

COMMUNITY WATER ALLIANCE TRUST
and
COMBINED HARARE RESIDENTS ASSOCIATION
versus
CITY OF HARARE
and
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS & NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 22 & 23 January 2020

Date of written judgment: 4 March 2020

Opposed application

Ms R. Magundani, for the applicants
Ms R.C. Muchenje, for the first respondent
Ms M. Mavemwa, for the second respondent

MAFUSIRE J

[1] The two applicants are public interest bodies. Together they move for an order in two parts: a *declaratur* and a substantive remedy, against the first respondent, a municipality or urban council (“*City of Harare*” or “*Council*”). The second respondent is the Minister in charge of urban councils (“*the Minister*”).

[2] The *declaratur* sought by the applicants is in two parts, namely

- that the 2018 budget presented by the City of Harare and approved by the Minister is unlawful in that it contravenes the Minister’s Circular No 4 of 2013, as read with s 313 of the Urban Councils Act, *Cap 29:15* (“*the Act*”), and
- that the loan facilities of US\$11 million accessed by the City of Harare from the Central African Building Society (CABS) to finance salaries and terminal benefits are unlawful in that they contravene s 290 and s 292 of the Urban Councils Act.

[3] The substantive remedy sought by the applicants is also in two parts, namely that the City of Harare should:

- revise its (2018) budget and align it with the Minister's circular aforesaid, and
- liquidate the loan facility aforesaid within six months of the date of the court order.

[4] The litigation stems partly from the audit of local authorities carried out by the Office of the Auditor-General, at the instance of the Minister. The audit was for the financial year ending 31 December 2016. The audit report was presented to Parliament in 2017. The audit findings relevant to this matter were that the City of Harare borrowed US\$11 million from CABS to finance salaries and terminal benefits for its employees and that such borrowing was contrary to s 292 of the Act, as read with s 290, which allegedly prohibit local authorities from borrowing without the Minister's authority or borrowing to finance the emoluments of permanent employees without the Minister's authority. In the audit report, the management of the City of Harare admitted that they did not obtain the necessary ministerial authorisation before the loans were acquired.

[5] The litigation also stems from the contents of an alleged circular by the Minister in 2013 which directed that the budget of any local authority had to reflect an expenditure ratio of 30:70 between salaries and service delivery respectively. The applicants argue that the circular was issued by the Minister in terms of s 313 of the Act and that therefore it is binding on the City of Harare. Unlike the audit report, the circular in question was not made part of the record. The papers do not say why. However, neither the fact that such a circular was issued nor that its contents were as set out by the applicants is in dispute.

[6] The applicants' cause of action is this. It is clear from the audit report that the City of Harare has failed on service delivery, particularly in regards to water and sewerage reticulation. There is a high degree of burst water pipes in and around Harare. Sewer pipes are old and unserviceable. The City is also failing in other service areas like the road network, public facilities such as swimming pools, parks, public toilets and sporting centres, all of which are in a poor state of repair due to lack of maintenance. Yet the City is spending a disproportionate amount of income on salaries for its employees. For example, for its 2018 the City allocated US\$114.8 million (or 42.6%) of its total revenue towards salaries, leaving

only US\$269.3 (or 57.4%) towards service delivery. This was contrary to the ministerial circular.

[7] The City of Harare and the Minister vehemently oppose the application. Their grounds are essentially the same. In summary, they are these. They admit the borrowing for salaries but argue that the borrowing was not in terms of s 290 or s 292, but in terms of s 291 of the Act, which provides for conditional short-term borrowings by councils by means of bank overdrafts or loans, for temporary financial accommodation. City of Harare says it had the requisite ministerial approval for the borrowing even though it cannot now locate it due to the passage of time, coupled with a high staff turnover. With regards the alleged breach of the ministerial circular, the respondents argue that the circular is a mere policy directive that is not mandatory but is a “*good wish*” for local authorities to make serious efforts towards meeting the desired ratio. In this connection, the respondents make reference to a subsequent circular by the Minister in 2017 the contents of which first made reference to the 30:70 ratio, before going on to say that where a council has previously failed to reach that ratio it must show progress towards compliance.

[8] All in all the respondents argue that the application falls short of the requirements for a declaratory order as set out in s 14 of the High Court Act, *Cap 7:06*. They submit that there is no longer any existing, future or contingent right or obligation to be determined since the 2018 budget, which was approved by the Minister, has already been implemented. The circular in question has since expired. Budgets and circulars are issued annually. At any rate, the impugned budget had been published and circulated for any possible objection by interested parties before it was presented, and none of the applicants raised any issue with it at the time. With regards the CABS loans, Ms *Muchenje*, for the City of Harare, advised from the bar that these have all been settled.

[9] Ms *Magundani*, for the applicants, argues that the fact that the 2018 budget has since been implemented, or that the circular in question has been superseded by subsequent ones, does not extinguish the applicants’ right to a *declaratur* because the court can still issue one if it is satisfied that when the proceedings commenced the right to the *declaratur* existed. She denies that the CABS loans have been liquidated. She points out that in terms of the audit

report, the loans were accessed in 2014 for a one-year period, yet by the time of the audit, two years later, the loans were still reflecting in the council's books. She also denies that the ministerial circulars are mere "good wishes" with no legal force and maintains that once issued, they carry the force of law by virtue of s 313 of the Act. They are binding, not only on the local authorities themselves, but also on the Minister and any of his or her successors in title.

[10] Before I consider the merits, I must determine whether or not the applicants have brought themselves within the precincts of s 14 of the High Court Act which governs the power of the court to issue a declaratory order in any given situation. If I find that they have, I will determine whether the circumstances of this case are such as to warrant that the orders sought should be granted. However, if I find that the applicants are not within the purview of s 14 of the High Court Act, that will be the end of the applicant's case because the two substantive remedies are merely consequential relief that is predicated on the declaratory orders.

[11] Section 14 of the High Court Act says:

"14 High Court may determine future or contingent rights

The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

[12] One who seeks a declaratory order under s 14 of the High Court Act must demonstrate more than mere academic interest. The court does not decide abstract or hypothetical questions: see *Adbro Investments Co Ltd v Minister of the Interior & Ors* 1961 (3) SA 283 (T) at p 285D and *Johnsen v Agricultural Finance Corp* 1995 (1) ZLR 65 (S). He or she must show the existence of some tangible and justifiable advantage to himself or herself.

[13] In terms of s 14 of the High Court Act, a person who qualifies to move for a declaratory order is one who has an interest in having his or her existing, future or contingent right or obligation determined even if he or she cannot claim any relief consequential upon

such determination. One does not seek a *declaratur* for the determination of rights existing in the past. In the present case, the respondents argue that the budget and the circular in question have both come and gone. I am told that the loans have been repaid, although Ms *Magundani*, without instructions, argues to the contrary. Without evidence to the contrary, I have no reason to disbelieve Ms *Muchenje's* submissions that the loans have been repaid. Ms *Magundani* refers me to the case of *Ex parte Chief Immigration Officer* 1993 (1) ZLR 122 (S), where the Supreme Court held that if, when litigation commenced, there was a live dispute, the court will proceed to decide it even though at the time of hearing no actual dispute remains.

[14] The circumstances of *Ex Parte Chief Immigration Officer* relevant to this particular argument were these. In a previous case¹ in which a couple, the O'Haras, had been respondents, a 3-judge Supreme Court bench had heard an appeal and reserved judgment. At some point all the three judges had discussed and reached a unanimous decision to allow the appeal. However, before the judgment was handed down, one of the judges had resigned from the bench. After the judgment was handed down, the O'Haras observed that it still included the name of the judge who had resigned. In a new case before the Supreme Court (now constituted differently), the O'Haras sought a declaratory order that their constitutional right to a fair hearing in the previous case had been violated by reason of the fact that when delivering its judgment in the previous case, the court had no longer been properly constituted. They sought an order declaring the judgment in the previous case invalid. The Chief Immigration Officer filed a counter-application seeking a reverse order that the judgment in the previous case be declared valid. However, before the hearing of the new case, the O'Haras withdrew their application. Ordinarily that withdrawal would have put an end to the proceedings. But the Chief Immigration Officer persisted with his counter-application arguing, among other things, that the matter in question was of enormous importance as he needed to know the status of the previous judgment which impacted heavily on the daily operations of his office.

[15] In the course of its judgment, the Supreme Court (GUBBAY CJ) said²:

¹ *Principal Immigration Officer & Anor v O'Hara & Anor* 1993 (1) ZLR 69 (S)

² At 126H to 127A - D

“If the O’Haras had not withdrawn their application, then it seems to me that this court, if it were satisfied that the submissions they raised were to be rejected, would have been at liberty to consider whether it was preferable to make what is known as a reverse declaratory order in the terms sought, rather than simply dismissing the initial application. But does the withdrawal have the effect of putting an end to these proceedings? Does it disable the applicant from obtaining relief in the form of a declaratory order because there is no longer a live dispute between him and the O’Haras? Is it permissible to grant a party a declaratory order whose opponent has left the arena of conflict?

There is respectable authority in English law for the proposition that if, when litigation commenced, there was a live dispute, the court will proceed to decide it even though at the time of hearing no actual dispute remained between the parties. Three decisions illustrative of this only need to be referred to.”

[16] Two of the three English decisions referred to were *Marion White Ltd v Francis* [1972] 3 All ER 857 (CA) and *Merricks & Anor v Nott-Bower & Anor* [1964] 1 All ER 717 (CA). In *Marion White*, the court went on to determine the validity of a certain restrictive covenant between an employer and employee after it had expired as between those parties before the court. This was on the basis that the question of the validity of the covenant was still of importance as between the employer and other employees. The court granted the employer an order declaring the covenant valid.

[17] In *Merricks*, an application for a series of declarations was made in respect of an incident that had occurred six years previously. The incident was the transfer of the plaintiffs, two police officers, at the instance of a police inspector who, two years after such transfers, was himself discredited. The declaratory orders sought by those police officers, six years later, were to the effect that the transfers had been done contrary to natural justice as they had neither been heard nor the police disciplinary rules followed. In the course of his judgment, granting the orders, LORD DENNING MR said³:

³ At t21A – D

“What use can such declarations be at this stage, when the transfer took place six-and-a-half years ago? What good does it do now? There can be no question of re-opening the transfers. The plaintiffs have been serving in these other divisions all this time. They cannot be transferred back ... On this point we have been referred to a number of cases which show how greatly the power to grant a declaration has been widened in recent years. If a real question is involved, which is not merely theoretical, and on which the court’s decision gives practical guidance, then the court in its discretion can grant a declaration.”

[18] On the basis of the above authorities, I consider that the declarations sought in the present case touch on matters of great importance, not only to the applicants, which are themselves public interest bodies, but also to the generality of the residents of the City of Harare. When moved by an interested party, the court has the power and mandate to pry into the functions of an administrative authority such as a local authority, a public institution, to ensure that it is operating within the precincts of its enabling legislation and any other provision of the law. The 2018 budget might have come and gone. But that cannot be a sufficient ground to non-suit the applicants, especially given that the evidence and arguments before me show that complaints in regards to that particular budget have more or less been the same as regards the other budgets in previous or subsequent years.

[19] With regards the contents of the 2013 circular, the evidence shows that the directive given therein had still not been complied with in 2017, four years later. Thus, when the litigation commenced in April 2018, the 2018 budget was still operative. I was told that such circulars are issued on an annual basis. Regarding the CABS loans, the public interest question is whether such kind of borrowing is done under s 290 and s 292 of the Act, as the applicants contend, or under s 291 as the respondents contend. I consider this to be an appropriate case to exercise the discretion reposed by s 14 of the High Court Act to determine the case for a *declaratur*. I consider that the rights and obligations in question touch on existing and continuous operations of the local authorities.

[20] The absence of the actual circular of 2013 on which the case is predicated places me in an invidious position. I am being asked to declare a violation of something that I have

neither seen nor read. But all the parties agree that such a circular was issued. They also agree on what its contents were. The City of Harare goes further to attach a copy of a similarly worded circular in 2017. It stated:

“Local Authorities should endeavour to achieve the 30:70 employment cost to recurrent expenditure for them to efficiently utilize their work force. Where a Council has previously failed to reach the 30:70, some progress towards compliance must be shown.”

[21] The respondents argue that circulars issued by the Minister are policy directions that are merely aspirational and not binding. At any rate, they conclude their argument, the Minister did approve the 2018 budget for the City of Harare in spite of that circular and in spite of the CABS loans that had been obtained for salaries. That was why the budget was implemented. On the other hand, the applicants argue that such circulars are law by virtue of s 313 of the Act. They argue that the Minister did not approve the budget because the audit report clearly said so. The budget is illegal. The CABS loans were illegal.

[22] So, obviously the first question is: what is the status of such ministerial circulars *vis a vis* s 313 of the Act? The section reads:

“313 Minister may give directions on matters of policy

(1) Subject to subsection (2), the Minister may give a council such directions of a general character as to the policy it is to observe in the exercise of its functions, as appear to the Minister to be requisite in the national interest.

(2) Where the Minister considers that it might be desirable to give any direction in terms of subsection (1), he shall inform the council concerned, in writing, of his proposal and the council shall, within thirty days or such further period as the Minister may allow, submit to the Minister, in writing, its views on the proposal and the possible implications on the finances and other resources of the council.

(3) The council shall, with all due expedition, comply with any direction given to it in terms of subsection (1).”

[23] Section 313 above is in three parts. The first part, sub-section (1), and part of sub-section (2), empowers the Minister to issue policy directions in the national interest. It is merely a proposal or an invitation to council to endeavour to comply with any such policy

directions. This cannot be binding because the second part of sub-section (2) gives the council thirty days or more to submit its own views and make any counter proposals. It is the third part, or sub-section (3), which undoubtedly has the force of law. It states in peremptory terms that the council *shall comply* with due expedition with any policy directions given in terms of sub-section (1) (*my emphasis*). What then does one make of this?

[24] Plainly, s 313 aforesaid has to be read as a whole, not disjunctively. It must then be applied to the facts of the matter as a single provision. In my view, the ministerial circular issued in terms of s 313 of the Act is binding if the Minister has given a council the opportunity to make its own counter proposals which he must consider. The policy direction is only binding after this step has been taken. In the present case, I have no information concerning the issuing of the 2013 ministerial circular. But the Minister says he did approve the 2018 budget and those preceding it, none of which met the 30:70 ratio. The 2018 budget was duly implemented. Before that, it had been published for possible objections by any interested parties. The applicants say they did not see the budget until the audit report. That is surprising for entities that profess to be public watchdogs. The probabilities are that the City of Harare made submissions that convinced the Minister not to insist on the 30:70 ratio for that budget. One such submission by Council was that 2013 was a year of general elections in Zimbabwe. In the preceding year, central government had directed the scrapping off of outstanding rates by ratepayers, but with no similar reprieve in respect of Council's own debtors. That inevitably scuttled Council's budget. Under these circumstances, I do not believe there are grounds for the court to interfere. In *City of Harare v Parsons* 1985 (2) ZLR 293(SC) McNALLY JA, quoting from an English case⁴, said⁵:

“When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of cases **It must always be remembered that the court is not a court of appeal.**”

[25] In the present case, the argument on the dichotomy between a council's borrowing powers in terms of s 290 and s 292 on the one hand, and s 291 on the other, has produced more heat than light. In paraphrase, s 290 empowers a council to borrow money for any of

⁴ *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA)

⁵ At 298E

the purposes listed therein (none of which includes the payment of employee emoluments) as long as certain conditions are met, one of such being the ministerial authorisation. Section 292 prohibits the use of a council's capital or loan accounts for the purpose of meeting the emoluments of a permanent employee unless the Minister has given authorisation. Section 391 permits a council to borrow money by means of a bank overdraft or short-term loans for the purpose of temporary financial accommodation, provided *inter alia* that no such borrowing can exceed the council's aggregate income from rates in the preceding year unless ministerial authorisation has been obtained.

[26] The applicants urge me to find that Council's borrowings were in terms of s 290 and s 292 and to impeach them because the loans went towards paying employment salaries, contrary to the express prohibition in s 292. On the other hand, the respondents urge me to find that the borrowings were made in terms of s 291 which has no such restriction but is in fact permissive of such powers where the borrowing is for short-term temporary financial accommodation. They argue that s 291 is not subject to the other two sections.

[27] Given that s 291 is less restrictive, it is no wonder Council wants its borrowings to be classified under it. But I think this is disingenuous. The loans were for a specific purpose, namely to pay salaries. There is a specific section dealing with borrowings for such a purpose, namely s 292. Why try to justify the borrowings under a provision of general application, ignoring the one of a specific application? It is the purpose for the borrowings rather than the mere act of borrowing that determines the governing section. Undoubtedly, the borrowings were made under s 292 of the Act. At any rate, that was the finding of the audit.

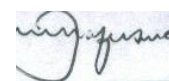
[28] However, and be that as it may, all types of council borrowings under any of these sections have to be sanctioned by the Minister. The respondents say they were sanctioned. The Minister says they were sanctioned. The Minister, as the administrative authority reposed with the power to decide, in any given situation, the wisdom of a council borrowing money for any such purpose as may be intended, is better placed than the court to sanction such borrowing or prohibit it. The court cannot substitute its own decision for that of the Minister,

except in special circumstances where, for example, the Minister's decision is such a palpable inequity and is so outrageous in its defiance of logic that no reasonable person could have sanctioned it. Nothing of the sort has been alleged, let alone proved.

[29] Thus, the grounds on which the applicants want the 2018 City of Harare impeached fall away. In other words, the CABS loans were duly authorised. The budget itself was authorised. Nothing turns on the circulars in the face of the authorisations. In the final analysis, there are no grounds to issue the declaratory orders sought by the applicants. Concomitantly, the substantive remedies also fall away. At any rate, being in the nature of mandatory interdicts, the substantive remedies have since been superseded by events in that the budget in question has since been implemented and the loans repaid. Therefore, the following order is issued:

- The application is hereby dismissed with costs

4 March 2020



Scanlen & Holderness, applicants' legal practitioners

Mbidzo, Muchadehama & Makoni, first respondent's legal practitioners

Civil Division, Attorney-General's Office, second respondent's legal practitioners