

MFARO MOYO
versus
THE MINISTER OF ENERGY AND POWER
DEVELOPMENT
and
ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 26 May 2017 and 23 August 2017

Opposed application

D. T Hofisi for the applicant
M Chimombe, for the 1st respondent

MUREMBA J: This application is in terms of section 85 (1) of the Constitution of Zimbabwe Amendment Act (No.20), 2013 whereby the applicant seeks a declaratory order to the effect that the Petroleum (Mandatory Blending of Anhydrous Ethanol with Unleaded Petrol) (Amendment) Regulations, 2013 (No.1) otherwise referred to as Statutory Instrument 147A of 2013 is constitutionally invalid in that it violates his right to property as enshrined in s 71 (2) as read with s 71 (3) of the Constitution of Zimbabwe. It is an application between the applicant and the 1st Respondent, being the Minister responsible for the administration of the Petroleum Act [*Chapter 13:22*]. The 2nd Respondent was cited as the principal legal advisor of the government and as the official who also participates in the drafting of legislation on behalf of government. However, he is barred for filing his opposing papers and heads of argument out of time.

The applicant made the following averments in his founding affidavit. He is an owner of a Mitsubishi Pajero GDI vehicle which was manufactured in 2000 whose registration number is ACT 5253. He acquired it in 2012. The manual and warning signs affixed to the motor vehicle say that it cannot use any fuel that is not unleaded petrol. More specifically the motor vehicle cannot use any fuel that is mixed with ethanol or similar fuel substitute. In 2001 the

manufacturer issued a general notice stating that motor vehicles such as the applicant's should not be fueled with any petrol that contains ethanol (The general notice in question was attached to the application as Annexure A.). It states that "Mitsubishi Gasolene Direct Injection (GDI) engines are not suitable for use with an ethanol blend of any mix strength." The motor vehicle is an important and integral part of the applicant's life. He uses it daily to go to work, ferry the children to school, ferry the family to his rural home and it meets the family's other transportation needs and requirements.

The applicant further averred that in 2013 the 1st Respondent acting in terms of section 57 (1) of the Petroleum Act issued the Petroleum (Mandatory Blending of Anhydrous Ethanol with Unleaded Petrol) (Amendment) Regulations 2013 (No.1) otherwise referred to as Statutory Instrument 147A of 2013. In terms of section 1 (2) and section 4 (1) of SI 147A of 2013, it is stated that by the 31st of March 2014 no fuel retailer shall sell unleaded petrol to the public unless it has been blended with 20 per centum of locally produced anhydrous ethanol. The statutory instrument thus bans the sale of unleaded petrol and it dictates that all petrol sold in Zimbabwe has to have at least 20% ethanol. Due to this statutory instrument the applicant can no longer purchase unleaded petrol from various fuel retailers across the country. The applicant's right to property in terms of section 71 (2) of the Constitution which entitles him to acquire, hold, occupy and use all forms of property in any part of Zimbabwe has been violated. Without access to unleaded fuel which his motor vehicle can only use, the applicant cannot use his motor vehicle without any hindrance. The Statutory Instrument denies the applicant access to the right fuel for his vehicle.

The Applicant further averred that in May 2013 he stopped at a fuel station and erroneously filled his fuel tank with E10 petrol which is petrol that contains 10% locally produced anhydrous ethanol. After travelling for a few kilometres the vehicle started having problems. It lost power, became jerky as it refused to gain momentum and eventually stopped. It then refused to start. This petrol harmed his motor vehicle's fuel system and it cost him USD\$2 232.92 to replace the whole fuel system. The spark plugs and the fuel pump had to be replaced (Receipts thereof were attached as annexures B-F). The technicians at AMC Motors (a company that specialises in maintaining and servicing Mitsubishi Pajeros) who repaired the motor vehicle informed him that it was this E10 fuel, which contains anhydrous ethanol that

damaged his motor vehicle's fuel system. The technicians further advised that the applicant's vehicle cannot be converted or modified to use petrol blended with ethanol. This puts it beyond doubt that the motor vehicle cannot operate if it uses any fuel mixed with any amount of ethanol.

The applicant further averred that SI 147A 2013 results in compulsory deprivation of his right and enjoyment of his property which is his motor vehicle. In terms of s 71 (3) (c) (ii) of the Constitution the applicant cannot be deprived of his property without being paid fair compensation yet the Statutory Instrument in issue makes no provision for the loss of his vehicle due to mandatory blending of petrol with ethanol. Section 134 (b) of the Constitution states that Statutory Instruments such as SI 147A of 2013 must not infringe or limit the rights and freedoms set out in the declaration of rights. Whilst SI 147A of 2013 bans the sale of unleaded petrol, the Petroleum Act does not say anything about the wholesale ban of unleaded petrol. This violates section 134 (c) of the Constitution. SI 147A of 2013 is arbitrary as it renders all motor vehicles that cannot use petrol blended with ethanol unusable. It is not in the general public interest to deny a significant section of society their right to use the vehicles they purchased. The right to property requires limitation or denial in exceptional circumstances of which there are none in the present case. Energy efficiency or reduction of the petroleum import bill can be achieved in other less restrictive ways.

In response, the 1st Respondent averred the following in his opposing affidavit. The applicant did not attach any proof to show his ownership of the described motor vehicle and proof that the said motor vehicle cannot use ethanol blended petrol. In any event such an assertion would be false for the following reasons. The introduction of ethanol in blending with unleaded petrol was preceded by extensive research locally and internationally. A supporting affidavit by Engineer Clement S. Shonhiwa of the University of Zimbabwe's faculty of Engineering, department of Mechanical Engineering was attached. He is a Renewable Energy Lecturer and Consultant holding an MSc. Chem. Eng. and MSc. Renewable Energy. He is also a member of the Zimbabwe Institute of Engineers. Attached to his supporting affidavit are two documents which state, among other things, that unleaded petrol mixtures containing up to 20% ethanol can be used in all petrol engines without need for modification, adjustment or adaptation on the engine or fuel system. These include petrol engines that are designed and labelled for unleaded or leaded petrol. Vehicles with fuel caps marked 'unleaded only' can use E10/E20 as

long as ethanol is blended with unleaded fuel. Ethanol blends of these proportions are in use in numerous countries across the globe and are accepted as a quality motor vehicle propellant. A paper prepared by a local scientist, Professor Christopher Chetsanga on 22 July 2012 titled, “*Making Sugar Cane based Ethanol our Green Fuel: Copying Brazil and its Flex-Fuel Cars*” was attached. The paper illustrates that ethanol blending has distinct advantages if used in Zimbabwe. The first respondent said that research about blending of ethanol with unleaded petrol was done as far back as the 1980s. As proof he attached the Bechtel Report entitled the “*Chisumbanje Sugar-Ethanol Project Feasibility Study*” by the Industrial Development Corporation of Zimbabwe which was done on behalf of the Government of Zimbabwe in October 1985. Reference was also made to the research and publication of a book titled “*Ethanol Driven Vehicle project (Malawi): Assessment of the use of Ethanol as an Alternative Vehicle Fuel for Petrol in Malawi*” that was done in Malawi by the National Commission for Science and Technology. The first respondent stated that the book recommends increased use of ethanol. It reveals that E20 can be used in all petrol motor vehicles without the need for any modification to the engine. E20 fuel does not affect the compatibility or the driving ability of a motor vehicle.

The 1st Respondent further averred that mandatory blending of fuel is not unprecedented in this country. From the 1970s to the early 1990s there was mandatory blending of petrol with ethanol but it was abandoned because of a drought that occurred in the 1990s that made ethanol unavailable in large enough volumes. The first respondent stated that since the enactment of S.I 147A of 2013 all petrol sold in Zimbabwe is blended with anhydrous ethanol. He averred that all blended petrol available is in fact unleaded petrol, thus unleaded fuel is available in blended form. He averred that the S.I 147A of 2013 only prescribes that unleaded petrol be blended with anhydrous ethanol. The need for blending is line with government policy born out of several public interest considerations, inter alia to cut the fuel importation bill, preserve the environment, create jobs, empower the local population economically and inhibit inflation.

The first respondent further averred that the right to property enshrined in section 71 of the Constitution is not absolute as it may be limited in terms of s 86. The 1st Respondent stated that the applicant’s right to property has not been infringed as his vehicle can use unleaded fuel that is blended with ethanol. He said that no reliance can be placed on the general notice that is said to have been issued by the manufacturers of the applicant’s motor vehicle as there is no

confirmation of the issuance of the said notice. Nothing shows that it is authentic and that it originated from the manufacturer. The first respondent stated that even if the document was authentic the applicant needed to supply expert testimony verifying its accuracy. The first respondent stated that the applicant tendered no evidence to show that the fuel system of his motor vehicle system was damaged by the use of blended petrol. He said that the receipts showing that the applicant's motor vehicle's fuel system was replaced are not proof that it was replaced as a direct and exclusive result of using blended petrol. Firstly, no tests were done to confirm that it was the fuel which caused the damage. Secondly, no tests were done to rule out other possible contaminants in the fuel such as dirt since a fuel system can be damaged by various things. There is no supporting affidavit by the technicians who came to the conclusion that the fuel system was damaged by blended fuel.

The first respondent attached a supporting affidavit by one Brian Kaukonde, a director at AMC saying that AMC mechanics and technicians could not have concluded that the fuel system of the applicant's motor vehicle was damaged as a result of the use of ethanol blended fuel because no tests were conducted on the fuel that was in the applicant's fuel system. The first respondent also attached a report which was written by Allway Motors (Pvt) Ltd Director Kelvin Allmark who stated his company services Mitsubishi Pajero GDIs of the same year as the applicant's. He stated that fuel system problems can be caused by a number of reasons which include normal wear and tear of the fuel pump as the motor vehicle's mileage was over 80 000 km and use of contaminated fuel due to e.g. dirt. He stated that tests should have been done on the fuel that was used to ascertain if it was really E10. He further said that the other Mitsubishi Pajero GDI's of the same year as applicant's which they have been servicing have not encountered any compatibility issues with ethanol blended fuel since the inception of mandatory ethanol blending regulations . The report was written on 31 March 2014.

The 1st respondent further averred that should the court find that the applicant's right to property was infringed, then the infringement is justifiable and permissible in terms of section 44 as read with s 57 of the Petroleum Act and as further read with s 86 of the Constitution. The limitation is permissible and justifiable in the public interest for reasons already highlighted above. He averred that the Statutory Instrument does not contravene s 71 of the Constitution. It

was enacted in terms of s 57 of the Petroleum Act after wide consultations and research had been done on the subject.

The applicant proceeded to file an answering affidavit in light of the above. He attached his motor vehicle registration book. The applicant averred that he had shown that his motor vehicle cannot use ethanol blended unleaded petrol because he attached a statement or general notice from Mitsubishi Motors that contains information to that effect. He averred that the response by the first respondent with regards to the suitability of ethanol blended petrol is general to all motor vehicles and not specific to Mitsubishi Gasoline Direct Injection (GDI) engines. The applicant averred that the notice he attached to his application emanating from Mitsubishi Motors is specific to the Mitsubishi GDI which he owns. About the authenticity of the notice he said that this can be found on the Mitsubishi Motors New Zealand website, Bio Fuel usage page which he went on to attach as annexure C. The annexure states that most New Zealand new Petrol engine Mitsubishi vehicles built since 2000 will run satisfactorily on petrol blended with up to 10% ethanol but motor vehicles that use the Gasoline Direct Injection engine will not since GDI is unsuitable for any ethanol blend. It further states that used import models built to Japan's domestic specifications may only be operated with a maximum of 3% ethanol blend fuels.

The applicant averred that it has not been disputed that his motor vehicle is a GDI and the first respondent has not shown that GDI vehicles as a distinct class of engine can run on unleaded petrol blended with ethanol. The applicant averred that the first respondent's assertions cannot be accepted on his mere say so at the expense of averment made by the manufacturer of the motor vehicle and other research which supports that the applicant's vehicle cannot run on ethanol blended unleaded petrol. The applicant further stated that it is not correct for the first respondent to say that unleaded petrol mixtures containing up to 20% ethanol can be used in all petrol engines without need for modification, adjustment or adaptation of engines or fuel system. He stated that the supporting affidavit of Engineer Shonhiwa the first respondent relies on is inadequate as it does not refer to the research or methodology or findings but on bold assertions. He said that the engineer's mere say so cannot be sufficient. For this averment the applicant relied on various authorities which he attached including the paper of the Association of Automobile Importers in Finland. The paper is titled "Compatibility of E10 Petrol with Various

Passenger Vehicles.” It states that the compatibility of petrol with a vehicle depends on both its octane rating and its ethanol concentration. The vehicle’s octane requirement must be met and the petrol’s ethanol concentration may not exceed the compatibility limit. With regards to Mitsubishi vehicles it is stated that:

“E10 is cleared for use in all petrol engine Mitsubishi vehicles starting from model year 1999 excluding models Pajero and Carisma GDI which have been discontinued.”

The applicant averred that this means that ethanol of 20% will be more damaging. The applicant went on to attach several documents demonstrating that unleaded petrol blended with up to 20% ethanol is not universally usable in all petrol engines. A number of modifications may be needed to a vehicle depending on the type of parts of the car and make of the vehicle. The applicant made reference to a Brazilian Engineer Henry Joseph Jr and his paper “*The Vehicle Adaptation to Ethanol Fuel*” in which it is stated that the use of ethanol fuel depends on the amount of ethanol blended to the petrol, the specification and quality of the ethanol and the technological level of the vehicle. The applicant averred that direct injection vehicles are known to be intolerant to fuels blended with ethanol of any amount. He attached documents in support of this averment as annexures K,L,M which state that direct injectors are prone to be affected by ethanol which forms part of today’s fuel. Ethanol speeds up the corrosion rate of some metals that are used in the engine, so there is a higher chance of a problem or failure.

The applicant averred that the totality of this evidence is that the 1st respondent’s averments plus his annexures cannot be accepted. He attacked Professor Chetsanga’s paper saying that it does not in any way say ethanol blending is not a danger to motor vehicles as suggested by the first respondent. He averred that the paper does not assess the compatibility of blended fuel with any vehicle. He said that, instead, the paper praises Brazil for its work in supporting the use of blended fuel which is based on the fact that Brazil manufactures cars that are ethanol powered yet we have no capacity to produce such vehicles or fuel flexible vehicles as we are not an industrialised country. This is why the paper ends by saying, “let us begin to order these flexi-fuel cars from Brazil as part of our future.” The applicant challenged the various annexures tendered by the 1st respondent. The applicant averred that his argument is simply that he can longer access unleaded petrol in unblended form for his type of motor vehicle. He said

that all research and documents that the first respondent used in opposing this application have nothing to do with his motor vehicle which is a 2000 model, GDI engine.

The applicant averred that the research that was done by the first respondent before the promulgation of SI 147A of 2013 was inadequate, flawed and not extensive enough. The statutory Instrument is not lawful. The limitation of his right is not reasonable and justifiable at all.

Analysis

The applicant's right to use his property is indeed protected under s 71 (2) of the Constitution. In terms of this provision, property owners are protected from any conduct which would cause them not to enjoy the use of their property.

The applicant's case is simply that without unleaded petrol he is unable to use his motor vehicle. Unfortunately for him, s 147A of 2013 states that no retailer in Zimbabwe can sell unleaded petrol. That the Statutory Instrument puts a blanket ban on the sale of pure unleaded petrol is not disputed. The issue before me is whether or not this total ban is unconstitutional. The applicant averred that the total ban of pure unleaded petrol is unconstitutional as it denies him access to the right fuel for his vehicle. He said that effectively he is being deprived of the right to use and enjoy his property by SI 147A of 2013.

Considering the evidence that was placed before me I am not inclined to strike down the Statutory Instrument in issue. The following are my reasons. To begin with the applicant did not tender evidence which shows that the replacement of his vehicle's fuel system was as a result of the damage that had been caused by the use of ethanol blended unleaded petrol. He spoke about the repairer of his motor vehicle having told him that this was the cause, but he did not see it prudent to furnish evidence from the repairer. A report and or a supporting affidavit might have sufficed. The applicant did not establish the link between the damage to his vehicle's fuel system and the use of unleaded petrol blended with ethanol. There is no evidence of any tests having been conducted to establish this link. There is also no evidence which shows that tests were conducted which ruled out other possible contaminants such as dirt. In the absence of this direct link between the damage and the use of unleaded petrol blended with ethanol this court will not be quick to strike down a whole piece of legislation. What if the fuel system was damaged by other causes other than the blended unleaded petrol?

The second consideration that I have made is that in making this application the applicant placed reliance on the general notice which he says was issued by Mitsubishi Motors. When the first respondent challenged its authenticity in his opposing affidavit, the applicant in his answering affidavit said that it is a notice which he downloaded from the internet. It should be noted that when the applicant attached this general notice to his founding affidavit, he did not supply the URL address of the website where the notice was downloaded from. The time and date when the search was done were not indicated. The so called general notice is just a document with a Mitsubishi Motors' Logo titled, "Ethanol Suitability for Mitsubishi Motors Range of Passenger Cars and Light Commercial vehicles". It does not show its source, when it was issued and by whom it was issued. It is only in the answering affidavit that the applicant explains that it was downloaded from the internet. Whilst articles downloaded from the internet are admissible as evidence of information available to the public, the weight given to such evidence must be carefully evaluated. For it to be given high probative value, the person relying on such evidence must provide complete information as to the date the evidence was published or accessed from the internet and its source hence the need to furnish the URL address of the website. This is information which should be furnished in the founding affidavit to give the respondent an opportunity to view and verify with the website in question. Verification by the other party is important because some sources are unknown and some are unreliable. In any case members of the public can edit articles downloaded from the internet. In the absence of the necessary website information in the applicant's founding affidavit the first respondent had no way of verifying this general notice which forms the basis or foundation of the applicant's application. To make matters worse, it had not even been disclosed that this general notice was downloaded from the internet. In any case even in the answering affidavit, other than disclosing that the notice had been downloaded from the internet, the applicant did not supply the URL address of the website thereof. The authenticity of this general notice the applicant tendered was therefore not proven by the applicant. In addition to this, the first respondent was not given an opportunity to verify it.

A document which could have been useful to the applicant is the vehicle's manual which the applicant said has the necessary warning signs about the use of unleaded petrol blended with ethanol. This would have assisted in supporting the averments the applicant made that petrol

blended with ethanol cannot be used for his type of motor vehicle. This was not furnished. The applicant said that he lost it. In the absence of (i) the manual of the motor vehicle and (ii) the evidence linking the damage of the vehicle fuel system to the use of unleaded petrol blended with ethanol this court cannot strike down a whole statutory instrument solely on the basis of a document which was downloaded from the internet whose authenticity was not established and verified. This should be taken in light of what the manager of AMC Motors where the applicant's motor vehicle was repaired said about no tests having been done on the fuel. In addition to this there is the report of the director of Allway Motors (Pvt) Ltd which says the same type of motor vehicles as the applicant's have been using blended petrol but they have not had any compatible issues. The applicant did not place before the court evidence which shows that his motor vehicle is susceptible to damage from the use of ethanol blended fuel and that the use of this type of fuel was the direct and exclusive cause of the damage to his vehicle's fuel system. Evidence from experts would have sufficed. A general notice whose origins are not known cannot suffice.

When the applicant filed his answering affidavit he attached many voluminous documents, much more than the ones he attached to his founding affidavit. Despite this, the documents he attached in his answering affidavit did not take his case any further because these articles did not deal with the pertinent issues that I have outlined above. There are matters that cannot be decided without the guidance of experts and this is one such case, yet the applicant did not see it prudent to place such evidence before the court. As a result, the applicant failed to establish that his right to property was infringed or is likely to be infringed. I will therefore not go into the question of whether or not the limitation of his right is justifiable and permissible.

In the result, the application is dismissed with costs.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners
Attorney General- Civil Division, 1st respondent's legal practitioners