HC 5071/01

ZVIMBA RURAL TRADERS ASSOCIATION
versus
ZVIMBA RURAL DISTRICT COUNCIL
and
FRANK GARIKAI N.O.

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 19 June 2002 and 26 February 2003

Opposed Matter

Adv. *Mushore*, for the applicant
Adv. *P. Nherere*, for the respondents

GOWORA J: The applicant is an unregistered body comprising of traders and business people carrying on business within the area of jurisdiction of the first respondent. The first respondent is Zvimba Rural District Council and the second respondent is its chairman and he is responsible for the administration of the first respondent.

On 30 November 2000, the first respondent, acting in accordance with the provisions of section 76(2) of the Rural District Councils Act [*Chapter 29:13*], published in the Herald of that day, its proposed tariffs for the 2001 financial year. In the publication the first respondent invited any objectors to lodge their objection within 30 days from the date of the publication. On 21 December 2001, the applicant's members, fifty-two in number, lodged their objection to the proposed tariffs.

Subsequent to that, several attempts were made by the applicant's members to discuss the proposed tariffs with the first respondent. The parties were able to meet and discuss on 30 January 2001. The second respondent did not attend.

On 15 February 2001, the full council of the first respondent met. One of the issues for discussion was the proposed tariffs for the year 2001. The first respondent resolved that as only 23 objections to the proposed tariffs had been received, which was less than the 30 provided for in the Act, there was need to meet with the rate-payers and have dialogue with them to encourage them to pay the rates. It was also noted that some of the objections had been clarified at a meeting which

was held with the rate-payers' association leadership.

The applicant seeks to have the decision of the first respondent increasing the rents, deposits and other charges set aside on the basis that the first respondent failed to observe the provisions of the Act and further that the first respondent did not consider the objections lodged with it against the increase in rentals, deposits and other charges. The applicant has also alleged that there is financial indiscipline within the first respondent and that an unjustified increase in the tariffs is not the proper manner of correcting the indiscipline. The applicant also states that the increases by the first respondent are unreasonable, irrational and unfair.

The first respondent firstly denies that the second respondent is vested with executive powers as alleged by the applicant. In addition, the first respondent denies that it failed to comply with the provisions of the Act. It states that the powers in the Act are discretionary and there is no sufficient basis upon which the discretionary powers are sought to be set aside. It denies that there is financial indiscipline and avers that the proposed increases are reasonable, taking into account the surrounding circumstances and the present economic indications and inflationary pressures. It states that the objections were considered on the merits. The first respondent prays for the dismissal of the application with costs.

It was submitted on the applicant's behalf that the first respondent's decision to approve the tariffs is vitiated by unlawfulness in that the statement setting out the proposed charges, rents and tariffs for the year 2001 was not posted in the council area for a period of not less than 30 days as required by section 76(2) of the Act.

Section 76(2) provides:

> "Before any charges, rents or deposits fixed in terms of subsection (1) come into operation, a statement setting out the proposed charges, rents or deposits and any existing such charges, rents or deposits for the same matters shall, for a period of not less than thirty days, be posted in the manner in which notices are usually posted in the council area and published in a newspaper or in such other manner as the Minister may direct."

The applicant has attached, as part of its papers, a cutting from the Herald of 30 November 2000, showing the publication of the existing

charges together with the proposed increases. The applicant has stated that the notices were not, however, posted in the usual manner in the council area. In response to this averment the first respondent's chief executive officer laconically states in paragraph 6 of its opposing affidavit:

> "Prepared tariffs were posted and distributed to Councillors as Chairman of Wards Development Committees Act 2000 minutes the publication was done in the usual way."

I have been unable to decipher the meaning of that statement. In paragraph 15 of the opposing affidavit, Lovemore Sipolilo states:

> "Applicants acknowledge there was sufficient circulation and posting on all notice boards and council sub-offices of the proposed tariffs. Applicants were not in the dark about them and in any case they are represented by their councillors at all council meetings were (sic) matters of policy are deliberated. The councillors will in any case have had a broad consultation with their subjects in the wards which include the applicants members."

The provisions of section 76(2) of the Act are peremptory and not directory. The first respondent has not furnished any evidence that notices were posted in the usual manner in the council area. A failure to observe the statutory provisions of s 76(2) therefore renders the decision null and void.

Subsection (3) of section 76 of the Act provides:

> "If during the period of thirty days referred to in subsection (2), thirty or more voters lodge objections to the proposed charges, rents or deposits, such charges, rents or deposits shall be considered by the council together with such objections and shall not come into operation unless passed by a majority of the total membership of the council."

The first respondent has not disputed that it received objections from more than thirty ratepayers. It states that the objections were considered on the merits. At a meeting of the first respondent's council held on 15 February 2001, it was noted that the objections numbered 23, and therefore less than the 30 required to enjoin the council to review the proposed rents, deposits or tariffs. The council therefore adopted the proposed charges, rents and deposits. The council did not consider them nor is there any indication that council voted on them or that they were passed by a majority of the council. In the matter of *Mutare Residents*

and Ratepayers Association v The City of Mutare HH 165/2002, SMITH J had to consider a similar provision in the Urban Councils Act [*Chapter 29:*15]. The relevant provision s 219(3) reads as follows:

> "If a statement has been advertised in terms of paragraph (a) of subsection (2) and within the period of thirty days referred to in that paragraph objections to the proposed tariffs, charges or deposits are lodged –
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> (a) by thirty or more persons who are voters or who are users of the services to which the tariff charge or deposit relates; or
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> (b) where there are less than thirty such users of the service concerned, by not less than fifty per centum of the number of such users;
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> such tariffs, charges of deposits shall be reconsidered by the council, together with the objections so lodged, and they shall not come into operation unless the resolution is again passed by a majority of the total members hip of the council."

At page 3 of his cyclostyled judgment SMITH J stated thus:

> "The requirement of s 219(3) of the Act are also crystal clear. Where the requisite number of objections to the proposed tariffs and charges have been lodged, the proposed tariffs and charges shall not come into operation unless the resolution is passed by a majority of the total membership of the council. In order to ascertain whether that test has been passed, a vote must be taken. It is not sufficient for the respondent to say that the Council acts by consensus and seldom resorts to votes. That may well be the case, and it obviously suffices, for the vast majority of the resolutions that come before the Council. However, the requirements of the Act must be strictly observed. Section 219(3) requires that in the circumstances specified therein in, proposed tariffs and charges shall not come into operation unless the resolution has been passed by a majority of the total membership of the Council. That means that a vote must be taken and the number of voters in favour of the resolution must be recorded. If that is not done, it cannot be established that the resolution was passed in accordance with the requirements of s 219(3) of the Act. Hat being the case, the proposed new tariffs and charges cannot come into operation."

In casu, the respondent did not adhere to the provisions of the Act and the failure by the first respondent to adhere to the provisions of subsection (3) renders the decision to adopt the charges, rents or deposits null and void. The proposed tariffs and charges cannot therefore be implemented.

In terms of s 76(4) of the Act the notice to councillors of any meeting at which charges, rents or deposits are to be considered in terms of subsection (3) of that section shall contain a copy of the objections lodged with the council. At a meeting of the council held on 15 February 2001, it was indicated that the council had received 23 objections to the rates published by the council. A letter from the applicant addressed to the first respondent, dated 16 December 2000, raised an objection to the proposed tariff. Attached to that letter is a list of petitioners containing more than 50 names. The respondents have not specifically addressed their attention to the complaint by the applicant that the objections were not attached to the notices sent to the councillors as provided for in terms of subsection (4) of section 76 of the Act. The respondents make a bald assertion that the objections were considered accordingly.

The minutes of the meeting of the council on 15 February 2001 where the issue was raised does not assist the respondents in this regard. There is no indication that the objections were considered. In point of fact, note is made of the fact that the objections were less than 30 in number. In addition it is noted that most of the objections were clarified at a meeting held earlier with the ratepayers. Since there is no dispute between the parties that in excess of thirty objections were received, the reference in the minutes to 23 objections can only mean that not all the objections were sent to the councillors with the notice. There was therefore a failure to comply with the provisions of s 76(4) of the Act.

It has been submitted on behalf of the applicant that the decision by the first respondent is so unreasonable in its effect on the rate-payers and voters who fall under its jurisdiction that no reasonable local authority would have arrived at it. In addition, it is submitted that the applicant's members are mostly rural business people whose customers are people who are generally at the very bottom of the social ladder and can hardly afford basic commodities and they would not be able to afford an increase of up to 300% in basic commodities.

In order to make a determination on the reasonableness or otherwise of the proposed tariffs, this court would have to conduct an in depth analysis

of the proposed tariffs of 2001 as against those of the year 2000. There would be need to examine the proposals of the budget for 2001 and the cost to the first respondent of rendering services to the applicant's members as well as the general populace of the area. There would be need to examine the incomes of the applicant's members as well as the general populace. This vital information is not part of the record in this matter. This court, on the papers before it, is not in a position therefore to examine the reasonableness or otherwise of the first respondent's decision to increase the tariffs to the proposed levels.

In the result I find that the first respondent failed to observe the provisions of s 76(2), (3) and (4) of the Act and the decision to increase the charges, rents and deposits in the absence of compliance with those provisions is, as a consequence, null and void. I therefore make the following order:

1. the decision made by the first respondent on 15 February 2001 increasing rents, deposits and other charges for services rendered by it be and is hereby set aside;

2. the first respondent be and is hereby directed to continue levying ratepayers at the level pertaining for the 2000 financial year until such time as it would have complied with the provisions of the Rural District Councils Act [*Chapter 29:13*] in levying the charges, rents and deposits for services rendered;

3. first respondent bear the costs of this application.

Messrs Kantor & Immerman, applicant's legal practitioners.

Messrs Manase & Manase, respondents' legal practitioners.