

DUDZAI MUREYI  
versus  
HEALTH PROFESSIONS AUTHORITY OF ZIMBABWE  
And  
PHARMACISTS COUNCIL OF ZIMBABWE  
And  
MEDICINES CONTROL AUTHORITY OF ZIMBABWE  
And  
MINISTER OF HEALTH AND CHILD CARE

HIGH COURT OF ZIMBABWE  
MUSHORE J  
HARARE, 10 July, 2017 & 13 December 2017

**Opposed Motion- Declaratur-Mandamus: Interdict**

*Prof L Madhuku*, for the applicant  
*T Kativu*, for the 1<sup>st</sup> respondent  
*Ms S Njerere*, for the 2<sup>nd</sup> & 3<sup>rd</sup> respondents

MUSHORE J: In the present matter, applicant, who is a qualified and registered pharmacist is desirous of obtaining declaratory and other relief from this Court, so that she can carry out her business idea within the confines of the law. Her business idea is to compile and publish a database for the benefit of, and use by the public; of all medical services and providers of health care and registered drugs and their location, to enable the public to access that information in an efficient and cost-effective manner. She has established a company, of which she is a major share-holder called Medical Information Services (Private) Limited, which I will refer to as 'MIS' for ease of reference.

When applicant approached the various health professionals and institutions to float the idea of bringing her concept into fruition, those professionals and institutions advised her that they were willing to participate, but that they could only do so if her idea came with some type of recognition from the institutions who oversee them; those being either of the respondents.

Accordingly and acting in her capacity as Director of MIS, applicant wrote to the first, second and third respondents seeking their permission to proceed with setting up and launching the operation of a patented electronic system under the company MIS. This is how she framed her proposal to the respondents:-

**Annexure 1**

“Medical Information Services (Private) Limited aims to launch and start operating an online directory which does the following:

1. Maintains a database of all healthcare service providers in Zimbabwe with the following details for each. Their speciality, physical location, and their contact details, which Medical Aid Schemes they accept as payment, their opening hours and specific services which they provide. For pharmacies and retailers of medical devices, each one has in stock at any given moment. This information will then be used by the system to answer queries submitted to the MIS by clients. This database will be a closed database and will not be accessible to persons who are not employees of the MIS. These employees are themselves, health professionals.
2. The database will be linked to a mobile phone application. Using this app, members of the public will be able to submit queries asking for information about pharmacies which have in stock the medicines they seek at any given time. The app will work in a similar way as other search platforms like Google. Members of the public who submit queries via the phone application will be given answers to their queries based on geographical location, their method of payment etc.; what they are looking for and at what time of the day that are looking for it. For example a person looking for X drug will be give details of ALL pharmacies within a 1km or 50 km radius.
3. The database will host user accounts for al healthcare providers who subscribe to the database, so that at any time, these healthcare providers can log in and see market research data on what patients on their vicinity are frequently looking for etc.”

Applicant’s proposal letter contained her reasons why she felt that her application would not be met with contention. The contents of her accompanying letter show that she had obviously made a thorough research of the law as it pertained to her business concept. She stated in her letter (as paraphrased) that she reasonably felt that the database would not be problematic in terms of the legislation pertaining to the respondents’ functions and powers together with the Constitution of Zimbabwe Amendment Act 20. In her letter she outlined that MIS would not present a conflict of interest in its operations because MIS employees would not be linked to any existing practice; neither would they be engaged in *locums* at any practice. Further, she stressed that the system is not an advertising medium, but is merely a system which will provide the public with answers such as where to get drugs etc. She emphasised that health professional already provide such information daily to members of the public when they are asked for information by their patients; and that they regularly refer their patients to other health

institutions and health professionals. The MIS would operate as a provider of the same kind of information by electronic means.

The respondents to whom the applicant's proposal was addressed, have the following statutory powers and functions:-

**First respondent is the Health Professions Authority of Zimbabwe**, and the body that oversees the health professions and whose functions among other things are to:-

**Section 5 of the Health Professions Act**

“5 Functions and Powers of the Authority

(1) Subject to this Act, the functions of the Authority shall be-

- (a) To formulate, develop, and implement measures and policies that are designed to
  - (i) Co-ordinate and integrate the functioning and operations of members of the health professions; and
  - (ii) Ensure the provision and promote the enhancement of efficient professional services by members of the health profession”

**Second respondent is the Pharmacist's Council of Zimbabwe**; a body that has been set up in terms of the Health Professions Act, whose functions and powers are [*inter alia*]:-

“46

(a) To assist in the promotion of health of the population of Zimbabwe”

Which it does by:

“46 1 (c) to regulate, control, supervise all matters affecting the training of persons in, and the manner of the exercise of, the professions and callings specified in Part V of the First Schedule;  
“

In short, the Councils powers are generally to supervise, control and regulate the practices and conduct of professions already established and registered.

**The third respondent, the Medicines Control Authority**, is a regularity body set up in terms of the Medicines and Allied Substances Act [*Chapter 15:03*]. It regulates the registration of medicines and keeps a medicines register; monitors and controls; prohibits and restricts certain medicines and other substances in the interests of the public.

**The fourth respondent is the Minister of Health and Child Care** and the overseer of all matters medical.

The Respondents' reactions to applicant's proposal were mixed but were to the larger extent negative. Interestingly, each of the respondents had a differing understanding of what it was that the applicant required them to consider in her application. First respondent responded to an '*Application for registration of the MIS Private Limited*'. Second respondent determined what it perceived was an application for a "*Request to Register the MIS as an Approved Directory*". Third respondent responded to a "*Request to operate the MIS with MCAS's endorsement*". The confusion calls into question the nature of their independent deliberations; and if at all they had properly determined the proposal. However, for progress sake, it is my intention to determine this matter on the actual intention behind the proposal on the part of the applicant; and whether or not the respondents arrived at a satisfactory determination within their respective functions and powers.

Their determinations were as follows:-

Briefly, first respondent refused to register MIS as a health institution unless MIS has been endorsed by a Practice Control Council, the clear and full explanation of which the first respondent provides no illumination. Secondly and with insufficient detail to glean what first respondent is saying, it stated that it will not register MIS "*as there are no satisfactory mechanisms to protect the public*". It then directed applicant to approach a Practice and Control Committees of the relevant Councils, although what the first respondent meant by '*the relevant Council*' is anyone's guess. The first respondent also stated that the MIS is not a Health Institute in terms of section 2 of the Health Professions Act [*Chapter 27:19*] and thus it does not qualify for registration.

The second respondent rejected applicant's proposal on the basis that it deemed the intended database to be advertising and thus in direct contravention of section 135 of the Health Professions Act, which prohibits advertising. The other reason why second respondent would not consider registering the MIS directory as a Health Institution because it deems that MIS is not a Health Institution as was intended by the Act.

Third respondent responded to the applicant's proposal in a tepid way; remarking on the database as being a much needed and good idea, and stating that although it did not have the requisite statutory powers to register MIS, it was all for approving the database. It would not however, so it emphasised, endorse the database. I am circumnavigating the narrative slightly and briefly, in order to make the observation that *approving* is synonymous with *endorsing*. They are one and the same thing.

Having failed to secure a positive response from the respondents, on 20 April 2017, applicant filed the present application. Her prayer for relief is presented in the following terms:-

- “1. That it be hereby declared that the proposed database, as more fully captured in Annexure 1 to this application (the proposal being the Annexure 1 referred to above) does not contravene section 135 of the Health Professions Act [*Chapter 27:19*], as read with sections 61, 62 and 76 of the Constitution of Zimbabwe, 2013.
2. That it be and is hereby declared that the proposed database, as more fully captured in Annexure 1, does not contravene any law in Zimbabwe,
3. That the Respondents be and are hereby directed to approve the Applicant’s database as described in Annexure 1.
4. As an alternative to 3, that the respondents be and are hereby interdicted from interfering with the Applicant’s database in Annexure 1.
5. The Respondents (if they oppose the application) are to pay the costs, jointly and severally one paying the others to be absolved”

The application is opposed by all respondents. The respondents’ objections in their letters and amplified in their notices of opposition are based upon the respondents’ interpretation of the Health Professions Council Act, the Medicines and Allied Substances Control Act; the Pharmacists Professional Conduct Regulations (1998) and, the Constitution of Zimbabwe, Amendment (Act No. 20) 2013.

#### POINTS RAISED IN LIMINE

Through its Heads of Argument and at the hearing of the matter, first respondents raised two points *in limine*. **Firstly** that the High Court lacks the jurisdiction because of applicant’s failure to exhaust domestic remedies, and **secondly** that applicant has no *locus standi* to institute the current proceedings.

On the first objection, the first respondent has insinuated that applicant ought to have taken the matter up on appeal first to the Health Professions Authority in terms of section 22 of the Health Professions Act, instead of approaching this Court for relief.

My view, which is based on a pedestrian appreciation of the law, is that both objections are without merit. Appealing to the Authority is of no use to the applicant as the Health

Professions Authority has already stated its position and the reasons why it is declining the applicant's proposal. Further second respondent has no jurisdiction to make a determination on declaratory relief.

The suggestion that applicant has no *locus standi*, is wrong. Section 85 of the Constitution enables applicant to ask for redress as an interested party.

**“85 Enforcement of fundamental human rights and freedoms**

(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.

(2) The fact that a person has contravened a law does not debar them from approaching a court for relief under subsection (1).

(3) The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1), and those rules must ensure that—

- (a) the right to approach the court under subsection (1) is fully facilitated;
- (b) formalities relating to the proceedings, including their commencement, are kept to a minimum;
- (c) the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities; and
- (d) a person with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules referred to in subsection (3) does not limit the right to commence proceedings under subsection (1) and to have the case heard and determined by a court”

THE RESPONDENTS' CONSTITUTIONALLY MANDATED DUTIES

The respondents all but abandoned their Constitutional duties to promote applicant's rights and freedoms her application to proceed with her business idea with their sanction. I say this because they owe applicant a Constitutional duty to “*promote and fulfil the rights and freedoms set out in the Declaration of Rights*” in accordance with their functions and *pro public*

*bono* as is set out in section 44 of the Constitution. The courts and agencies of government have a duty to ensure that such fundamental rights and freedoms remain protected and to play their role in advancing the national agenda. Section 13 (1) of the Constitution provides that:-

**“13 National Development**

- (1) The State and agencies of government at all levels must endeavour to facilitate rapid and equitable development and in particular must take measures to-
  - (a) promote private initiative and self-reliance;
  - (b) .....

The respondents failed to discharge their Constitutional duty to consider the implications on the rights and freedoms of the applicant and their chief constituent, that being the public, in terms of section 46 of the Constitution, whilst they were considering applicant’s proposal. It is a fact that they seemed to be ignorant of such a duty.

The MIS intends to provide a service which promotes the health of the public. It’s creation and operation would, in my view, advance and not imperil the interests of the public, going by applicant’s mission statement. Applicant explained that her intention was to assist the health delivery system; minimize the risks associated with a lack of information of what health services and facilities are immediately available to the public. The benefit to the public would be to reduce time-wasting and costs.

The State is required to ensure the individual’s right to health services in terms of sections 29 of the Constitution which reads:-

**“29. Health Services**

- (1) The State must take all practical measures to ensure the provision of basic, accessible and adequate health care services throughout Zimbabwe;
- (2) The State must take appropriate, fair and reasonable measures to ensure that no person is refused emergency treatment at any health institution.
- (3) .....

The respondents are constitutionally bound to uphold the rights of the public where such rights are evident and relevant in the Declaration of Rights. The Constitution of Zimbabwe provides instruction to a court a tribunal or other body whenever it is interpreting such a matter as the one before me. An interpretation of legislation where it occurs in the interests of the public must yield to upholding the rights enshrined in the Declaration of Rights. If the interpretation made by a tribunal discounts the guaranteed rights of an individual or the populous, then the determination will be deemed unconstitutional. I am guided by section 46

of our Constitution which obliges me to review the respondents' determinations and to see if they fall in line with that section. Section 46 reads:-

**“46 Interpretation of Chapter 4**

(1) When interpreting this Chapter, a court, tribunal, forum or body—

- (a) must give full effect to the rights and freedoms enshrined in this Chapter;
- (b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;
- (c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;
- (d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and
- (e) may consider relevant foreign law; in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.

(2) When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.

**APPLICANT’S CONSTITUTIONAL RIGHTS AND THE INTERESTS OF THE PUBLIC**

The rights which are relevant to the purpose and intention behind applicant’s proposed database and which are guaranteed in the Declaration of Rights and which the applicant references are the following:-

**“51 The right to human dignity.**

Every person has inherent dignity in their private and public right, and the right to have that dignity respected and protected”

**“61. Freedom of expression**

- (1) Every person has the right to freedom of expression which includes-
  - (a) Freedom to seek receive and communicate ideas and other information;
  - (b) Freedom of artistic expression and scientific research and creativity;”

The proposed database would enhance the protection of the right of access to information.

**“62. Access to information**

- (1) Every Zimbabwean citizen and permanent resident, including juristic persons and the Zimbabwe media has the right to access of any information held by the State or by any institution or agency of government at any level, in so far as the information is required in the interests of public accountability.

- (2) Every person, including the Zimbabwe media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right.
- (3) Every person has the right to the correction of information, or the deletion of untrue, erroneous or misleading information, which is held by the State, or any institution or agency of the government at any level, which relates to that individual”

In the same manner the service which applicant intends to provide would significantly enhance the right to Health Care.

**“76. Right to health care.**

- (1) Every citizen and every permanent resident of Zimbabwe has the right to have access to basic health-care services.
- (2)
- (3) No person may be refused emergency medical services in any health-care institution
- (4) The State must take reasonable and legislative measures, within the limits of resources available to it, to achieve the realisation of the rights set out in this section”

Thus because the respondents determined the applicant’s proposal purely on their interpretation of the various statutes without having examined the Declaration of Rights or at least referring to it, they clearly erred. Their lack of attention to the Constitution and the Declaration of Rights no doubt led them to fall into error when they pronounced that *“applicant’s idea was not in the interest of the public”*. Not only did they make the wrong decision, but they also failed to discharge their duty to the public and for the benefit of the public. Their determinations which they made, were obviously motivated by self-preservation and an alarming reluctance to be held to accountable for their decisions.

As I mentioned earlier, the first respondent determined that *“it only registers private institutions which have been approved by a Practice Control Committee of a Council, in this case, Medical Information Service is not a member of any such Council. 2. Furthermore, according to the provisions of s 2 (a) (b) and (c) of the Health Professions Act, MIS cannot be classified as a Health Institution and accordingly does not fall under the mandate of the Health Professions Authority”*

I disagree. One must not overlook first respondent’s obligation in terms of section of the Constitution is; *“to facilitate rapid and equitable development and to promote private initiative”* in pursuance of national development, it is first respondent’s responsibility to

encourage initiatives such as that which the applicant has presented. It is also first respondent's statutory function to:-

**“Health Professions Act.**

**Preamble**

...; to provide for the registration and control of health institutions and the regulation of services provided therein”

MIS qualifies to be described as an institution because it is “*an organisation with a special purpose*’ (Merriam Webster dictionary).

Thus instead of recognising that its *raison-etre* is that of registering health institutions, and functioning in a dynamic manner to promote an enhancement of health services for the benefit of the public, first respondent instead, chose to bury its head in the sand and made its decision based upon a restrictive interpretation of what the Act deems to be health institutions already ratified and are listed in the interpretation section of the Act ( section 2 (a), (b) and (c) thereof), which reads as follows:

**‘Health Professions Act**

**2. “Health institution” means**

- ( a) any hospital, clinic, medical laboratory, consulting room or other premises or part thereof which is used by a health practitioner for any purpose connected with the diagnosis, treatment, mitigation or prevention of any illness, injury or disability or abnormal physical or mental state or the symptoms thereof in human beings; or
- (b) any premises in or on which a pharmacist practises or carries on business as such; or
- (c) any premises in or on which any medicine, as defined in the Medicines and Allied Substances Control Act [Chapter 15:03], is manufactured;”

The *ejusdem generis* rule of interpretation is applicable in the context of the present matter. It is that where a statute contains a list of items followed by “*or other*” such as is present in 2 (a) of the Health Professions Act which as can be seen above provides that “*other premises or part thereof which is used by a health practitioner for any purpose connected with....*”

The rule permits me to determine “*or other*” in the context of the things on the list. In *Powell v Kempton Park* 1897 QB 242, the House of Lords was dealing with the Betting Act of 1853, which made it an offence to keep house office; room or other place for the purpose of betting. The House of Lords had to decide if the statute applied to the Tattersall enclosure at Kempton Park racecourse. By way of explanation to those who may not immediately be in the

know, Tattersall is a famous English gaming or betting entity. The House of Lords applied the *ejusdem generis* rule and held that the other items mentioned in the statute related to places indoors whereas Tattersalls was outside. Thus there was no offence committed.

Applicant is a pharmacist and a health practitioner. Section 2 (a) is, in my view, inclusive of the MIS by virtue of its intention to improve the health and welfare of the general public. The rudimentary principles of statutory interpretation teach us that when words such as ‘*and other*’ and ‘*or any other*’ and ‘*or other*’ and ‘*to do all things necessary*’, are found in a statute, they are included to deal with not only present, but future concerns. That is because the legislative draftsman has a limited capacity to see into the future. Every so often a law which is drafted with one particular situation in mind, will eventually be applied to quite different situations.

The legislation (statutory) was crafted to protect members of the public from the unscrupulous dealings of institutions or bodies such as the respondents, and to create other means to afford members of the public to access medical care.

In her letter, applicant stated the intention [*inter alia*] of MIS to reduce the instances where patient health being compromised by a lack of information and that in the result the adherence to treatment and ultimately to the health of members of the public was being unjustly affected.

I have also deduced from a description of the Health Professions Authority’s statutory powers and functions that it is peremptory that the Health Professions Authority to bring organisations such as MIS to life; and to promote initiatives such as that proposed by applicant especially where it positively advances the interests of the public health.

Furthermore the Health Professions Authority’s functions are specifically described as follows:

**“5. Functions and Powers of the Authority**

(1) Subject to this Act, the functions of the Authority shall be—

(a) to formulate, develop and implement measures and policies designed to-

(i) co- ordinate and integrate the functioning and operations of members of the health professions; and

(ii) ensure the provision and promote the enhancement of efficient professional services by members of the health professions;”

[*My underlining*]

Accordingly, first respondent partial application of the Act, was an incorrect application of its discretion which led to first respondent's erring. It is my considered view that there is nothing preventing the first respondent from accepting that MIS falls within the definition of 'health institution' as envisioned by the Health Professions Act.

Further first respondent has the requisite power to

**“Preamble HP Act**

*“amend references to health practitioners, councils and associated matters in other Acts”.*

It is therefore empowered not only to amend the list of health institutions referred to in section 2 of the Health Professions Act, and also to amend the list of health professionals referred to in the Part V of the First Schedule of the Health Professions Act, to include MIS. If first respondent requires that applicant be approved by a Practice Council, and in the absence of MIS being a member of any such council, if MIS were to be added to the list of Health Professions, then MIS would automatically be registered under the umbrella of the Pharmacists Council.

The powers and functions of the second respondent (Pharmacists Council) are to:-

**“45 Establishment of Pharmacists Council of Zimbabwe**

( 1 ) There is hereby established a council, to be known as the Pharmacists Council of Zimbabwe, which shall be a body corporate capable of suing and being sued in its corporate name and, subject to this Act, of performing all acts that bodies corporate may by law perform.

**(2) The Council shall represent the persons registered in any profession or calling specified in Part V of the First Schedule”**

Second respondent would also thus be enabled to regulate the functions of MIS. There is thus no justification for the first and second respondents to have just thrown their hands up in the air', and ignored their statutorily mandated duty.

Second respondent objected to MIS's registration on the basis that the publication of a database was unlawful because it amounted to advertising which is prohibited by section 135 of the Act. To my mind, what applicant has in mind is making a publication of information by electronic means and that is most certainly NOT advertising in the sense of pitting one institution or profession against the other. Applicant aptly stressed that the MIS directory would be doing what health professions already do when they refer patients to other health care professionals and institutions. To that end, first and second respondents unjustifiably reacted

with apprehension at the prospect of applying advancements in information technology to an already weakening medical health delivery system.

### APPLICANT'S RIGHT TO ADMINISTRATIVE JUSTICE

Let me now address applicant's constitutional rights. Applicant has a legitimate expectation to a fair hearing as per section 69 of the Constitution. She also has a right to administrative justice based upon her legitimate expectation to reasonable, prompt and fair redress in terms of section 68 of the Constitution.

#### **“68 Right to administrative justice**

- (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
- (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.
- (3) An Act of Parliament must give effect to these rights, and must—
  - (a) Provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;
  - (b) impose a duty on the State to give effect to the rights in subsections (1) and (2); and
  - (c) promote an efficient administration”

### DECLARATUR

In *Munn Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S) GUBBAY CJ (then) pronounced the remedy available in terms of section 14 of the High Court Act [*Chapter 7:06*] which reads:-

#### **“Section 14 of the High Court Act**

14. High Court may determine future or contingent rights.

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

The learned Chief Justice said on page 343 [G-H], 344 [A-F]:-

“The condition precedent to the grant of a declaratory order is that the applicant must be an interested party, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. See *United Watch & Diamond Company (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C) at 415;

*Milani & Anor v South African Medical & Dental Council & Anor* 1990 (1) SA 899 (T) at 902G-H. The interest may relate to an existing future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. See *Anglo-Transvaal Collieries Ltd v S A Mutual Life Assurance Soc* 1977 (3) SA 631 (T) at 635G-H. But the existence of an actual dispute between persons interested is not a statutory requirement to the exercise by the court of jurisdiction. See *Ex parte Nell* 1963 (1) SA 754 (A) at 759-760A. Nor does the availability of another remedy render the grant of a declaratory order incompetent. See *Gelcon Investments (Pvt) Ltd v Adair Properties (Pvt)* 1969 (2) RLR 120 (G) at 128A-B; 1969 (3) SA 142 (R) at 144D-F.

This then is the first stage of the determination by the court.

At the second stage of the enquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s 14. What constitutes a proper case was considered by WILLIAMSON J in *Adbro Investments Co Ltd v Minister of the Interior and Ors* 1961 (3) SA 283 (T) at 285B-C, to be the one which generally speaking, showed that-

“..... despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation claimed to be due by a respondent. I think that a proper case for a purely declaratory order is not made out if the result is merely a decision of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant’s position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought”

I have already discussed applicant having a substantial and direct interest in the matter. I have also discussed the rights, (bar one which I will elaborate upon below) upon which the present application is reposed.

In the present matter, however, applicant is also desirous of obtaining is a mandatory interdict to compel the respondents to approve Applicant’s database; and alternatively a prohibitory interdict barring the respondents from interfering with the database.

### INTERDICTS

For either interdict, applicant has to prove that she has:

- (a) A clear right;
- (b) An injury actually committed or reasonably apprehended;
- (c) Absence of similar protection by any other remedy.

See: *Setlogelo v Setlogelo* 1914 AD 221 pp 227; *Minister of Law and Order Bophuthatswana & Anor v Committee of the Church Summit of Bophuthatswana & Ors* 1994 (3) SA 89 (B) at page 98B-D; *Knox D’Arcy Limited & Others v Jamieson & Ors*

1995 (2) SA 579 (W) at pages 592H-593C; *Admark (Recruitment) (Pty) Ltd v Botes*  
1981 (1) SA 860 (W) at page 861 C-D.

R G Mckerron in his book entitled “*The Law of Delict 7<sup>th</sup> Ed (Cape Town: Juta & Co., Ltd 1971) 140 n 13* elaborates on these requirements.

Applicant’s right to an interdict are aligned to the rights outlined in the abovementioned cases.

#### APPLICANT’S RIGHT TO FREEDOM OF PROFESSION, TRADE AND OCCUPATION.

Applicant also enjoys the right to freedom of profession, trade and occupation by virtue of section 64 of the Constitution.

##### **“64 Freedom of profession, trade or occupation**

Every person has the right to choose and carry out any profession, trade and occupation, but the practice of a profession, trade or occupation may be regulated by law”

The guarantee of freedom of trade is a significant aid to the building of a community enlivened by social mobility and dynamism. Our courts, and indeed tribunals such as the ones *in casu*, must be more inclined to move with the times, what with useful advances in technology being available to convey information with more efficiency and speed.

The State should only have a restricted power to limiting the enjoyment of these freedoms by (i) prescribing the qualifications necessary and (ii) regulating the conduct of those professions, trade and occupations. In the present matter, because the various rights of the public and the applicant which are guaranteed by the Constitution being present; and because an interpretation of the statutes must be inclined to upholding those rights; then the intervention of the respondents should only be confined to licencing and regulating in accordance with their statutory powers. This is because the applicant’s rights to a fair hearing and to administrative justice must be respected as far as is just and reasonable. Arbitrary determinations, such as those made by the respondents, and which did not involve much thought by the respondents, are neither “*proportionate, fair nor reasonable*”. The State and *ergo* the respondents cannot exercise their powers to unreasonably limit the rights which an individual is guaranteed by the Constitution to carry out a trade, business or profession.

There is a similiar clause in the Constitution of India, guaranteeing freedom of trade, business or occupation from which I will explain the extent to which this remedy can enable a party to obtain administrative justice.

In *Rashid Ahmed v Municipal Board* AIR 1950 SC 610, the applicant Rashid Ahmed (applicant) was carrying out a business in fruits and vegetables. In April 1949, the local municipality imposed a set of by-laws by which the Municipality had auctioned the contract for wholesale trade to another businessman, Habib Ahmed. The Municipal Board specified a space for wholesale business in vegetables which notice had the effect of barring applicant from plying his trade at his shop. Applicant petitioned the Board to allow him to continue carrying his business lawfully but his application was rejected and applicant faced prosecution for the alleged breach of the by-law. The relevant by-law read:

“No person shall establish any new market-place or place for wholesale business without obtaining the prior permission of the Board, and no person shall sell, or expose for sale, any vegetable, fruit etc. at any place other than that fixed by the Board”

Applicant applied to the court for a declaration of rights and the Supreme granted the application unanimously. In the judgment S.R das J observed:-

“The Constitution by Article 19 (1) (g) guarantees to the Indian citizen the right to carry on trade or business such to such reasonable restrictions as are mentioned in clause 6 of that Article. The position under by-law<sup>2</sup> is that while it provided that no person shall establish a market for wholesale transactions in vegetables except with the permission of the Board, there is no by-law authorising to do the same. The net result is that the prohibition by this by-law, in the absence of any provision for issuing licences, becomes absolute”

The Indian Supreme Court also pointed out that by the prohibition, it meant that it had granted Habib Ahmed a monopoly.

In my view it is the responsibility of the courts to oversee administrative decisions with an awareness that one key consideration is need to give maximum and reasonable individual protection from high-handed executive decisions or discriminatory legislative enactments.

In the present matter, the respondents’ decisions were made from a apprehension of modern technology and I must agree with *Mr Madhuku’s* submission, that there is a tendency by people to retreat from making decisions when they are presented by an idea which is novel and complex to them and one that they cannot immediately comprehend, as is often the case in matters involving information technology. However, the law needs to be dynamic with the courts discouraging the inherent and unreasonable tendency to retain what we comprehend and does not frighten us, against the preferred need to keep abreast of modern technology as a useful societal development tool.

In the present matter, applicant’s idea was met by the respondents with a mixture of apprehension, unreasonable caution and needless suspicion. As a result, that led to a dereliction

of duty by the respondents or a genuine lack of awareness of their legislated mandated authority and appreciation of the statutes they operated under. By way of an example, the respondents decried that there “*were no satisfactory mechanisms in place*” for applicants database “*to protect the public*”, without thought or elaboration as to how or why the public would be adversely affected by the database; neither did they explain what they meant by mechanisms. In failing to provide proper reasons and the necessary guidance to applicant, they have presented applicant with an inability to chart her course.

It was only third respondent who recognised the value and need for such a database, by agreeing to approve it. I have considered the fact that neither the Health Professions Act; nor the Medical and Allied Substances Control Act or any regulations provide specifically for instances of approving such a database for the obvious reason that the concept is innovative. I have, however, been inspired by the reasoning of the Indian Supreme Court in the *Rashid Ahmed* case, which propelled the court to provide Mr Ahmed with remedy. The Indian Supreme Court found that even in circumstances where the bye-laws and legislation did not provide specific redress for the applicant; it was in recognition of Rashid Ahmed’s constitutional rights that it stepped into the gap by granting him permission to, based upon such fundamental rights.

In the same vein, I too have no desire to emasculate the Constitution. I find no cause for denying the applicant the mandatory interdict prayed for. The rights of the public to enjoy proper, efficient and effective health care and health services, together with the duty owed by the courts to the public; to assist in bringing about rapid and equitable national development in the promotion of private initiative and self-reliance; enjoin me to grant the order sought.

### THE ISSUE OF COSTS

Applicant is pursuing an order for costs on a legal practitioner and client scale without providing a justification for me to I make such an order. I am thus intent on granting applicant costs on the ordinary scale and not on the higher scale.

In the result, I order as follows:-

IT IS HEREBY DECLARED that:-

1. The proposed database, as more fully captured in Annexure 1 to this application, does not contravene section 135 of the Health Professions Act [*Chapter 27:19*] as read with sections 61, 62 and 76 of the Constitution of Zimbabwe, Amendment Act No 20.

2. The proposed database, as more fully captured in Annexure 1 to this application does not contravene any law in Zimbabwe.

The Respondents be and are hereby ordered to:

1. Approve Applicant's database as described in Annexure 1.
2. Pay applicant's costs of suit.

*Lovemore Madhuku Lawyers, applicant's legal practitioners*  
*Kantor & Immerman, 1<sup>st</sup> respondent's legal practitioners*  
*Honey & Blanckenberg, 2<sup>nd</sup> & 3<sup>rd</sup> respondents' legal practitioners*