

REUBEN MATENGU

Versus

THE INDEPENDENT TRIBUNAL

And

HILDA MAKUSHA MOYO N.O.

And

MIDARD KHUMALO N.O.

And

LUCY MANHOKWE N.O.

And

**THE MINISTER OF LOCAL GOVERNMENT,
PUBLIC WORKS & NATIONAL HOUSING N.O.**

And

BULAWAYO CITY COUNCIL

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 18 MAY & 8 JUNE 2017

Unopposed Application for Review

K. Ngwenya for applicant

BERE J: This application for review has been made in terms of sections 26, 27 and 28 of the High Court Act¹ as read with section 114 (1) (c) of the Urban Councils Act.²

1. Chapter 7:06

2. Chapter 29:15

The background to this case can be summarised as follows: The applicant was a councilor for Ward 21, Bulawayo City Council. The allegations against the applicant were that after the applicant had acquired a residential stand with Bulawayo City Council he immediately sold it to a third part before he had even paid for it in contravention of clause 17 of the agreement of sale between himself and Bulawayo City Council.

In response to these allegations the applicant denied violating the clause in question and stated that he had acted above board in disposing of the stand in question. The applicant's position was that he sought for and obtained the authority of the Director of Housing for Bulawayo City Council before he sold the stand.

The conduct of the applicant culminated in him being brought before an Independent Tribunal set up by the parent Ministry viz Ministry of Local Government, Public Works & National Housing in order to deal with the allegations levelled against the applicant.

Pursuant to the hearing that followed which consisted of *inter alia* the recording of *viva voce* evidence and the tendering of documentary exhibits, the Independent Tribunal found the applicant guilty of misconduct as a consequence of which the applicant was evicted from his position as a councilor of Bulawayo City Council. The Independent Tribunal gave a thorough assessment of the evidence that was presented to it in order to support its findings.

Aggrieved by the findings of the Tribunal, the applicant lodged this application for review.

For some reason, despite having been duly served with this application for review all the respondents did not respond to it resulting in this matter being set down for hearing on the unopposed roll.

A closer look at the complaint being raised by the applicant in his review application is simply that the tribunal arrived at a decision which did not go down well with him. In other words the applicant was aggrieved by the findings of the tribunal and not that there was any irregularity in the manner in which the decision was arrived at.

Even during submissions in court, I put a pointed question to the applicant's counsel who was quick to concede that his client (the applicant) was not alleging any irregularity in the manner the proceedings were conducted by the tribunal. Counsel instead alleged that the application for review was prompted by what he termed as "gross unreasonableness" in the decision that was made against the applicant.

This application in my view brings to the fore the need to recognize and maintain the distinction between review and appeal proceedings. Quite often, litigants tend to confuse these two concepts. The mere fact that the objectives of bringing an appeal or a review are basically the same i.e., to have the decision under attack set aside, does not on its own mean that these two concepts of our law are the same. They remain miles apart and the distinction must always be observed to ensure that the correct remedial action is instituted.

The position of the law in this regard is succinctly put by Herbstein and Van Winsen in the following:

"The reason for bringing proceedings under review or an appeal is usually the same, viz to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of trial, it is proper to bring the case on review. The first distinctions depend, therefore, on whether it is the result only rather the method of trial which is to be attacked. Naturally the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not review upon this test. The essential question in review proceedings is not the correctness of the decision under review, but its validity."³

3. The Civil Practice of the High Courts of South Africa, Fifth edition Volume 2, published by Juta at p 1271

MAKARAU J (now JA) could not have put it in any better way in the case of *Dombodzuku and Anor v Sithole NO & Anor*⁴ when she remarked:

“As observed in *Oskil Properties v Chrman, Rent Control Board* 1985 (2) SA 234 (SEC), the onus resting upon a litigant to set aside the exercise of a discretion on grounds of unreasonableness is considerable. In my view, the task is Herculean if it is an interpretation of the law by a judicial officer that is sought to be impugned as being unreasonable. An incorrect rendition of the law cannot be grossly unreasonable merely because it does not find favour with its attacker. The person attacking it must go further and show that on the facts before the court, the decision reached defies all logic and is completely wrong. A different, opinion of the law, clearly showing how it was arrived at cannot be said to defy logic. It may be wrong but may not necessarily be unreasonable.”⁴

I am quite aware that in the matter that I am seized with, the decision whose review has been sought was not a decision of a judicial officer but that of a quasi-judicial body in the form of a tribunal. Despite this, I am certain the observations by the learned Judge in *Dombodzvuku (supra)* would apply with equal force.

I have had the privilege of going through the decision of the tribunal in the instant case. The sound reasoning in that decision is unmistakable. It involved what I would refer to as a thorough assessment of the material that was placed before the tribunal. The logic or the reasoning process that the tribunal engaged in as it moved towards the determination of the matter is clearly laid out in the record of proceedings. It is there for all to see. The decision may be wrong (which sentiment I do not share) but clearly it is outside the purview of review.

It is noted in this case, and as has become customary in similar cases that in a desperate attempt to make an unreviewable case fit within the ambit of review proceedings the terms “grossly irregular” and “grossly unreasonable” are thrown into the body of the applicant’s founding affidavit. But alas! A reading of the whole record of proceedings does not support this characterization of the proceedings.

4. 2004 (2) ZLR 242 (H) at 246B-C

The inevitable conclusion that I arrive at is that the applicant has used a wrong procedure to have the decision of the tribunal set aside.

The application is accordingly dismissed with costs.

T.J. Mabhikwa & Partners, applicant's legal practitioners