

LICENSING OF ETHANOL PRODUCERS IN THE FUEL SECTOR

Commentary on a Business Weekly article of 4-10 May 2018 titled “Ethanol shortages push up fuel price.....as Green Fuel stops production”

The *Business Weekly* of 4 May 2018 reported that the price of fuel has increased as a result of the failure by Green Fuel to resume the production of ethanol on the back of its annual shut down at the end of 2017. It was also reported that, as a stop gap measure, Triangle Limited has been mandated to supply ethanol from its surplus until 15 May 2018 when Green Fuel is expected to resume production.

On 28 May 2018 the Parliamentary Committee on Mines and Energy met to receive oral evidence from the Ministry of Energy and Power Development, the Ministry of Finance and Economic Development, the Zimbabwe Energy Regulatory Authority (ZERA) and related players on the petroleum sector. The *Daily News* of Tuesday 29 May 2018 reported that ZERA’s Chief Executive testified that the sole licensed ethanol producer Green Fuel sells ethanol at \$1.10 per litre while Triangle Limited sells it at \$0.88 per litre. The *News Day* of the same day reported that the Chairperson of the Parliamentary Committee accused Ministry of Energy officials of taking bribes from Green Fuel in order to allow Green Fuel to maintain a monopoly on mandatory blending ethanol production.

Green Fuel is the sole licensed producer of anhydrous ethanol for mandatory blending with unleaded petrol. The periodic shortage of ethanol over the years and the Green Fuel prices bring into question the desirability of maintaining the regulations governing mandatory blending of fuel in their current form. This article explores the legality of this monopoly and whether ZERA has discharged its statutory mandate.

The principal statute governing the petroleum industry is the **Petroleum Act [Chapter 13:22]** which provides for the licensing and regulation of the petroleum industry. The **Petroleum Act** is administered by the Minister of Energy and Power Development. The **Petroleum Act** also assigns certain functions to ZERA including ensuring the provision of sufficient fuel products for the domestic market, the promotion of effective competition between persons engaged in the petroleum industry, the expansion of the petroleum industry and the advancement of technology relating to the petroleum industry. The **Petroleum Act** further requires ZERA to monitor and ensure that the provision of petroleum products is being done competitively.

The Mandatory Blending Regulations

In 2013 the Government introduced the mandatory blending of unleaded petrol with ethanol in line with international practice aimed at reducing engine exhaust fumes and dependence on fossil fuels. The **Petroleum (Mandatory Blending of Anhydrous Ethanol with Unleaded Petrol) Regulations, 2013** Statutory Instrument 17 of 2013 (the Regulations) govern the mandatory blending of unleaded petrol imported into

Zimbabwe by rail or pipeline. Section 4 (1) of the Regulations provides that:

“Subject to section 1(2), no procurement licensee or wholesale licensee or retail licensee shall sell unleaded petrol to end users, unless the unleaded petrol has been blended with—

- (a) 10% locally produced anhydrous ethanol, being blend E10; or*
- (b) 15% locally produced anhydrous ethanol, being blend E15; or*
- (c) 20% locally produced anhydrous ethanol, being blend E20;*

which is produced by an ethanol blender”

Section 4 (3) further provides that:

*“No licensed ethanol blender shall purchase anhydrous ethanol for blending purposes except from a **licensed ethanol producer**”* (My emphasis added)

A licensed ethanol producer is defined by the Regulations as:-

“A production licensee who is licensed to manufacture and produce anhydrous ethanol for mandatory blending with unleaded petrol in joint venture with the Government of Zimbabwe.

Provided that where the licensed producers are not able to provide anhydrous ethanol for mandatory blending, any other producer of ethanol can supply anhydrous ethanol for mandatory blending.”

As already stated, Green Fuel is the only licensed ethanol producer since the introduction of mandatory blending. Prior to 2013, Triangle Limited had been producing blending ethanol as a by-product of sugar production.

Impact of Mandatory Blending Regulations on the Ease of Doing Business in the Petroleum Industry

ZERA is a creature of statute; as such its powers and obligations are limited by the enabling statutes which in this case are the **Energy Regulatory Authority Act** [Chapter 13:23] and the **Petroleum Act**. The **Petroleum Act** empowers the Minister of Energy and Power Development after consultation with ZERA, to make regulations prescribing all matters which are required or permitted to be prescribed by the Act or which, in the opinion of ZERA, are necessary or convenient to be prescribed for carrying out or giving effect to the **Petroleum Act**. The **Petroleum (Mandatory Blending of Anhydrous Ethanol with Unleaded Petrol) Regulations, 2013** require all fuel imported into Zimbabwe by rail or pipeline to be blended only with ethanol from Green Fuel. This is unlawful because it is directly in conflict with the promotion of effective competition between persons engaged in the petroleum industry, the expansion of the petroleum industry and the advancement of technology relating to the petroleum industry as required by the **Petroleum Act**.

The statutory functions and powers of ZERA are further prescribed in the **Energy Regulatory Authority Act** and again include the duty to:-

“(g) maintain and promote effective competition within the energy industry; and

(b) promote and encourage the expansion of the energy industry and the advancement of technology relating thereto.”

It can be debated whether the ethanol used in the blending of unleaded petrol should be restricted to locally produced ethanol. What is apparent however is that the stringent regulations governing the sale of unleaded petrol to end users do not warrant the creation of a monopolistic situation for the benefit of one entity with other ethanol producers being used only as a stop gap measure when the licensed ethanol producer is unable to deliver.

The **Petroleum (Mandatory Blending of Anhydrous Ethanol with Unleaded Petrol) Regulations, 2013** prescribe that a producer who wishes to supply anhydrous ethanol for the local petroleum market can only be licensed if, first, the ethanol is produced locally and second, the ethanol is produced in a joint venture with the Government of Zimbabwe. These requirements, in our opinion, are not reasonably necessary “*to create, promote and preserve an efficient energy industry market for the provision of sufficient energy for domestic and industrial use*” and in fact negate ZERA’s duty to develop and implement laws and policies that reduce barriers to entry into the petroleum industry and its obligation “*to promote and encourage the expansion of the energy industry and the advancement of technology relating thereto*”.

The strategy to grow and expand local sources of energy (by requiring the ethanol component of the blended fuel to be locally produced) is in line with the National Energy Policy. The prescription of the business model

that investors in the mandatory blending ethanol sector must adopt that is a joint-venture with the Government is however contrary to the value addition and beneficiation strategy of the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim Asset). Zim Asset recognises the key role to be played by the private sector in the funding and execution of business activities that foster the growth of the energy sector, and acknowledges the need to develop and implement policies and laws that expand the sources of energy.

Competition in the Petroleum Industry

Section 30(2) of the **Petroleum Act** provides as follows:-

“A procurement licensee shall sell petroleum products in an open, transparent and competitive manner unless the circumstances require otherwise or the Authority allows or requires an alternative method of sale.”

The monopoly created by ZERA is proscribed by the anti-trust statute the **Competition Act** [Chapter 14:28] which defines a monopoly situation as a situation in which a single entity exercises, or two or more entities with a substantial economic connection exercise substantial market control over any commodity or service. Section 2 of the **Competition Act** further defines a restrictive practice as:-

“(a) any agreement, arrangement or understanding, whether enforceable or not, between 2 or more persons...”

which restricts competition directly or indirectly to a material degree, in that it has or is likely to have any one or more of the following effects—

(i) restricting the production or distribution of any commodity or service;

(ii) limiting the facilities available for the production or distribution of any commodity or service; ...

(vi) preventing or restricting the entry into any market of persons producing or distributing any commodity or service;

(vii) preventing or retarding the expansion of the existing market for any commodity or service or the development of new markets therefor...”

Conclusion

The joint-venture between Green Fuel and the Government directly restricts competition to a material degree. The **Petroleum (Mandatory Blending of Anhydrous Ethanol with Unleaded Petrol) Regulations, 2013** have the effect of restricting production of mandatory blending ethanol by limiting the facilities where ethanol can be produced and preventing entry into the market by new entrants. The Regulations are unlawful in that they are in violation of the **Competition Act**.

The Regulations have also created a monopoly situation in which two entities exercise substantial market control over the production of ethanol for the mandatory blending with unleaded petrol. They further created restrictive practice characterised by:-

- (a) Restriction in ethanol production as new entrants are required to be in a joint venture with the Government of Zimbabwe, thus preventing the sourcing of ethanol from outside Zimbabwe; and
- (b) Restriction and retardation of the private sector's ability to develop and introduce technical improvements in the production of anhydrous ethanol for mandatory blending.

The requirement that only an entity which is in a joint venture with Government can be a licensed mandatory blending ethanol producer and the failure by ZERA to license any other entity apart from Green Fuel is clearly anti-competitive. It offends against the **Petroleum act**, the **Energy Regulatory Act** and the **Competition Act** and is thus unlawful. The Minister of Energy and Power Development in consultation with ZERA has clearly spelt out responsibilities which were meant to ensure that monopolies are not created. The Petroleum (**Mandatory Blending of Anhydrous Ethanol with Unleaded Petrol**) Regulations, 2013 must be amended so as to foster genuine and effective competition in the petroleum industry. If that is done the annual shut down of Green Fuel will be of no moment and it may result in the price of fuel going down.

Harare, 31 May 2018

<i>By</i> Arnold Chikazhe Associate Corporate & Commercial Department	&	Sara Moyo Partner Intellectual Property Department
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