that the issue of his indebtness or otherwise would arise.

In as far as an application stands or falls on the founding affidavit, it follows that the application cannot succeed on the present papers. Upon realising that the provision in question had been repealed well before filing the application, applicant ought to have withdrawn the applicant and explored other viable causes of action which recognised the fact that the provision in question had been repealed and any relief had to be on other legal grounds.

It may also be noted that whilst applicant alleged that the deductions complained of started in September 2017 when he installed the prepaid meter, he did not explain his inaction from that date to 1st June 2018 when the SI 44A of 2013 was repealed. He surely had ample time to have challenged the SI 44A of 2013 before it was repealed. The adage that the law helps the vigilant and not the sluggard is quite apt here. I am of the view that applicant has no one to blame but himself for the fate of this application.

The second respondent asked for costs on a legal practitioner and client scale. In seeking such costs second respondent contended that the application was unmeritorious and applicant was simply a disgruntled lessor. The applicant argued that such costs were not warranted as he persisted with his arguments for a declaratory order. Upon consideration of the submissions on this point I am of the view that had applicant filed his application before the repeal of the SI it could not have been said that his arguments were frivolous as respondent sought to say. The defining point against applicant is simply that he sought to challenge the SI after it had been repealed. The second respondent's opposing affidavit shows that second respondent was not

even aware that the SI had been repealed till applicant revealed this in his answering affidavit or else the deponent to second respondent's opposing affidavit could have raised this as a red flag against the applicant.

Whilst ignorance of the law is no defence one cannot ignore that second respondent did not deny that upon being approached by applicant over the issue it advised him that its actions were in terms of that SI and as at the time of filing its opposing affidavit second respondent still believed it was entitled to act in terms of that SI and was oblivious to the fact that the SI had in fact been repealed. It appeared it was a matter of the two parties not being alive to the fact that the SI they were contesting over was no longer valid. In the circumstances it would not be justified to penalise applicant with costs on the higher scale. It is of course appreciated that applicant ought to have withdrawn its application even on the hearing date when the futility of seeking a declaratory order, on the papers filed under the impression the provision was still valid,, against a repealed provision was brought to the fore.

I am of the view that applicant must pay costs on the ordinary scale.

Accordingly, the application be and is hereby dismissed with applicant to pay costs on the ordinary scale.

Dururu & Associates, Applicant's legal practitioners
Dube, Manikai & Hwacha, 2nd Respondent's legal practitioners