HAMUTENDI KOMBAYI
and
KENNETH MAREKIWA SITHOLE
and
WILLARD NDAGUTA
and
GIBSON JACKSON FUNDIRA
and
CHARLES CHIKOZHO
and
CATHERINE MHONDIWA
and
ERNEST GUDUZA
and
ALEXANDER NORMAN MHONDIWA
and
TAWANDA MAGIDI
and
FARAYI J MUZA
and
BORNFREE MAGARA
versus
MINISTER OF LOCAL GOVERNMENT, PUBLIC
WORKS AND NATIONAL HOUSING
and
THE PROVINCIAL ADMINISTRATOR FOR
THE MIDLANDS PROVINCE
and
DR LUCKSON CHIKUMBIRIKE NO.
and
MR G. N KHOSA NO.
and
NICHOLAS MOYO NO.

HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 18 AND 22 FEBRUARY 2016

Opposed Application

R. Chidawanyika with *E. Mandipa* and *L Mudisi* for the applicants
E. Mukucha and Ms *R. Hove* for the respondents

BERE J: This matter was originally brought to this court as an urgent application and argued on 22 September 2015.

Pursuant to that, in a well-reasoned judgment my sister Judge MOYO J granted a provisional order couched as follows:

"INTERIM RELIEF GRANTED

That pending the confirmation of the Provisional order the applicants are granted the following relief:

1. That pending finalization of this matter, all disciplinary proceedings against applicants that are pending before the tribunal appointed by the first respondent are hereby stayed.
2. That first respondent and second respondent jointly and severally bear the costs of this application."

The applicants' application before me now seeks the confirmation of the provisional order and the final order desired by the applicants is to the following effect:

"FINAL ORDER

1. That the conduct of the first respondent to appoint a tribunal set to hear charges against applicants be and is hereby declared to be *ultra vires* the constitution.
2. That the first respondent's letter dated the 25th of August to applicants be declared to be null and void and of no force or effect and is hereby set aside.
3. That the proceedings presided by the tribunal be and are hereby declared to be null and void *ab initio*.
4. That the second respondent's letter dated the 27th of August to the applicants be declared to be null and void.
5. That the first and second respondents bear the costs of suit."

The respondents have rigorously opposed the confirmation of the provisional order sought and have instead sought to have the order discharged.

Perhaps, in passing, and before dealing with the substantive arguments in this case, I note that the second part of the provisional order alluded to the respondents having to bear costs of suit. It is not normal that a provisional order would contain such a provision as the issue of costs is generally reserved for consideration or determination on the return day when the granting or non-granting of the final order is determined. I sincerely hope that no effort has been made by the applicants to enforce part 2 of the provisional order granted.

That aside, let me now focus on the issue that I am seized with in this application.

The facts giving rise to this case can be briefly summarized as follows:

The first applicant in this case is the current mayor of the City of Gweru whilst the rest of the applicants are councilors of Gweru City Council having been so elected in the harmonized election of 2013. On 12 August 2015 the applicants were suspended and immediately evicted from their offices without remuneration from Gweru City Council by the first respondent in terms of section 114 (1) (c) (d) (i) (ii) of the Urban Councils Act (the Act) [1]on a litany of allegations which impacted negatively on their ability to continue discharging their functions as the servants of the Gweru City Council.

Following their suspension, on 25 August 2015 the first respondent then served the applicants with a formal notice to appear before a tribunal to be chaired by the third respondent together with two other members cited as the fourth and fifth respondents. Subsequent to this, and on 27 August 2015 the applicants were served with a document containing specific allegations which had been preferred against them and which the tribunal was supposed to deal with. For some strange reasons these charges were now framed by the second respondent. All the correspondents sent to the applicants clearly indicated that the first and the second respondents were acting in terms of section 114 of the Act.

The applicants sought legal advice and the result of their effort was a fairly detailed letter dated 2 September 2015 from a Mr *T Christmas*, a senior projects lawyer attached to the Zimbabwe Human Rights NGO forum. This letter was addressed to the first respondent and copied to the other respondents. The import of the letter in question was to highlight to the respondents the impropriety of proceedings against the applicants in terms of section 114 of the Act in the light of the clear provisions of section 278 (2) and (3) of the Constitution of the Republic[2] which ought to have been invoked in dealing with the applicants.

Despite all these efforts by the applicants to have the proceedings before the tribunal stopped, the respondents were determined to go ahead with the path they had chosen, and continue with the hearing before the tribunal. The urgent application filed and the provisional order granted in this case was a desperate effort by the applicants to force the respondents to act within the parametres of the law in dealing with them and as perceived by the applicants themselves.

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[1] . Chapter 29:15

[2] . Constitution of Zimbabwe Amendment (No. 20) Act 2013

As already indicated the respondents have vehemently opposed this application and their position is that in suspending and subsequently setting up a tribunal the first respondent has fully complied with the provisions of both the Urban Councils Act and the Constitution.

ISSUE BEFORE THE COURT

The issue that I have to deal with has been simplified by the detailed heads filed by both counsels and for which I would want to express my appreciation. The issue as perceived is simply whether the first respondent and the rest of the respondents should have proceeded to deal with the applicants in terms of section 114 of the Urban Councils Act or in terms of section 278 of the Constitution of the Republic.

For clarity's sake section 114 of the Urban Councils Act provides for both the "suspension and dismissal of Councillors" and is framed as follows:

1) Subject to this section, if the Minister has reasonable grounds for suspecting that a councillor—

(*a*) has contravened any provision of the Prevention of Corruption Act [*Chapter* 9:16]; or

(*b*) has contravened section *one hundred and seven* section *one hundred and eight* or section *one hundred and nine*; or

(*c*) has committed any offence involving dishonesty in connection with the funds or other property of the council; or

(*d*) has been responsible—

(i) through serious negligence, for the loss of any funds or property of the council; or

(ii) for gross mismanagement of the funds, property or affairs of the council; whether or not the councillor's responsibility is shared with other councillors or with any employees of the council; or

(*e*) has not relinquished office after his seat became vacant in terms of this Act; the Minister may, by written notice to the councillor and the council concerned, suspend the councillor from exercising all or any of his functions as a councillor in terms of this Act or any other enactment.

(2) Any allowance that is payable to councillors in terms of this Act shall continue to be paid to a councillor who has been suspended in terms of subsection (1) for so long as he remains a councillor, unless the Minister, by notice in writing to the council concerned, directs otherwise.

(3) As soon as is practicable after he has suspended a councillor in terms of subsection (1), and in any event within forty-five days, the Minister shall cause a thorough investigation to be conducted with all reasonable dispatch to determine whether or not the councillor has been guilty of any act, omission or conduct referred to in that subsection.

(4) If, following investigation, the Minister is satisfied that the grounds of suspicion on

the basis of which he suspended a councillor in terms of subsection (1) have been established as fact, he may, by written notice to the council and the councillor concerned, dismiss the councillor, and the councillor's seat shall thereupon become vacant.

(5) A person who has been dismissed in terms of subsection (3) shall be disqualified from nomination or election as a councillor for a period of five years."

On the other hand section 278 of the Constitution specifically provides for the

Tenure of seats of members of local authorities and is worded as follows:

"1) The seat of a mayor, chairperson or councilor of a local authority becomes vacant in the circumstances set out in section 129, as if he or she were a member of Parliament, any reference to the Speaker or President of the Senate in section 129 (1) (k) being construed as a reference to the Minister responsible for local government.

(2) An Act of Parliament must provide for the establishment of an independent tribunal to exercise the function of removing from office mayors, chairpersons and councilors, but any such removal must only be on the grounds of –

(a) inability to perform the functions of their office due to mental or physical incapacity;

(b) gross incompetence;

(c) gross misconduct;

(d) conviction of an offence involving dishonesty, corruption or abuse of office; or

(e) wilful violation of the law, including a local authority by-law.

(3) A mayor, chairperson or councilor of a local authority does not vacate his or her seat, except in accordance with this section."

There can be no doubt that section 114 of the Urban Councils Act is in direct conflict with section 278 of the Constitution. It is abundantly clear that whereas section 114 of the Urban Councils Act gives all the power to suspend and dismiss Councillors to the first respondent, section 278 of the Constitution provides a new paradigm shift from this scenario. Section 278 sets out a completely different regime in the removal of Councillors from office. The section arrogantly and authoritatively concludes as follows:

"278 (3) A mayor, chairperson or councilor of a local authority does not vacate his or her seat except in accordance with this section."

This peremptory dictation of the constitution is there for all to see. The section requires no further interpretation except what it says.

Counsel for the applicants passionately put a refined argument that section 114 of the Urban Councils Act must graciously pave way for section 278 of the Constitution when it comes to the eviction of councilors from office. I agree.

The supremacy of the Constitution of the Republic finds expression in the preamble to the constitution which reads as follows:

> "Supremacy of constitution
> (i) This constitution is the Supreme Law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency."[3]

Further, as correctly noted by the applicants' counsel while leaning on one of the leading legal writers Frank 1 Michelman:

> "--- whenever and in so far as legal norm or rule of decision laid down by the constitution comes into practical collision with the legal norm or rule of decision laid down by any sort of non-constitutional law-be it parliamentary legislation, subordinate legislation, common law, or customary law, – the constitution's norm is to be given precedence by anyone whose project is to carry out the law"[4]

The supremacy of the constitution was fairly recently highlighted in the South African case of *Pharmaceutical Society of South Africa and Others* v *Minister of Health and Another* where the court succinctly put it in the following:

> "there is only one system of law. It is shaped by the Constitution which is the Supreme law, and all law including the common law derives its force from the constitution and its subject to constitutional control."[5]

All what this boils down to is that Constitutions all over the planet place constraints on the exercise of public power for obvious reasons. If left unchecked Executive power can be cause for night mare to the citizenry. Baxter and Hoetter could not have put it in a clearer way when they noted:

> "The grandnorm of the Administration law is to be found in the principles of the Constitution"[6]

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[3] . Section 2 of the Constitution of Zimbabwe *(supra)*

[4] . "Rule of Law, Legality and Supremacy of the Constitution" in *Constitutional Law of South Africa*, 2nd Edition, Volume 1 by Woolman, Roux, Klaaren, Chakalson et al Juta at p. 11

[5] . Case No. 4128/04 at page 14

[6] . Baxter, Administrative Law 1984 and C Hoexter, *Administrative Law of South Africa* 2nd Edition, 2012

Faced with an almost insurmountable task of trying to defend the conduct of the respondents in this matter counsel for the respondents put up a brave face and sought to find refuge in section 10 under Part 4 of the sixth schedule to the Constitution of Zimbabwe which is framed as follows:

> "Continuation of existing Laws
>
> 10 Subject to this schedule, all existing laws continue in force but must be construed in conformity with the constitution" (my emphasis)

This section simply means what it says and in interpreting it I could not agree more with my sister Judge MOYO J when she remarked as follows:

> "My understanding of this clause is that the current constitution did not repeal all existing laws, they are still in force but rather they should be construed in conformity with the constitution meaning that they should be applicable where they conform with the constitution and where they are inconsistent with the constitution obviously they should be amended and realigned to it."[7]

There can be no doubt that the provisions of section 114 of the Urban Councils Act are inconsistent with the sweeping provisions of section 278 of the Constitution. Naturally section 114 must graciously give way to section 278.

Fully appreciating that he was on slippery ground in as far as his arguments to torpedo the clear provisions of section 278 of the Constitution were concerned, counsel for respondents urged me to consider invoking the provisions of section 175 (6) (b) of the constitution.

The argument was premised on the conviction by counsel that if this court were to grant the remedy as desired by the applicants, then chaos would reign supreme at Gweru City Council as the first respondent would not be in a position to effectively deal with errant councillors. Counsel therefore urged the court to grant the first respondent more time to remedy the apparent invalidity of the impunged section 114 of the Urban Council Act.

In so urging me to use my discretion, respondents' counsel referred me to a host of persuasive authorities one of which is the South African case of *Fose* v *Minister of Safety and Security* where the learned judge KRIEGLER J had this to say:

> "When courts give relief, they attempt to synchronise the real world with the ideal construct of constitutional world. This means that a court should not only consider what is appropriate relief under the circumstances is, but also what the effect of its order on the

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[7]. *Hamutendi Kombayi and 10 others* v *Minister of Local Government, Public Works and National Housing and Others* HB 188-15 at p. 6 of the cyclostyled judgment.

> general public will be. It must take into account the interests of all persons affected thereby. It must also determine whether the declaration of invalidity will give rise to a situation less consistent with the Constitution than the existing situation."[8]

The difficulty with this argument is that it does not find expression in the notice of opposition filed but is merely created in the heads of argument. The issues now being canvassed in the heads are not canvassed in the notice of opposition filed by the respondents. Heads of argument when filed take their roots from the pleadings filed of record and can never be pinned in air.

More importantly the suggestion by respondents' counsel fails to realize that what we are dealing with is not merely a superficial violation of the Constitution. The court has had to deal with not only the illegal actions by the first respondent but also the second respondent who has given himself powers which are not recognized even in terms of section 114 of the Urban Councils Act. There is no provision in section 114 of the Urban Councils Act for the second respondent to lay any charges against the applicants, that remains the prerogative of the first respondent.

Thirdly and equally important the suggestion made by the respondents' counsel fails to realize that in this case we are dealing with a serious violation against the Constitution made by the respondents with their eyes wide open. The respondents have without decorum decided to act against the clear dictates of the constitution despite repeated pleas by the applicants through their counsel. There is no indication on the papers filed before me that the respondents have made any effort to seek their counsel's legal opinion on the pertinent legal points raised by the applicants through their counsel. There is also no indication that ever since the provisional order was granted by my sister Judge MOYO J, the respondents have made any effort to align section 114 with section 278 of the Constitution.

When section 278 of the Constitution speaks to the need to appoint an <u>independent tribunal</u> to look into the allegations raised against the applicants it means much more than hand picking those who constitute such a tribunal. The qualifications of those independent members of such a tribunal must not be a subject of speculation but it remains the prerogative of the Legislature to define such qualifications.

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[8] : 1997 (3) SA 786 (CC); 1997 (7) BLCR 851 (CC) para 94.

In the absence of a specific Act of Parliament put in place to define the nature of the independent tribunal envisaged, it was not competent for the first respondent to hand pick individuals to sit in the tribunal and purport to have complied with the Constitution.

The position urged upon me by respondents' counsel does not sound good in law because acceeding to it would create an untenable situation where this court is seen to be aiding and abeting those in positions of authority to disregard specific peremptory provisions of the Constitution. Our role as courts is to ensure compliance with the law and the constitution in particular because it is the supreme law of the land. It is the most important document in the management of the affairs of any country. The position as urged upon me by the respondent would render the constitution of the Republic nugatory and create an unattractive precedent.

I have agonized over the question of costs in this case given the issues involved. Under normal circumstances I would have been persuaded to spare the first and second respondents from the burden of costs. I gave respondent's counsel an opportunity to address me on the question of costs. For some strange reason he maintained that the respondents acted in terms of the law. How strange?

The first respondent, being charged with the administration of the Urban Council Act has a Constitutional mandate to ensure that its provisions are aligned with the Constitution to avoid undesired consequences. Nothing has been put before me to demonstrate the first respondent's enthusiasm to align the offending provisions of the Urban Councils Act with the new constitution. The second respondent blindly waded into the conflict between the applicants and the first respondent and gave himself powers which he does not have.

When the Court is faced with such errant litigants, they must not be spared the burden of costs.

Consequently the provisional order granted by my sister MOYO J is confirmed and the final order is granted in the following terms:

It is ordered:

(1) The conduct of the first respondent in appointing a tribunal to hear charges against the applicants be and is hereby declared to be ultra vires section 278 (3) of the Constitution of Zimbabwe

(2) That the notice of 25 August 2015 and the charges as contained in the letter of 25 August 2015 and purported to have been crafted in terms of section 114 of the Urban Councils Act be and are hereby declared to be null and void and of no force or effect.

(3) That the proceedings presided over by the "tribunal" be and are hereby quashed and set aside.

(4) That the first and second respondents bear the costs of suit.

Messrs Chitere, Chidawanyika and partners, applicants' legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners