

DISTRIBUTABLE (42)

CITY OF HARARE
v
JONPENN (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, MAY 22, 2017 & JUNE 12, 2017

O Shava, for the applicant

A Makoni, for the respondent

BHUNU JA: This is a chamber application for condonation of late noting of appeal and extension of time within which to appeal. At the closure of argument, I ordered by consent of the parties that the application be removed from the roll with no order as to costs. In the normal run of things judges do not write reasons for judgment where there is consent to judgment. I have however taken the trouble to write this judgement because it deals with important matters of public policy and interest.

The background facts forming the basis of this application are by and large common cause. The applicant is a Municipal Council duly constituted as such in terms of s 4 of the Urban Councils Act [*Chapter 29:15*], whereas the respondent is a ratepayer within the municipal area. The applicant has the obligation to supply water to the respondent who in turn is obliged to pay for the water so provided.

The mode of payment is through monthly bills sent to the respondent by the applicant. On 29 April 2015 the respondent challenged the balance on its statement arguing that it was up-to-date with its payments. It asserted that certain payments it had made had not been credited to its account.

The applicant did not respond or investigate the query raised by the respondent. Relying on s 8 of its Water By- Laws, it proceeded to disconnect water to the respondents' premises without any further ado on 11 May 2015.

The By-Law provides that:

“The Council may, by giving 24 hours’ notice, in writing, without compensation, and without prejudicing its rights to obtain payment for water supplies to the consumer, discontinue supplies to the consumer:

(a) If he shall have failed to pay any sum which in the opinion of the council is due under these conditions or the water By- Law.”

Aggrieved by the above apparently high handed water disconnection, the respondent approached the High Court for relief. On 21 May the High Court issued an interim interdict barring the applicant from discontinuing water supplies to the respondent's premises without a court order. The interim order was confirmed on 1 June 2016. In confirming the interim order, the High Court relied on a chain of judgments of that Court which determined that every person has a constitutional right to water. For that reason, it held that it is unlawful for a service provider to disconnect water without a court order where there is a genuine complaint or dispute.

Disturbed by the confirmation of the interim order, the applicant belatedly sought to appeal against the High court judgment, hence this application for condonation of late noting of appeal and extension of time within which to appeal.

At this hearing Mr *Makoni*, counsel for the respondent submitted without contradiction that the applicant has since written to the respondent acknowledging that it had indeed received the disputed amounts but credited them to a wrong account in error.

What this means is that council disconnected water and deprived the respondent of a vital fundamental human right in circumstances where it had erroneously credited payments made by the respondent to a wrong account. Council has since corrected the error. This prompted Mr *Shava*, counsel for the applicant to concede that there was no merit in the application. He accordingly moved that the matter be removed from the roll with no order as to costs.

I take judicial notice that depriving someone of water can have ghastly consequences which may lead to an epidemic of water borne diseases such as cholera and dysentery capable of wiping out whole populations. Lack of water impedes production and every facet of economic development. It is therefore, shocking to contemplate that society can be exposed to all these health and economic vagaries in circumstances where council may be at fault as happened in this case.

This case is therefore ample illustration that the applicant is not infallible. It is prone to making mistakes like anyone else. Demanding payment without justification for such payment on pain of disconnection of water can only amount to extortion which is unlawful and unsustainable at law. The case is also ample proof that applicant's Water By-Law 8 is prone to abuse by Municipal officials. But for the High Court's timely intervention, the respondent would have been exposed to severe prolonged suffering and prejudice in circumstances where it was not at fault at all. The applicant would then have benefitted from its own fault and error.

This is wholly unacceptable and offends against all notions of justice and fairness in a democratic society.

For the foregoing reasons, the applicant could not find any fault with the court *a quo's* judgment leading to it applying for removal of the matter from the roll with no order as to costs. The respondent did not seek any costs on the basis that initially it was not inclined to oppose the applicant's application. Had it not been for that concession I was inclined to dismiss the application with costs at the punitive scale.

The application having been removed from the roll by consent of the parties, the High Court's judgment in this matter still stands.

Mbidzo, Muchadehama & Makoni, the applicant's legal practitioners.

Makoni Legal Practitioners, the respondent's legal practitioners.