

HH 147-03
HC 9159/02
CITY OF HARARE
versus
LESLEY GWINDI

HIGH COURT OF ZIMBABWE
MAVANGIRA J,
HARARE, 23 July and 10 September, 2003

OPPOSED APPLICATION

Mr *Biti*, for the applicant
Mr *Mamvura*, for the respondent

MAVANGIRA J: This is an application for the return by the respondent of his motor vehicle, a Nissan Hardbody registration number 779-208P a mobile phone Nokia 3210 and a set of keys and a counter application by the respondent for his reinstatement by the applicant without loss of salary and benefits.

The following facts emerge from the papers. At the relevant time, the affairs of the applicant were being run by a commission appointed in terms of section 80(1) of the Urban Councils Act, [*Chapter 29:15*], (the Act) by the Minister of Local Government, Rural and Urban Development. In or around December 2001, the applicant invited applications for the post of a Public Relations Manager, Grade 6. Such applications were to be received not later than 4 January 2002. An advertisement was placed in the Herald and also in the Sunday Mail Newspapers on 16 and 20 December 2001 respectively.

Nineteen applications were received after which the applicant's town clerk forwarded to the Chairman and members of the then Executive Committee of the Commission a memorandum dated 14 January 2002 in which he recommended that the Commission convene a meeting to short-list suitable candidates for interview for the position of Public Relations Manager in the office of the Town Clerk and also that the short-list be selected from the list of the said 19 applicants. The memorandum further stated that a total of twenty applications were received, "with one late application". Attached to the memorandum was a document prepared by the Town Clerk giving full details of all applicants including their names, ages, sex, academic and professional qualifications as well as their experience.

On 28 January 2002 the Commission met and debated a number of issues including that of the appointment of a Public Relations Manager. It considered the Town Clerk's report of 14 January 2002 and concluded that all the applicants were not suitable. The relevant portion of the minutes reads:

"The commission considered a report dated 14 January 2002 outlining details of applications received for the above position. The Commission expressed

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dissatisfaction with the applications received.
Following discussion it was -
RESOLVED
That Lesley Gwindi be appointed to the position of Public Relations Manager in Grade 3."

On 31 January 1001, a letter was written to the respondent by the Town Clerk. It reads:

"I make reference to considerations made in respect of the above position in a Special Commission Meeting dated 28th January 2002 and the subsequent decision of the same meeting item 3.

I have pleasure in informing you that you are hereby offered appointment to the position of Public Relations Manager (Grade 3) Town Clerk's Office on a commencing salary of \$1 655 136,00 per annum) - old scale and (\$2 940 000,00 per annum) new scale - inclusive of allowances.

The offer is subject in all respects to the terms and conditions of service - Statutory Instrument 66 of 1992 (General Conditions of Service Agreement).

Confirmation of appointment is subject to compliance with Medical Examination requirements - copies of the Medical Examination forms are hereby enclosed.

Please advise me in writing as soon as possible whether you accept this offer or not.

In the event of acceptance, please indicate the date of assumption of your duties".

The letter was copied to "Commission Chairman; Human Resources Director; Acting City Treasurer; Personal File".

In an undated letter which was received at the applicant's offices on 221 February, 2002, the respondent accepted the offer of employment in the following terms:

"I am writing to inform you that I accept your offer of employment as the City of Harare's Public Relations Manager effective from 1 February 2002.

I am looking forward to working with you and the entire Council".

Subsequently, a written contract of employment was executed between the parties on 27 February 2002.

It also emerges from the papers that on 18 February 2002 the applicant's Human Resources Director wrote a memorandum to the applicant's Chamber Secretary in the following terms:

"Having read the minutes of the Special Commission Meeting may I draw your

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attention to item 3 'Vacant Position of Public Relations Manager'.

The minutes are not clear on whether the applicant was added to the pool of applicants or a head hunting exercise was conducted. Furthermore it is not clear whether he was subsequently interviewed by the Commission.

I am requesting that these aspects of the appointment be clearly worded in the resolution so that the Auditors and City Treasury do not pose unnecessary questions.

One further request is that the decision to upgrade the position from Grade 6 to Grade 3 be reflected correctly. I also wish to enquire if the issue of Local Government approval has been done away with. As you know it is a requirement that appointments to designated positions (1-3) be approved by the Local Government Board."

Subsequent to this and on 1 March 2002, a letter was written to Local Government Board seeking retrospective approval of the appointment of the respondent. The letter reads:

"Authority is hereby sought to appoint Mr L Gwindi to the position of Public Relations Manager in retrospect with effect from 4 February 2002.

The position was advertised and the Commission met on 28 January 2002 to consider 19 applicants. The Commission did not find suitable any of the applicants. It was then decided to headhunt a suitable candidate from the open market and Mr Gwindi was then identified as a suitable candidate. Mr Gwindi was working for Zimbabwe Tourism Authority as the Public Relations Manager. He is well qualified and experienced.

The Commission subsequently resolved to appoint Mr Gwindi and requested that he joins the Council immediately. He was then appointed and started work on 4 February 2002.

I attach herewith his Curriculum Vitae, Commission minutes and schedule of the 19 applicants".

The Local Government Board responded by letter dated 5 April 2002 in the following terms:

"Reference is made to your application for the Local Government Board's condonation of the appointment of a Public Relations Manager for the City of Harare.

Please be advised that the Local Government Board has condoned and approved the appointment of Mr L Gwindi as the Public Relations Manager for the City."

On 30 April 2002 the applicant wrote to the Local Government Board and stated:

"On the 29th April 2002, the Executive Committee expressed concern in the manner the above mentioned employee was recruited. Some of the issues raised include why, despite the position having been advertised for Grade 6, the incumbent was appointed to a higher position in Grade 3 and that the employee was recruited before your approval. In short, sections 134 and 135 of the Urban Councils Act (Chapter 29:15) were not complied with.

The Committee therefore resolved to terminate the contract of employment of Mr Gwindi forthwith because the relevant recruitment procedures were not followed".

On 24 June 2002 the following letter was written to the respondent -

"Further to my letter dated 30 April, 2002 in regard to the above, you are hereby dismissed from Council Service in terms of section 140(b) of the Urban Councils Act (Chapter 29:15) with effect from 24th June 2002. Your last working day is 24 June 2002.

Council terminated your contract of employment on the basis that your appointment was found to be irregular and unlawful.

Please surrender the vehicle, keys, cell phone any other council property in your possession to the Senior Administrative Officer after which I will ask the City Treasurer to process and pay your terminal benefits.

This letter supersedes my letter dated 30 April 2002".

On 1 July 2002 the applicant wrote to the respondent the following letter:

"Reference is made to my letter of 24 June 2002 paragraph 3.

Please could you surrender the listed below items by end of the day of Tuesday 2 July 2002.

- (1) Nissan Hardbody
- (2) Spare Car Keys
- (3) Cellphone
- (4) Back Door Key
- (5) Master Key".

It is the applicant's contention that the respondent has no legal basis for holding on to the items in question as there was never any contract of employment between the parties and there was thus no obligation to comply with section 140 of the Urban Councils Act, which demands permission of the Local Government Board to terminate such contract of employment.

The applicant's contention was said to be based on two issues. Firstly, the contract of

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employment was *contra bonas mores*, that is, that it offends the morality of Zimbabweans in that no basis was shown as to why the respondent who was not one of the 19 applicants, was chosen above them when none of them were interviewed. This is particularly glaring when regard is had to the impressive curriculum vitae of the 19 applicants and the fact that the respondent submitted neither application nor curriculum vitae. Furthermore, the position advertised for was a Grade 6 position which is not a senior position yet the respondent was appointed to a Grade 3 position, which is a senior position. It was submitted that this was done when Council had not rescinded the resolution of 26 May to appoint a Public Relations Manager in Grade 6.

Secondly, the contract of employment, it was submitted, infringes and is *ultra vires* the provisions of the Urban Councils Act, in particular, Section 135, in that the Local Government Board did not interview the respondent. Furthermore, unlike common law bodies, the Local Government Board (the Board), being a creature of statute can only do those things that it is permitted to do by the statute. The functioning and powers of the Board are set out in the Act and these do not include condoning departures from compliance with the Act. It was further submitted that even if the Board had such powers, which was not conceded, that discretion would be tainted by the gross misrepresentations in the letter to the Board in that the letter stated that the Commission met on 28 January 2002, when in fact it did not sit. Furthermore, it was not decided on that date to headhunt. The respondent's name emerged from nowhere. It was further submitted that in any event the Commission did not carry out its statutory obligation to conduct an interview and also that it has no power to condone its own omissions or failure to comply with the Act.

On the other hand it is the respondent's contention that there was a valid contract between the parties. Furthermore, that the Commission running the affairs of the applicant at the relevant time was duly appointed in terms of section 80(1) of the Act and therefore had authority to act as the applicant in terms of the said section, and to vary or rescind any earlier resolutions made by itself in the execution of its duties in terms of section 89(3) of the Act. It was submitted that when the Commission resolved that the respondent be appointed it had authority to make that resolution. Furthermore, it was acting not as agent of the respondent but of the applicant. The applicant is thus bound by the acts of the Commission.

It was also submitted on behalf of the respondent that a valid contract was concluded between him and the applicant after he had accepted the applicant's offer of employment to him. It was submitted further that on the papers before the court, there is no evidence that there was any illegality on the part of the respondent and that one cannot cast aspersions of immorality against the respondent on the grounds of his qualifications as his qualifications are not in issue.

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It was submitted on behalf of the respondent that there was substantial compliance with the provisions of the Act with particular reference being made to sections 134 and 135. Furthermore, there was no evidence that the appointment of the respondent prejudiced the applicant. Neither is there any evidence that the decision that the 19 applicants were unsuitable prejudiced the applicant. Thus, in the absence of prejudice, the court may overlook a formal or procedural defect.

It was submitted that as there was a valid contract between the parties, the respondent was lawfully in possession of the property in question.

In respect of the counter application by the respondent it was submitted that as the respondent was a senior employee of the applicant, it was imperative that the provisions of section 140(2) of the Act ought to have been complied with. The purported discharge was not approved by the Local Government Board. The *audi alteram partem* rule was not adhered to.

The purported summary dismissal of the respondent therefore constitutes a gross procedural irregularity and on that basis the court should set aside the arbitrary decision by the applicant to terminate the respondent's contract of employment. It was further submitted that the Minister of Local Government, Public Works and National Housing's directive that the respondent must be reinstated ought to be complied with. The directive was in the Minister's letter dated July 16, 2002 which reads in part:

"While I appreciate that any earlier letter with respect to Mr Gwindi was based on a recommendation of the Executive Committee, I note that your Council has now resolved to discharge same from employment, and a letter to that effect has since been written to him...

In this regard I hereby direct your Council to rescind the relevant resolutions in terms of section 314 of the Urban Councils Act (Chapter 29:15), and that you (*sic*) Council afford the parties a chance to be heard (*sic*), or that you exercise the functions vested in you by sections 64(e) of the Urban Councils Act. Accordingly, could you ensure that...Mr L Gwindi and...are returned to council employment immediately. As suggested a fortnight ago when you came to my office with the Deputy Mayor I would advise that you consult relevant officials in my Ministry for advice in future, should issues of concern arise, before making resolutions".

In response to the applicant's submission that in our law there is no general right of a litigant to approach this court on review before exhausting domestic remedies unless there are special reasons, it was submitted on behalf of the respondent that there is no ouster of this court's jurisdiction pending exhaustion of domestic remedies. It was

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submitted that the issue of exhaustion of domestic remedies is one of discretion to be exercised by the court and that the issues raised in this matter are so serious as to warrant entertainment by this court.

In my view the starting point is the determination of whether or not there was a valid and binding contract of employment between the parties.

Section 134 of the Act provides:

"(1) Subject to this Part, a council *shall appoint* persons approved by the Local Government Board to be senior officials of the Council:

Provided that the appointment of a medical officer of health shall be subject to the approval of the Local Government Board and of the minister responsible for health in terms of section 7 of the Public Health Act [*Chapter 15:09*];

(2) The council concerned *shall recommend* the Local Government Board the names of suitable candidates for appointment as senior officials." (the emphasis is added).

Section 135 of the Act provides:

"(1) The Local Government Board *shall interview* every person whose name has been submitted to it by a council in terms of this Part and *may*-

(a) approve a person recommended by the Council concerned;

or

(b) refuse to approve any person recommended by the council concerned.

(2) Where the Local Government Board refuses to approve a person recommended by a council, it shall give its reasons therefore in writing in such council.

(3) Where, after a period of two months has elapsed since the Local Government Board notified the council of its refusal to approve a person for appointment, the council fails to recommend any other person who meets the approval of the Board, the Board shall submit a report to the Minister setting out the full details of the matter for his consideration.

(4) The decision of the Minister on any matter referred to him in terms of subsection (3) shall be final". (The emphasis is added).

In my view the provisions of the two sections are very clear regarding the manner of appointment of senior officials and it is not in dispute that the position to which the respondent was appointed is a senior position. It is quite clear that the process is started off by the applicant's council recommending to the Board the names of suitable candidates for appointment. The Board then interviews every person whose name has been so submitted and may approve a person so recommended. The council then appoints the person(s) who has/have been so approved by the Local Government Board. It is quite clear to me and in fact it appears to be common cause that the provisions of the two cited and relevant sections were not complied with. It is rather the respondent's contention that by its letter of 5 April 2002, the Local Government Board condoned such non-compliance with the Act, thus validating the contract of employment.

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In the letter of 1 March 2002, there is no explanation or reason given why the applicant chose not to comply with section 134(2) of the Act. There is no reason given why it was decided to appoint the respondent and not, as required by the Act, to recommend his name to the Board. There is also no reason on the papers why the Board condoned such a blatant breach of the Act nor on what authority such condonation was given.

It appears to me that the breach by the applicant of section 134(2) led to the breach by the Board of section 135(1) of the Act. I find persuasive the applicant's counsel's submission that assuming that the Board had the power to condone the applicant's defiance of the Act, there is no indication that the Board had power to condone its own failure to comply with section 135(1) of the Act. The respondent's counsel did not point the court to any authority or provision in terms of which the Board has the power or authority to condone such a clear departure from or non-regard for the specifically applicable and relevant sections of the Act cited above. It is important in this regard to highlight the fact that although the appointment was made at the time when the affairs of the applicant were being run by a Commission and the termination of the Contract was done at a time when an elected council was in place, it is common cause that the council is bound by the acts of the Commission, which as already stated above, was duly appointed in terms of the Act. Thus if there was a valid and binding contract executed, then the applicant's council could only discharge the respondent from its employment in terms of section 140 of the Act.

Section 140 provides, *inter alia*:

- (1) Subject to subsection (2) and to the conditions of service of the senior official concerned, a council may at any time discharge a senior official -
 - (a) upon notice of not less than three months; or
 - (b) summarily on the ground of misconduct; dishonesty; negligence or any other ground that would in law justify discharge without notice.
- (2) A council *shall not discharge* a senior official *unless the discharge has been approved by the Local Government Board...*" (emphasis added).

In my view section 140 becomes relevant only if or where there is a valid contract of employment.

For reasons discussed immediately above, it appears to me that no such contract ever came into being.

The purported condonation of the blatant flouting of the provisions of the Act appears to me to be baseless and ineffectual. As submitted by the applicant's counsel, it was possible for the applicant to comply with the Act and have the respondent properly appointed in terms of the Act without having to resort to unstatutory means as happened in this case.

In the result, in my view the respondent's counter application must consequently fail. There can be no reinstatement where there was no valid appointment in the first place. The counter application is therefore dismissed with costs.

In view of my finding that the respondent's appointment was not valid or proper, I do not find it necessary to deal with or make findings on the other issues raised by the applicant. I however find in favour of the applicant and grant the order sought in the applicant's draft order for the return of the applicant's property which had been handed to the respondent by virtue of his appointment which has been discussed above. There is thus no legal basis for the respondent to retain in his possession the claimed property.

With regard to the question of costs it appears to me that this is a case in which an award of costs in favour of the application would in a way be akin to allowing a party to benefit from its own misdeed. This is particularly so in view of the fact that the applicant's council is bound by and therefore a party to the acts of the predecessor, the Commission. It is my view that on the facts of this case, each party must bear its own costs.

In the result it is ordered as follows:

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IT IS ORDERED:

1. That the respondent returns to the applicant a Nissan Hardbody motor vehicle registration number 779-209-8P, a mobile Nokia phone, model 3210, master keys, spare keys for the above mentioned motor vehicle and back door keys within 48 hours of the date of service of this order, failing which the Deputy Sheriff be and is hereby authorized to remove the said items from the respondent and surrender them to the applicant.
2. That each party bears its own costs.
3. That the counter application by the respondent is dismissed with costs.

Honey & Blanckenberg, legal practitioners for applicant
Scanlen & Holderness, legal practitioners for respondent