MISHECK SHOKO
and
COLLIN GWIYO
and
CHITUNGWIZA RESIDENTS AND
RATEPAYERS ASSOCIATION
versus
THE MINISTER OF LOCAL GOVERNMENT
PUBLIC WORKS & URBAN DEVELOPMENT

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE, 6 and 28 February 2007

OPPOSED APPLICATION

Mr *T Biti*, for the applicant
Ms *V Mabhiza*, for the respondent

MAKARAU JP: The first applicant was elected as the Executive Mayor of the second respondent on 11 March 2002. On 29 December 2005, he received a letter from the first respondent suspending him from duty upon certain specific grounds that were detailed in the letter. It was also indicated in the letter that the suspension would be without salary and benefits and accordingly, the first applicant was to surrender all council property in his possession and vacate council premises to allow investigations into the allegations leveled against him to proceed.

Believing that his suspension was irregular, was without foundation in law and was politically motivated, the first applicant filed a court application with this court on 6 March 2006. In the application, he specifically sought an order setting aside the decision of the first respondent to suspend him from duty without salary and that he be paid the arrear salary due to him from the date of suspension to date of judgment.

In the application, the first applicant was joined by the second and third applicants as co-applicants. The second applicant is a voter in the area falling under the municipal jurisdiction of the second respondent. He is a councilor in the second respondent for ward 11.

He joined in the application of the first applicant as an interested voter and to challenge the law under which the first applicant was suspended from office as being unconstitutional as it undermines the wishes of the electorate when an elected mayor is dismissed by a single person without consulting the electorate.

The third applicant, as its name suggests, is a voluntary association of the residents and ratepayers within the jurisdiction of the second respondent. It joined in the application to seek a similar declaration that the second applicant was seeking in having the matter referred in terms of section 24 of the Constitution of Zimbabwe to the Supreme Court sitting as a Constitutional Court.

The application was opposed.

At the hearing of the matter, the nature of the application was not specifically adverted to as the parties directly went into the merits of the application. I equally to blame, did not seek the views of counsel on the exact nature of the application before me. I was however assured by counsel that I had to first determine the merits of the application and if I could not grant the application as sought, I was then constrained by law to refer the dispute to the Supreme Court as a constitutional issue. Both counsel were of the shared view that the issue raised in the applicant's papers was not frivolous and vexatious. By the strength of their joint submissions, they were strongly dissuading me from making a finding to the contrary.

It appears to me that the application before me is for review although the grounds for review were not set out on the face of the application as required by the provisions of Order 33 of the High Court Rules. The second and third applicants have joined in the application as co- applicants to co-raise or support the request that I refer the dispute to the Supreme Court as a constitutional issue. They did not file independent applications seeking this order. The importance of this finding in my view lies in that should I find that the application of review is not properly before me, then the relief sought by the second and third applicant cannot survive an independent life.

As stated above, the decision to suspend the first applicant as the Executive Mayor of the second respondent was communicated to him by letter dated 29 December 2005. The first applicant accepts in his founding affidavit that he was suspended from duty with effect from the date of the letter.

In terms of the rules, the first applicant must have filed his application for review within 8 weeks of the date of the decision. According to my calculation, the 8 week period expired around 19 February 2006. The application before me was only filed on 6 March 2006, a week or two after the expiration of the 8 week period.

The respondents did not specifically object to the late filing of the review application. The issue was not raised in any of their papers or in the applicants' papers. No application for condonation was therefore made before me.

The issue that has exercised my mind in this matter is whether the court can *mero motu* grant extension of the time within which an application for review may be filed. It is common cause that the court may extend this period on application and upon good cause being shown.[1] The issue before me is whether the court upon noticing that the application has not been brought within the time limited in the rules, can extend the period *mero motu* and proceed to deal with the merits of the matter. I think not. In my view, "good cause shown" as stated in rule 259 means good cause shown by the applicant either in a written application or verbally or with the consent of the opposing party. It cannot mean good cause as seen by the court *mero motu*.

I have no doubt that had the issue been raised at the beginning of the hearing, the parties may have shown good cause for the extension of the time period. This was however not done.

I have further considered whether I can employ the provisions of Rule 4C to condone the departure from the rules by the applicant in the interests of justice and in view of the fact that the parties argued the merits of the matter before me without making reference to the

[1] Rule 259 of the High Court Rules 1971.

technical details of the application. The option appeared to me more attractive as Rule 4C does not seem to require that an application be made before the court can condone a departure from the rules. I however do not wish to make a definitive finding on this aspect of the Rule as the issue is not before me. I however hesitated to use Rule 4C on the narrow basis that the respondents may wish to take advantage of the technical lapse by the applicant and were I to grant condonation *mero motu*, I would effectively rob them of that chance without affording them an opportunity to the heard.

As stated above, there is only one application before me. Thus, my finding that the review application is not properly before me precludes me from referring the dispute between the parties to the Supreme Court as a constitutional issue on behalf of the second and third applicants as they do not have independent applications before the court.

On the basis of the above, I must dismiss the application. In view of the fact that I am dismissing the application on a ground that was not raised on behalf of the respondents, I will not make an order as to costs in their favour.

In the result, I make the following order:

1. The application is dismissed.

2. Each party shall bear its own costs.

Honey & Blankernberg, applicants' legal practitioners.
Civil Division of the Attorney-General's Office, respondents' legal practitioners.