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Chipasha Mulenga
High Court of Zambia

Kangwa-Musole George Chisanga
University of Cape Town

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The People v Attorney General & Energy Regulation Board [2020] HP 0575

Chipasha Mulenga¹ and Kangwa-Musole George Chisanga²

Facts

This case was an application for judicial review against two decisions: one of the Minister of Energy ('The Minister') under the provisions of the Electricity (common carrier) Regulations Statutory Instrument No. 57 of 2020 ('the SI') and another by the Director-General of the Energy Regulation Board ('ERB'). The first, dated 29 May 2020 declared Copperbelt Energy Corporation ('CEC') transmission and distribution lines as a common carrier. This decision also declared that the use of the lines would be determined by the ERB; the other Respondent in the matter. The second dated 31 May 2020 directed CEC to charge a wheeling (i.e. transmission) tariff of USD5.84/KW/month

The Applicant sought eleven reliefs; principal among which was a declaration that the two decisions were unlawful. Other reliefs included an order to quash the decisions and a stay of the decisions.

The timing of the decisions came after negotiations between CEC and Zambia Electricity Supply Corporation Limited ('ZESCO') who had a Bulk Supply Agreement from 21 November 1997 which ended on 31 March 2020. The negotiations were held between February and March 2020.

As of 31 March 2020, no agreement had been reached. That same day, the Minister held a press briefing at which it was announced that a decision had been made to impose 'unilateral and non-negotiable terms' for an interim arrangement for power supply by ZESCO to CEC. CEC did not accept these terms, but ZESCO attempted to force them to supply electricity to ZESCO's 'new unknown client on the Copperbelt'.

The true root cause of the matter is found in another agreement which was that between CEC and Konkola Copper Mines ('KCM') which was set to expire on 31 May 2020. CEC was making attempts to recover USD 144 million owed by KCM; a private entity now controlled by the government through its appointed provisional liquidator.³ KCM entered a Supplemental Agreement dated 18 July 2019 whereby it committed to liquidating its debt to CEC. KCM ultimately defaulted. The electricity supplied to KCM represents 47% of the total electricity supplied by CEC, making KCM a key debtor to the company.

Holding

The court made four key holdings in the matter, namely:

1. The Minister's decision to declare CEC's transmission and distribution lines as a common carrier is unlawful.

¹ LLB (University of Zambia), LLM and LLD (University of Pretoria), Advocate of the High Court of Zambia

² LLB (Nelson Mandela Metropolitan University), LLM (University of Cape Town)

³ See Sangwani Patrick Ng'ambi and Chanda Chungu 'Vedanta Resources Holdings Limited v ZCCM Investment Holdings Plc and Konkola Copper Mines Plc, CAZ/08/249/2019' (2020) *SAIPAR Case Review* (3) 2 November 2020.

The Court reasoned that the promulgation of the SI was *ultra vires* section 15 of the Electricity Act ('the EA'), which empowers the Minister to declare transmission and distribution lines as a common carrier for the purpose of the Act.⁴ The Court found that, though the decision of the Minister was for purposes of the Act (*emphasis ours*), the intention was 'to assist KCM to avoid the effect of section 43 of the Electricity Act.' The Court was, however, quick to point out that the Minister's decision to 'ensure a continuous supply of electricity power to KCM, despite being indebted to the Copperbelt Energy Corporation ...cannot be the intention or purpose of the Act.'⁵

Further, Section 15(2) requires that, where a declaration is made, it must be on 'terms and conditions that may be agreed between the enterprise and a person who owns or controls the transmission or distribution line.' By implication, while the Minister could make a declaration, he cannot impose terms and conditions of their use.

The Court found that the Minister, by invoking section 15, interfered with the commercial dispute between CEC and KCM.⁶ This despite the Respondents' argument that no attempt was made to prevent CEC from using all available legal remedies to recover the debt from KCM.

It was argued that declaring all the transmission or distribution lines as a common carrier was excessive as it not only deprived CEC of the commercial use of its property but also opened them up to use by anyone. What the Minister could have done under the circumstances was to declare only those transmission and distribution lines of the CEC that supply power to KCM and not declare the entire interconnected system as a common carrier.⁷

2. A declaration that the Minister's direction for CEC to provide a wheeling path for ZESCO to supply power to KCM on terms dictated by the ERB is illegal and therefore null and void.

It was contended that the decision of ERB's Director-General, on the directive of the Minister, dictating the wheeling tariff without allowing the CEC and ZESCO an opportunity to engage in negotiations for a wheeling agreement was sub-optimal, uneconomical, and spurred by ill-motive of the Minister;⁸ contrary to the express provisions of Section 15(2) of the EA. It is only in default of such agreement that these can be determined by the ERB. It was the Court's considered view that the Minister exceeded his powers.⁹ The Court ultimately held that the 'decision of the Minister that the terms and conditions for the use of the Copperbelt Energy

⁴ Section 15 reads:

- (1) The Minister may, by statutory instrument, declare a transmission or distribution line as a common carrier for the purposes of this Act.
- (2) A transmission or distribution line that is declared as a common carrier may be used for the purpose of an enterprise on terms and conditions that may be agreed between the enterprise and a person who owns or controls the transmission or distribution line concerned or, in default of that agreement, as may be determined by the Energy Regulation Board, with the approval of the Minister.

⁵ *The People v Attorney General & Energy Regulation Board* [2020] HP 0575, J 58.

⁶ *Ibid*, J 16.

⁷ *Ibid*, J 66.

⁸ *Ibid*, J 19.

⁹ *Ibid*, J 58, 59 & 70.

Corporation's distribution and transmission network would be determined by the ERB is illegal because he has no such power.'¹⁰

On whether the Minister's decision to invoke section 15 was spurred by bad faith or ill-motive, the Court found no evidence concluding that the decision was made to resolve the 'impending crisis looming that would have led KCM not to have power supply.'¹¹

A plausible argument is that the Minister is determined to 'assist' KCM whatever the cost or implication. If the decision to invoke section 15 was not spurred by improper motive, the Minister would have heeded the advice of the Court to utilise only the transmission and distribution lines that supply power to KCM. In any case, such insistence by the Minister is misguided as the judgment of the Court is binding unless overturned by a Superior Court.

3. A declaration that the Minister of Energy's decision to issue SI 57 of 2020 was illegal

It was argued that the SI is *ultra vires* section 15 and as such, illegal. The reasoning for this was premised on the fact that the wording of the SI leaves no room for the affected person to manoeuvre. The Court rightly found that CEC 'cannot even negotiate new terms or conditions' without violating the SI.¹²

The Court agreed with the Applicants' argument that to the extent that ERB would set the terms and conditions for the use of CEC's infrastructure, is *ultra vires* section 15(2) and therefore illegal.'¹³ Counsel for the Applicant went as far as arguing and the Court affirming that the Minister's action in passing SI could amount to expropriation.¹⁴ This, however, was not explored further in the judgment.

4. A declaration that the wheeling tariff of USD5.84/KW/month is illegal and therefore null and void.

It was argued that in arriving at the tariff of USD5.84/KW/month, ERB ignored the principles set out in section 30 of the EA.¹⁵ It was contended by ERB that the tariff was arrived at based on ERB's 'database and the interim determination was based on the Southern Africa Power Pool sub wheeling tariff for customers on the Copperbelt'. This was, however, rejected by the Court on account that ERB's 'decision to set the wheeling tariff before the contracting parties

¹⁰ Ibid, J 64.

¹¹ Ibid, J 70.

¹² Ibid, J 61.

¹³ Ibid, J 64.

¹⁴ Ibid, J 17 & 64.

¹⁵ Section 30(1) of the EA reads:

'The Energy Regulation Board shall, in determining a tariff or variation of a tariff, take into account the following principles:

- (a) a tariff shall be fair and reasonable and reflect the cost of efficient business operation;
- (b) a tariff shall ensure quality of service, predictability of tariff adjustment and reasonable rate of return on capital investment;
- (c) a tariff shall encourage competition, economical use of the source of the electricity, good performance and optimum investment;
- (d) a tariff shall reward efficiency in performance; and
- (e) reflect enforceable standards for the quality and cost of the supply of electricity to retail consumers and non-retail consumers.

could engage in negotiations...is an act of illegality and is procedurally improper.’¹⁶ The decision by the Court was premised on the fact that sec 15(2) of the Act ‘specifically provides that terms and conditions ought to be agreed between the enterprise and the owner of the transmission or distribution line.’¹⁷

Significance

There are at least three respects in which this decision is significant. Firstly, from an energy policy perspective, though no evidence of bad faith was found to have existed at the time the matter was decided, recent sentiments by the Minister seem to suggest an improper motive for invoking section 15. Within a few weeks of the judgment, the Minister stated that there is a ‘law now which allows other power producers to supply any client of their choice...all they (CEC) have to do is to have a contract in place’ and then buy electricity from any other power producers.¹⁸ The Minister has reiterated that ‘the Constitution gives me the power to make decisions. When I make a decision, it becomes a policy and no one can go against it. So we are going to Court so that my decision as Minister is respected.’¹⁹ These sentiments may explain why the Minister insists on ZESCO supplying power to KCM, using CEC transmission and distribution lines, yet his decision was annulled.

Secondly, from an investment law perspective, the assertion that the Minister’s decisions may have amounted to expropriation was not further inquired into. This could be considered a missed opportunity as the principles of expropriation are still debated in this jurisdiction even among undergraduate scholars of law.²⁰ As observed, expropriation occurs where a state interferes with the property rights of the investor with the effect of ‘deprivation of the economic use and enjoyment of the rights to the investment.’²¹ Article 10(3)(4) of the Constitution (amendment No. 2), 2016 mandates the Government to ‘promote local and foreign investment and protect and guarantee such investment through agreements with investors’ and not to ‘compulsorily acquire an investment, except under customary international law.’ Where an investment is compulsorily acquired, compensation shall be paid by the Government.²² It is asserted that the Court missed the opportunity of interrogating further the aspect of expropriation notwithstanding having made the right conclusion. Ironically, though assertions were made by Counsel to that effect, such was not coupled with firm arguments demonstrating whether or not an expropriation had occurred.

Finally, from an energy justice perspective,²³ the decision makes it clear that even large corporations must be afforded procedural fairness when government deals with them. In arriving at its decision, the court considered the facts and law discussed above and stated that the Minister failed to avail procedural fairness towards the company. This was especially because the SI was too wide in application.²⁴ The decision to declare CEC’s transmission lines

¹⁶ *The People v Attorney General & Energy Regulation Board* [2020] HP 0575, J 59.

¹⁷ *Ibid*, J 60.

¹⁸ *Daily Mail* ‘ZESCO power supply to Mines will continue’ 9 March 2021, 2.

¹⁹ *Daily Nation* ‘Govt decides to appeal against CEC ruling’ 6 March 2021, 3.

²⁰ N Taher *Lands Acquisition Act and its Influence on Investor Confidence in Zambia: Judicial Approaches To Defining Public Interest* (2017 unpublished LLB dissertation ZCAS-University)

²¹ C Mulenga *Foreign Direct Investment and the Law in Zambia* (2020) 149.

²² Article 10(5).

²³ See Raphael J Heffron and others, ‘A treatise for energy law’ (2018) 11 *The Journal of World Energy Law & Business* 34; Chisanga KMG and Heffron R, ‘Legal Case Note: Nevsun Resources Limited v. Araya’ *Global Energy Law and Sustainability* 1.2 (2020): 248–251 (Edinburgh University Press).

²⁴ *The People v Attorney General & Energy Regulation Board* [2020] HP 0575, (at J55).

as a common carrier affected all of the company's lines including those used to supply other customers in the Copperbelt and the Democratic Republic of Congo. The sentiments of the Court in this judgment are, therefore, encouraging to investors who may have had little confidence in the level of energy justice they can expect from the Zambian government.

Conclusion

The Court correctly applied the law overturning the decision of the Minister to declare CEC's transmission and distribution lines as a common carrier. It also correctly held the decision by ERB to impose a wheeling tariff as illegal. While we agree with the decision, it was a missed opportunity by the Court to expansively deal with the issue of expropriation despite having made a correct finding of its existence. Although the Court rightly found no improper motive by the Minister in invoking section 15 of the EA, the recent sentiments seem to suggest otherwise. The matter has since been appealed to the Court of Appeal.