REPORTABLE (29)

TOUR OPERATORS BUSINESS ASSOCIATION OF ZIMBABWE
v
(1) MOTOR INSURANCE POOL (2) ZIMBABWE REVENUE AUTHORITY (3) INSURANCE AND PENSIONS COMMISSION (4) ATTORNEY-GENERAL OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, PATEL JCC & GUVAVA JCC
HARARE, 14 JANUARY & 25 JUNE, 2015

L. Uriri, W. Chinamhora and N. Chasi, for the applicant

T. Magwaliba, for the respondents

PATEL JA: The applicant, Tour Operators Business Association of Zimbabwe (TOBAZ), is an association of registered tour operators. Among other things, it buys and arranges insurance services for foreign tourists, including motor vehicle insurance for foreign vehicles entering Zimbabwe.

The first respondent is named the Motor Insurance Pool (the MIP) and is an association of insurers. The second respondent is the Zimbabwe Revenue Authority (ZIMRA). The third respondent is the Insurance and Pensions Commission (the I&PC), a

statutory body responsible for the regulation of insurance and pension business in Zimbabwe. The Attorney-General is cited as an interested party who might wish to intervene in these proceedings.

It is common cause that foreign vehicles are required by law to have a temporary import permit coupled with valid insurance cover for the duration of the permit. According to TOBAZ, its members were previously entitled to arrange temporary insurance cover and did in fact do so until February 2010, when the MIP and ZIMRA concluded an agency agreement, with the tacit concurrence of the I&PC, the purpose of which was to confine the issuance of such cover to the MIP and ZIMRA. The latter then published a notice to that effect and proceeded to issue insurance cover on behalf of the former.

TOBAZ avers that the MIP, as an association of insurers, cannot itself issue insurance cover or authorise ZIMRA to do so as its agent. This is because they do not qualify as licensed insurers under the Insurance Act [*Chapter 24:07*] or approved insurers under the Road Traffic Act [*Chapter 13:11*]. Their agency agreement is not only *ultra vires* those statutes but also creates a monopoly in breach of the Competition Act [*Chapter 14:28*]. In the constitutional context, the agreement operates to infringe its members' freedom of profession, trade or occupation as well as their right to equal protection of the law. It also violates the freedom of contract implicit in the freedom of association by imposing a contracting party on foreign motorists.

The relief sought by TOBAZ is a *declaratur* that it and its members have been denied the above-mentioned constitutional rights and that the agency agreement between the MIP and ZIMRA is consequently null and void. TOBAZ also seeks a *mandamus* compelling ZIMRA to accept insurance cover obtained from any registered, licensed and approved insurer.

The MIP is an association formed under an agreement concluded between several registered insurers and executed on 16 December 1964. Pursuant to its formation, a further agreement was concluded on 4 January 1965 between the MIP and the then Minister of Roads and Road Traffic. In terms of this later agreement, nominated members of the MIP were authorised to issue temporary insurance permits to motorists entering the country. The effect of the agreement was to approve the members of the MIP as issuers of policies of insurance in respect of foreign motor vehicles, in terms of the precursor to s 23(1)(a)(i) of the Road Traffic Act, for the purposes of Part IV of the Act.

The MIP avers that its registered and approved members are legally authorised to issue temporary insurance permits and collect premiums, either directly by themselves or through ZIMRA as the duly appointed agent of the MIP. Insurance cover for foreign motor vehicles represents a very small section of the motor insurance market. Thus, its 2010 agency agreement with ZIMRA does not constitute a monopoly, nor does it contravene the Insurance Act, the Road Traffic Act or the Competition Act. Moreover, the members of TOBAZ are not brokers or providers of insurance in terms of its own Constitution. Therefore, the agency agreement does not in any way restrict their right to

carry on any trade or profession as brokers or insurers. (The I&PC, in its opposing papers, abides by the grounds of opposition advanced by the MIP).

ZIMRA takes the point *in limine* that the administration of motor insurance cover for foreign motor vehicles is the prerogative of the Minister of Transport who appoints approved parties to implement the relevant provisions of the Road Traffic Act. Consequently, he should have been cited as a party to these proceedings, and the failure to do so constitutes a material non-joinder. It is further averred that the MIP, acting through its members, acquired the requisite statutory approval to issue temporary insurance cover for foreign motor vehicles. Thereafter, it duly mandated ZIMRA as its agent to issue insurance cover and collect premiums on its behalf. In contrast, TOBAZ and its members are not authorised to issue short term insurance cover to foreign motorists. It should therefore apply to the Minister of Transport for approval under the Road Traffic Act if its members wish to venture into motor insurance.

In its answering affidavit, TOBAZ adopts a more limited approach to its insurance activities. It accepts that it and its members are not registered insurers engaged in the business of issuing insurance policies. Its members do not wish to issue such policies but merely to arrange insurance cover for local and foreign tourists. It contends that they have a right to do so and cannot be restricted in that regard.

The issues for determination in this matter, as I perceive them, are as follows:

- Whether the Minister of Transport (the Minister) should have been joined in these proceedings.
- Whether TOBAZ and/or its members have the requisite *locus standi* to bring the present application.
- Whether TOBAZ and its members are entitled to the relief that they seek.
- Whether the agency agreement between the MIP and ZIMRA operates to violate the constitutional rights of TOBAZ, its members and local or foreign motorists. (This question only arises for determination if the first three issues are decided in favour of TOBAZ).

Non-Joinder of the Minister

The position taken by TOBAZ in this regard is that the failure to cite the Minister as a party to this application is not fatal. This is because it is not seeking any relief as against the Minister.

As a matter of procedure, it is trite that a party instituting any legal proceedings must cite every person who has a direct and substantial interest in the matter or who is likely to be prejudicially affected by the relief sought therein. The failure to do so is not necessarily fatal in every case inasmuch as the courts have an inherent discretion to cure any material non-joinder by giving such directions as may be just and appropriate for that purpose. This is explicitly recognised in r 87 of the High Court Rules 1971.

It is not in dispute that it was the Minister's predecessor who granted the necessary statutory approval, through his agreement with the MIP in 1965, enabling the members of the MIP to issue temporary insurance cover for foreign motor vehicles. One of the complaints raised by TOBAZ is that the MIP *per se* cannot issue insurance cover and that, therefore, it cannot authorise ZIMRA to do so as its agent. In my view, this contention does not impinge upon the continuing validity or operability of the agreement concluded in 1965. In other words, it does not call into question the Minister's authority or the approval conferred by him under that agreement.

The same applies to the substantive relief that is sought by TOBAZ as against the respondents, *viz.* that the agency agreement of 2010 between the MIP and ZIMRA be nullified and that ZIMRA be compelled to accept insurance cover outside the terms of its mandate from the MIP. Given that the 2010 agreement is not predicated on the 1965 agreement, none of the relief sought has any direct bearing on the Minister's powers or the exercise of his discretion under the Road Traffic Act.

In the premises, I take the view that the Minister's interest in the present matter is purely peripheral and that any relief that might be granted in favour of TOBAZ will not have any appreciable impact on his rights. It follows that the non-joinder of the Minister *in casu* cannot be said to be material and, therefore, cannot be held to have been fatal. Accordingly, ZIMRA's objection *in limine* cannot be sustained and must be dismissed.

The Applicant's *Locus Standi*

Section 85(1) of the Constitution delineates the categories of legal standing available for the enforcement of fundamental human rights and freedoms, as follows:

> "(1) Any of the following persons, namely –
> (*a*) any person acting in their own interests;
> (*b*) any person acting on behalf of another person who cannot act for themselves;
> (*c*) any person acting as a member, or in the interests, of a group or class of persons;
> (*d*) any person acting in the public interest;
> (*e*) any association acting in the interests of its members;
> is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation."

Advocate *Uriri*, for the applicant, submits that this application is instituted on two different bases recognised in subsection (1) of s 85. The first arises from paragraph (e) of that subsection, where TOBAZ is acting in the interests of its members to protect their right to equal protection and benefit of the law, under s 56, and their freedom of profession, trade or occupation, under s 64. The second basis accrues from paragraphs (c) and (d), where TOBAZ is acting in the interests of a group or class of persons and in the public interest to protect the rights of foreign motorists and the general public to the freedom of contract, implicit in the freedom of association under s 58, so as to contract with insurers of their choice and thereby obtain cheaper insurance cover.

The fundamental rights and freedoms invoked by TOBAZ are enunciated in the Constitution as follows:

> "56.(1) All persons are equal before the law and have the right to equal protection and benefit of the law."

> "58.(1) Every person has the right to freedom of assembly and association, and the right not to assemble or associate with others.
>
> (2) No person may be compelled to belong to an association or to attend a meeting or gathering."

> "64. Every person has the right to choose and carry on any profession, trade or occupation, but the practice of a profession, trade or occupation may be regulated by law."

According to Advocate *Uriri*, *t*he violation of the rights enshrined in these provisions stems from the monopolistic and restrictive arrangement between the MIP and ZIMRA, which hinders the members of TOBAZ from obtaining insurance cover specifically for their foreign clients. It also operates to restrict access to insurance cover generally by members of the motoring public.

As regards the first basis proffered by TOBAZ for its legal standing in this matter, it is necessary to consider the provisions of its own Constitution which was adopted on 17 August 2012. In terms of clause 3(a), the principal objective of the association is to promote tourism activities in the country and the business interests of its members in the tourism industry. Its other objectives elaborate this principal objective and are essentially incidental to that objective. Under clause 4(a), the membership of TOBAZ consists of companies, bodies or organisations and individuals that are in the tourism industry.

As is indisputably evident from the provisions of its Constitution, the objectives of TOBAZ and the business of its members are confined to the tourism industry. They are not registered insurers or brokers or licensed insurance agents. They have no legal

interest in the issuance of insurance or insurance brokering or in any other form of insurance activity. Their constituent instrument is entirely silent in that regard. To put it colloquially, insurance is none of their business. On this premise, it is not possible to ascribe to TOBAZ any legal standing to enforce its members' right to equal protection and benefit of the law or their freedom to trade in the specific sphere of insurance.

As for the second basis of legal standing, it must be assumed that the freedom to contract is necessarily implied in the freedom of association guaranteed by s 58 of the Constitution. I am somewhat disinclined to accept the correctness of this proposition on my interpretation of that section as being concerned with the formation and membership of voluntary associations and corporations rather than the negotiation and conclusion of commercial contracts. In any event, the more critical question for present purposes is the applicant's claim to represent the interests of foreign motorists and the general motoring public.

Taking a liberal and charitable approach, I am prepared to accept that TOBAZ is not simply a vexatious busybody and is genuinely concerned about the rights and interests of local and foreign motorists. However, what is absent in its founding and answering papers is any meaningful evidence to support its contention that these motorists have been or are likely to be prejudiced by the 2010 agency agreement between the MIP and ZIMRA or that they are in any way aggrieved by that agreement. Very crucially, there is no affidavit or other evidence from any foreign or local motorist or from any organisation representing motorists to substantiate the allegations made by

TOBAZ. This deficiency is critical insofar as TOBAZ purports as it does to represent the interests of the motoring public.

To sum up, I take the view that the applicant has dismally failed to establish the requisite *locus standi* to act in this matter in the interests of its own members or in the interests of any class of persons or in the public interest.

Entitlement to Relief Sought

Notwithstanding the above conclusion on the absence of *locus standi*, I shall proceed, for the sake of completeness, to address the propriety of the relief sought by the applicant in the context of the Insurance Act and the regulations made thereunder.

Apart from the constitutionality of the 2010 agency agreement, TOBAZ also questions its legality under the Insurance Act, in particular as regards the status of ZIMRA as an insurance agent. Advocate *Magwaliba*, for the respondents, argues that there is no statutory registration requirement in respect of an insurance agent such as ZIMRA. He also argues that the members of TOBAZ have been operating as unregistered insurance brokers in clear contravention of the Insurance Act. It is necessary to examine both of these aspects, even though they are incidental to the constitutional issues before the Court.

An "insurance agent" is defined in s 3 of the Insurance Act as a person who, on behalf of a registered insurer, initiates insurance business or does any act in relation to the

receiving of proposals for insurance, the issuance of policies or the collection of premiums. An "insurance broker" is defined as a person who, on behalf of any other person, negotiates insurance business with insurers. Both definitions exclude an employee of a registered insurer who receives a salary.

It is common cause that ZIMRA is mandated under its agency agreement with the MIP to issue policies and collect premiums. There is therefore no doubt that ZIMRA acts as an insurance agent rather than as an insurance broker in the present context.

Turning to TOBAZ, its own admission is that its members have previously been buying and arranging insurance services for local and foreign tourists, including temporary motor vehicle insurance cover for foreign vehicles. As for the future, their prayer is to be allowed to arrange insurance cover for foreign vehicles through any registered and approved insurer who is not necessarily a member of the MIP. It therefore cannot be disputed that the members of TOBAZ have been negotiating or brokering insurance business with insurers on behalf of tourists and wish to continue to do so. They are clearly operating as insurance brokers and there has been no attempt in the applicant's papers or by its counsel to gainsay that position.

Section 7(1) of the Insurance Act requires that every insurer must be registered, while s 35(1) mandates the registration of every insurance broker. Both provisions make it an offence, attracting a maximum fine of level 14 and/or imprisonment for a period of up to 5 years, for any person to carry on business as an insurer or insurance broker

without being registered. Section 88 goes further to penalise any person who holds himself out to be an insurer or insurance broker whilst not being registered as such in terms of the Act. The prescribed penalty for such conduct is the same as that stipulated under ss 7(1) and 35(1).

It is clear that the Act itself does not require the registration of insurance agents. However, s 89(1) provides for the making of regulations prescribing anything which under the Act is to be prescribed or which is necessary or convenient to be prescribed for carrying out or giving effect to the Act. In particular, s 89(2)(d) enables, *inter alia*, the regulation, registration, licensing and control of insurance agents.

The Insurance Regulations 1989 (S.I. 49 of 1989), framed in terms of s 89 of the Act, regulate the conduct of virtually every class of insurance business and activity, including insurance agents. Section 14 of the Regulations provides for the issuance of various insurance agent licences, while s 15 enjoins every agent who represents a registered insurer in respect of insurance business to hold a valid insurance agent licence in the class of business concerned. Additionally, s 15(5) stipulates that no registered insurer or broker shall cause or permit any agent to represent him in respect of any insurance business unless that agent is in possession of a licence in respect of that class of insurance business.

It is abundantly clear from the foregoing that ZIMRA is acting in contravention of the Insurance Regulations, by purporting to issue motor insurance policies and collect

premiums, without being licensed as an insurance agent under the Regulations. Conversely, the MIP has also contravened the Regulations by permitting ZIMRA to represent its nominated members as their insurance agent. Both parties were patently ill-advised in embarking on their agency arrangement without regard to the licensing requirements of the Regulations.

As for TOBAZ itself, it is equally clear that its members have also violated the peremptory provisions of the Insurance Act by not registering themselves as insurance brokers or by holding themselves out as brokers without being registered as such. In either event, their offence is graver in that they have contravened an Act of Parliament as opposed to purely subordinate legislation.

It is implored on behalf of TOBAZ that the fact that its members have contravened a law does not debar them from approaching a court for relief in respect of any alleged violation of fundamental rights, as is expressly affirmed in s 85(2) of the Constitution, and that the Court is at large to make any order that is just and equitable, in terms of s 175(6)(b) of the Constitution. While this may be perfectly correct, allowing TOBAZ to approach this Court is one thing, but allowing it to succeed in this matter is an altogether different proposition. As I have already stated, ss 35(1) and 88 of the Insurance Act unequivocally and emphatically criminalise unregistered brokering. What TOBAZ seeks to enforce on behalf of its members is the right to persist in and continue their criminal conduct. Thus, by granting the constitutional relief that TOBAZ seeks, the Court

would not only condone its members' flagrant violation of the law but also sanction and perpetuate that illegality under the cover of their alleged fundamental rights.

Equally significantly, the principal fundamental right that TOBAZ relies upon to ground its legal standing before this Court, *viz.* the right of every person to choose and carry on any profession, trade or occupation, is itself made expressly subject to the crucial qualification that the practice of a profession, trade or occupation may be regulated by law. In the present context, the right of its members to engage in business as insurance brokers is regulated by the Insurance Act. Unless and until they are duly registered under that Act, it is patently impermissible for them to invoke the right to carry on any activity regulated by that Act in circumstances that are clearly not countenanced by the Constitution itself. In short, TOBAZ and its members have no cognisable constitutional cause of action.

Disposition

To conclude, the applicant has no *locus standi in judicio* under s 85(1) of the Constitution, Additionally, the declaratory and other relief that it seeks cannot properly be granted by this Court. This application must accordingly fail on these procedural grounds. Given this conclusion, it is not necessary to delve into or determine the remaining substantive issue as to whether or not the impugned 2010 agency agreement operates to violate the constitutional rights of TOBAZ, its members and local or foreign motorists.

As for costs, I am inclined to the view that this application was manifestly ill-conceived, almost on the verge of amounting to an abuse of court process. Nevertheless, as none of the respondents have prayed for costs on the punitive scale, the order for costs will simply follow the cause on the ordinary scale.

In the result, it is ordered that the application be and is hereby dismissed with costs.

CHIDYAUSIKU CJ: I agree.

MALABA DCJ: I agree.

ZIYAMBI JCC: I agree.

GWAUNZA JCC: I agree.

GARWE JCC: I agree.

GOWORA JCC: I agree.

HLATSHWAYO JCC: I agree.

GUVAVA JCC: I agree.

Chigwanda Legal Practitioners, applicant's legal practitioners
Atherstone & Cook, respondent's legal practitioners