DANIEL MATAWU
versus
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS
AND NATIONAL HOUSING
and
CITY OF GWERU
and
T. MHANGAMI
and
C PARENYI
and
M CHOGA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 7 MARCH 2018 AND 15 MARCH 2018

Opposed Application

R Chidawanyika with *R Ndlovu* for the applicant
M Jaravani for the respondents

MATHONSI J: The applicant is the town clerk for the City of Gweru who was suspended from office by the third respondent in his capacity as the chairperson of a three member commission appointed by the first respondent to run the affairs of the City of Gweru on 15 January 2016 and had an array of misconduct charges preferred against him. Disciplinary proceedings were commenced before a disciplinary committee put in place by the commission. He has brought this application before this court seeking a declaratur *inter alia* that the appointment of a commission and the extension of its terms of office beyond the period of its three months life span was a nullity and that administrative actions taken by the commission including the applicant's suspension and the disciplinary proceedings set in motion were also a nullity.

Under normal circumstances the City of Gweru is run by a full complement of eighteen elected councilors representing wards from where they are elected. For some reason, the first respondent took the unusual decision to suspend all the councilors on 12 August 2015 triggering

protracted litigation which played out in this court and when this court finally reversed the suspensions of the councilors by judgment delivered on 22 February 2016 in HC 2371/15 the first respondent escalated the dispute taking the matter on appeal to the Supreme Court in SC 148/16. Meanwhile the City of Gweru was left with no council to run its affairs although two councilors were later brought back to the fold. That development was unhelpful as the two obviously did not form a quorum.

By letter dated 14 August 2015, the first respondent appointed the third, fourth and fifth respondents as a caretaker commission to run the affairs of the City. The letter reads:

> "RE: APPOINTMENT OF CARETAKERS FOR CITY OF GWERU
> Reference is made to the afore-cited subjected (*sic).* Following suspension of all the councilors for the City (of) Gweru on 12 August 2015 I found it expedient in terms of section 80 (1) of the Urban Councils Act [Chapter 29:15] to put in place necessary administrative arrangements for the purpose of ensuring that the operations of council continue. I therefore appoint you as caretakers for the Gweru City Council and Mr T Mhangami shall be the Chairperson. As caretaker, you shall exercise all the functions of the council provided that you shall not without approval of the Minister exercise any power conferred on the council to levy rates or taxes or by the council to fix any new charge. You shall hold the office until there are councilors in place. All the expenses pertaining to your travel, subsistence, allowances and work shall be met by Gweru City Council. You are advised to make use of the resident provincial skills and expertise especially in areas of Health, Water and Sanitation, Environmental Management and any other matter you deem necessary as council.
>
> Hon S. Kasukuwere [M.P]
> Minister of Local Government,
> Public Works and National Housing."
> (The underlining is mine)

The assumption of office by the caretaker commission must have commenced from a wrong footing because surely such a commission could not have a blank cheque, as it were, to "hold office until there are councilors in place" as that was an indeterminable period. It actually explains the glaring mistakes which both the Minister and the committee later made having proceeded from a wrong premise altogether right from the beginning. I say so because section 80 in terms of which the Minister appointed the commission makes it clear that there are limitations to the term of office of caretakers so appointed.

In terms of section 80:

"80 Minister may appoint caretakers to act as council

(1) If at anytime—
(a) there are no elected councilors for a council area; or
(b) all the elected councilors for a council area have been suspended or imprisoned or are otherwise unable to exercise all or some of their functions as councilors;
the Minister may appoint not more than three persons as caretakers, whether or not such persons are qualified through residence or ownership of property to become councilors, to act as the council in accordance with this section.
(2) ---.
(3) A caretaker appointed in terms of subsection (1) shall hold office during the pleasure of the Minister, but his or her office shall terminate—
(a) as soon as there are any councilors for the council area who are able to exercise all their functions as councilors; or
(b) ninety days after the date of his or her appointment; whichever occurs sooner.

Provided that if the period of ninety days expires within three months before the date of the next succeeding general election, the caretaker shall continue to hold office until such general election."

To the extent that the caretakers were appointed on 14 August 2015 and no general election was due until later in 2018 the term of office of the caretakers expired, by peremptory statutory necessity, at the end of ninety days from that date which is 13 November 2015. It is common cause that when the ninety days expired the Minister remained silent and so were the caretakers. They continued in office as if nothing had happened.

It was during the time that they held office illegally that the applicant says he was suspended from office of town clerk by letter written by the third respondent on 15 January 2016. The third respondent wrote the suspension letter in his capacity as "Commission/Caretaker Council Chairman," acting in terms of section 139 (3) of the Urban Councils Act. He complained about management failures in supervising projects among other issues. On 26 January 2016 the third respondent struck again, this time formulating a host of misconduct charges running into ten pages against the applicant in a letter addressed to him on that date. At the same time he wrote another letter to the applicant inviting him to attend a disciplinary hearing on 3 February 2016 before a four member disciplinary committee chaired by Moffat Ndlovu.

The applicant says that after a false start, the disciplinary hearing finally got underway on 25 April 2016 at which he raised the preliminary point that the caretaker commission had no

lawful mandate to hold office at the time they purported to suspend him and to put in place a disciplinary committee to try him of misconduct charges. Not only was his suspension a nullity, so were the charges preferred by an illegal commission. The applicant says that after taking the preliminary submissions the disciplinary committee adjourned until 27 April 2016 to consider the submissions only to return on that date with a letter written to the caretaker commission by the first respondent on 16 March 2016 to wit:

> "RE: AFFIRMATION OF CARETAKERS FOR GWERU CITY COUNCIL
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> Reference is made to your appointment letters dated 14 August 2015. Please note that there is currently no functional council in place for Gweru City Council. In light of this your services as caretakers are still required until there is a fully functional council in place. This letter further serves as a confirmation of your continuing status as caretakers for Gweru City Council.
>
> Thank you
> Hon S Kasukuwere [M.P]
> Minister of Local Government, Public
> Works and national Housing."

If ever there was an exercise in futility, this takes the honours. The Minister appeared to realize for the first time more than four months after the caretaker commission's tenure had expired that there was need to legitimize their continued stay in office. Even as it dawned to him that the caretakers could not hold office indefinitely the prescribed solution raised more questions than answers. If the letter of 16 March 2016 was written upon a realization that the commission's tenure had expired after ninety days of its assumption of duty, what was to happen to the period of more than four months during which it held office before the term was extended or made to continue? Could the letter clothe the commission with legality in retrospect? What then would become of the administrative actions taken by the commission subsequent to the expiry of its term and prior to the magical letter of 16 March 2016. That letter left the commission not only *in limbo* but very high and dry. It was no solution at all.

The applicant would have none of it. He stated that there is nothing in the law which allows a caretaker commission to operate outside the maximum period of ninety days prescribed by section 80 (3) of the Act. By equal measure there is nothing in the law empowering the Minister to extend the life-span of a caretaker commission which has run its course. Worse still

to renew its life four months after it expired could not be done. Apart from that the caretakers could not charge him on the basis of an audit report compiled for the Minister because by doing so they purported to exercise power which they did not have. As such his constitutional rights enshrined in sections 56 (b), 65, 68 and 69 are being violated.

The application is opposed by all the respondents. In his opposing affidavit sworn to on behalf of the first respondent George Sifihlapi Mlilo, the Permanent Secretary in the Ministry stated that the "re-appointment" of the caretakers was appropriate in the circumstances in order to fill a gap left by the suspended councilors. This is because the only two councilors available did not constitute a quorum. The suspension of the applicant was "a valid act." I must say that no attempt is made by the first respondent to point to any law by which such a "reappointment" is permitted.

The rest of the respondents also opposed the application on the basis of necessity. The caretakers continued to run the affairs of council because there were no adequate councilors to do so. The third respondent also took the view that the application raises issues of a labour nature. For that reason this court's jurisdiction is specifically ousted by section 89 (6) of the Labour Act [Chapter 28:01] which allows only the Labour Court to deal with such matters. I should eliminate that argument at once because it is glaringly lacking in merit.

There can be no doubt that what the applicant seeks is a declaratur. Only this court has jurisdiction in terms of section 14 of the High Court Act [Chapter 7:06] to issue a declaratur in its discretion. The section provides that this court may, at the instance of an interested party inquire into and determine any existing, future or contingency right or obligation. The Labour Court does not have such jurisdiction. In any event, section 4 (1) of the Administrative Justice Act [Chapter 10:28] allows a party who is aggrieved by the failure of an administrative body to act lawfully, reasonably and in a fair manner to seek recourse in the High Court. Therefore this court's jurisdiction cannot be said to be ousted in the circumstances.

The issues to be decided in this matter are fairly straight forward. They are whether the Minister is still entitled to appoint a caretaker commission to run the affairs of a municipality. If he or she is, whether once the term of office of such commission has expired, the Minister may extend its term for an indefinite period. If the answers to those two questions are in the negative, whether the applicant's suspension from the post of town clerk by the chairperson of the

caretaker commission was valid and, by extension, whether the institution of disciplinary proceedings against the applicant by the caretaker commission was valid in the circumstances.

Mr *Chidawanyika* for the applicant submitted that for the first respondent to appoint a caretaker council to manage the affairs of the second respondent he can only do so if there is a law empowering him to. I agree. This derives from the principle that in any constitutional democracy, those who exercise public power are constrained to exercise only those powers and to perform only those functions conferred upon them by the law. That is what the rule of law is all about. A public official cannot be allowed to act on a whim or to wield power which he or she does not have and then make appointments derived from nowhere. It would be illegal and completely unacceptable. See *Masetlha* v *President of the Republic of South Africa and Another* 2008 (1) SA 566.

Mr Chidawanyika submitted further that in terms of the 2013 constitution there is no longer any room for the appointment of caretaker councils by the Minister responsible for local authorities. For that reason the first respondent had no power to appoint the caretaker commission in the first place especially as section 274 of the constitution envinces only elected people running the affairs of local authorities. I have no doubt that the spirit and letter of the constitution is that elected councilors, and other officials must run councils as opposed to the imposition of individuals to superintend over councils which tends to take away the prerogative of citizens to elect those of their choosing to run their affairs.

However there is nothing in the constitution, in particular chapter 14 thereof dealing with Provincial and Local Government, which renders section 80 of the Urban Councils Act unconstitutional. I am mindful as well of the fact that section 278 (2) of the Constitution permits the appointment of an independent tribunal to exercise the function of removing from office mayors, chairpersons and councilors on the grounds of inability to perform the functions of their office, gross incompetence, gross misconduct, conviction of an offence involving dishonesty or willful violation of the law. If councilors can be removed from office at any time on those grounds, surely it was anticipated that there may come a time when councilors are unable to run the affairs of the local authority when removal has dissipated the quorum.

It is in that regard that section 80 of the Act sets in to allow for the appointment by the Minister of caretakers with a very limited life-span. The law giver must have envisaged that

scenario as occurred in this particular case but because the constitution is the cornerstone, the Minister's appointing authority is restricted to putting in place caretakers to endure for only ninety days. I therefore reject Mr *Chidawanyika*'s argument that such appointment is unconstitutional.

What then is the implication of the ninety days tenure on the activities of the caretaker commission? Mr *Musika* for the first respondent did not attempt to dispute that the Minister could only put in place caretakers for ninety days. Instead he sought to justify the continued existence of the caretaker commission beyond the statutory ninety days by submitting that it was borne out of necessity. *Mr Jaravani* took the point further by arguing on the basis of public policy that if this court were to declare the activities of the caretaker council beyond ninety days illegal, that would open flood gates in which more people affected by the decisions taken by the caretakers after ninety days may come forward to litigate against the City of Gweru. He added that the decision was taken by a hybrid council consisting of two elected councilors and three caretakers.

Not that the involvement of the two elected councilors would make any difference to the legality of those decisions. I have said that the full council comprises of eighteen elected councilors. In terms of section 84 (2) (b) of the Act all questions coming or arising before a meeting are decided by a resolution passed by a majority of votes cast. Section 85 provides that one-third of the total membership of a council, together with one other councilor, shall form a quorum at a meeting of the council. No matter how one wants to play with mathematics two councilors cannot constitute a quorum. I am not sure whether it is competent to mix elected councilors with caretakers. Even if it was the five of them would still not form a quorum and therefore the decision taken by such an assemblage cannot be valid.

But then all that is purely academic because the validity of decisions and actions taken by the caretaker commission is predicated upon its being lawfully in office. If the commission was illegally operating it could not possibly make valid decisions. In my view it is not for nothing that the Minister is empowered to constitute a caretaker commission to hold office for a limited period of ninety days. In fact that provision in section 80 of the Act is of peremptory application.

By clear and quite unambiguous language the law giver allowed for a caretaker commission of ninety days duration. The first respondent ignored that provision completely

even in his letter of appointment when he appointed the caretakers to hold office until there are councilors in place. In doing so he was acting outside the appointing powers conferred upon him by the enabling section 80. Whatever terms of appointment he cobbled together for the commission they could only be valid to the extent that they fell within the confines of the Act. Therefore the moment the ninety day period expired the commission ceased to hold office lawfully. When it purported to suspend the applicant and to discipline him from 16 January 2016 the commission was engaging in a very futile exercise because it possessed no such authority.

In *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S) at 157 B-C KORSAH JA referred to the seminal remarks of LORD DENNING MR when he said:

> "If the order was *void ab initio* it was void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it. As LORD DENNING MR so exquisitely put it in *Mac Foy* v *United Africa Co Ltd* [1961] 3 All ER 1169 at 1172I:
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> > 'If an act is void, then it is in law a nullity. It is not only bad, but incurably bad --. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'"

Once the mandatory period expired the commission was, as I have said, an unlawful one. The suspension made by an unlawful organization was sitting on nothing. It was also a nullity and so was the appointment of a disciplinary committee to try the applicant.

Could the belated attempt at resuscitation by the first respondent by letter of 16 March 2016 change anything? I do not think so. In the first place there is nowhere in the Act where the first respondent is imbued with power to extend the life-span of a caretaker commission whose term has expired. Secondly he could not purport to extend the term several months after it ended. At best he could have tried to reappoint them but then there is no provision for reappointment either, in as much as there is no lawful means by which a term can be extended.

That was the reasoning of the Supreme Court in *City of Harare* v *Zvobgo* 2009 (1) ZLR 218 (S), a case decided when the Minister still had power to reappoint a commission whose term had expired, by virtue of the then section 80 (5) of the Act which has since been repealed and is no longer part of our law, the court ruled at 228 B –C that the Minister could not lawfully reappoint a commission whose legal tenure has expired as a way of avoiding the holding of

elections. The court also ruled that a commission that has exhausted its legal tenure cannot appoint or constitute a valid committee. It is that principle which invalidates even the disciplinary proceedings before the committee appointed by the commission in the present matter. See also *Stevenson* v *Minister of Local Government and Others* 2002 (1) ZLR 498 (S); *Zvobgo* v *City of Harare and another* 2005 (2) ZLR 164 (H).

I therefore come to the inescapable conclusion that the suspension was invalid. I am not persuaded by Mr *Jaravani*'s argument that public policy demands that the decisions taken by the caretaker commission after it had exhausted its legal tenure should be upheld to save the Municipality from a floodgate of litigation. Surely as a court of law, this court cannot be expected to turn a blind eye at a glaring illegality in order to cover up for those that either did not bother to check the law before acting or deliberately ignored the law and operated outside it. This court cannot legitimize illegal activity for any reason including protecting a municipality that has been forced into an invidious position by the unlawful acts of the first respondent. Indeed there can be no public policy considerations favouring illegality.

In the result, it is ordered that:

1. It is hereby declared that the term of office of the caretaker commission appointed by the first respondent to run the affairs of the second respondent expired ninety days from 14 August 2015, the date of its appointment, and that legal tenure could not be lawfully extended by the first respondent.

2. The suspension of the applicant from the office of town clerk by the third respondent by letter dated 15 January 2016 and the subsequent disciplinary action taken, including charging the applicant with acts of misconduct and the appointment of a tribunal to try the applicant, were all a nullity and of no legal effect.

3. The disciplinary proceedings presided over by a disciplinary tribunal set up by the 3rd, 4th and 5th respondents to hear the matter against the applicant are hereby set aside.

4. The 1st and 2nd respondents shall bear the costs of this application jointly and severally the one paying the other to be absolved.

Chitere Chidawanyika and Partners, applicant's legal practitioners
Civil Division, Attorney General's Office, 1st respondent's legal practitioners
Messrs Tawona & Jaravani Attorneys, 2nd -5th respondents' legal practitioners