HEBERT GOMBA
and
HAMMY MADZINGIRA
and
KUDZAI KADZOMBE
and
GAUDENCIA MARERE
and
HAPPYMORE GOTORA
and
COSTS MANDE
versus
MOVEMENT FOR DEMOCRATIC CHANGE (T)
and
THE MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS
and
CITY OF HARARE
and
ZIMBABWE ELECTORAL COMMISSION

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 3 November, 2021

Urgent chamber application

M.E. Motsi, for the applicants
No appearance for 1st respondent
O. Zvedi, for the 2nd respondent
T. Chiriseri with *JP Mutiziri*, for 3rd respondent
T.Kanengoni, for 4th respondent

CHITAPI J:The applicants are elected councillors for various wards within Harare having been so elected in terms of the operative provisions of the Urban Councils Act, [*Chapter 29:15*]. The first applicant was subsequently elected Mayor of City of Harare. The rest of the applicants are councillors in the Harare City Council. The first respondent is the political party which sponsored the election of the applicants into office under the banner of a coalition of parties which contested the 2018 general elections as Movement for Democratic Change Alliance.

The applicants have averred that on or about 20 August, 2020, they learnt through the social media of a notification made by the first respondent to the Minister of Local Government and Public Works who administers the Urban Councils Act, and is cited herein as the second respondent. The notification was to the effect that the applicants' membership of the first respondent had been terminated. The notification was according to the notice, made in terms of the provisions of s 278 as read with s 279 of the Constitution of Zimbabwe.

The applicants on 26 August 2020 gave written notice to the second respondent in terms of s 6 of the Liabilities Act [*Chapter 8:14*] of their intention to sue the Minister to protest the validity of the alleged recall of the applicants by the first respondent. The applicants averred in the notice prepared by their legal practitioners that they could not be recalled in terms of the provisions of the Constitution cited by the first respondent because these provisions applied to Members of Parliament and not councilors. The second respondent had in this regard written to the third respondent advising it of the expulsion of the applicants from membership of first respondent. The second respondent in his letter to the third respondent stated:

> "DECLARATION OF VACANCIES
> I have to inform you that I am in receipt of a letter from the Movement for Democratic Change (T) stating that the following councillors have been expelled from the party:
> 1. Herbert Gomba of Ward 27
> 2. Hammy Madzingira of Ward 10
> 3. Kudzai Kadzombe of Ward 41
> 4. Gaudencia Marere of Ward 32
> 5. Costa Mande of Ward 24
> 6. Happymore Gotora of Ward 7
>
> In terms of section 278 (1) of the Constitution of Zimbabwe, as read with section 29 (1) (k); wards 7, 10, 24, 27, 32 and 41 are now vacant.
>
> In terms of section 121 of the Electoral Act please inform the Zimbabwe Electoral Commission…."

The third respondent; Harare City Council, in turn wrote letters to each of the applicants advising of the vacancies in their wards and attached a copy of the directive from the second respondent

Against the above background, the applicants filed this application on 2 September, 2020 and claimed the following relief as set out in the draft provisional order

"TERMS OF FINAL ORDER SOUGHT (SIC)

Pending the hearing the applicants are granted the following relief:

1. That fourth respondent shall suspend the Notice of Election and Communication day to fill casual or special vacancies in Councils as provided for by S 121 A of the Electoral Act pending the finalization of this matter in respect of the office of Mayor of City of Harare and councilors for wards 27, 10, 41, 32, 14 and 24.
2. That second and third respondents shall not obstruct the first, second, third, fourth, fifth and sixth applicants from effecting their constitutional mandates in the mayoral and councilor duties pending the finalization of this matter.
3. That the Sheriff and/or the applicants' legal practitioners shall serve this provisional order on the first, second, third and fourth respondents.

TERMS OF FINAL ORDER SOUGHT

1. That first respondent has no authority or power to recall a mayor, chairperson and councilors of any local authority and that the purports recall on the applicants be and is hereby declared null and void.
2. That second and third respondents should not obstruct applicants from conducting their constitutional mandate as mayor and councilors unless and until the second respondent had complied with s 278 (2) of the Constitution of Zimbabwe.
3. That political allegiance as envisages in s 129 of the Constitution of Zimbabwe is not a basis for recalling mayors, chairpersons and councilors in Local Authorities.
4. That first respondent and any other respondent who opposed this application pay the costs of suit one paying the other to be absolved."

The applicants by notice of amendment filed on 10 September, 2020 applied to amend the first part of the provisional order to read "INTERIM RELIEF SOUGHT" in place of "TERMS OF FINAL ORDER SOUGHT". There being no opposition to the amendment, I granted the amendment.

The respondents opposed the application and filed notices of opposition and opposing affidavits to that effect. As expected, it being a fashionable way of countering urgent application *in limine* adopted by most respondents, the third and fourth respondents objected to the application as not urgent. Additionally they also averred that the applicants used the wrong form or format in preparing their application and ought to have used form 29 or 29 B. These are objections which I did not have to consider and rule upon after case managing the application with counsel. The decision was taken that since facts were common cause and that the issues arising for determination were matters of law, the applicants be permitted to file an answering affidavit and all parties to then file heads of argument. This was done.

The common cause facts were that the applicants are elected councilors for the wards in which they contested. The first applicant was further elected by the Councilors as the Mayor. Their sponsoring and mother political party which is the first respondent terminated their membership in the party. By virtue of such termination which the first respondent communicated the fact to the second respondent who in turn directed that the third respondent should notify the fourth respondent of the vacancies in the concerned wards. The fourth respondent would then facilitate the holding of by elections in the affected wards as mandated by law.

The applicants seeks an interim interdict on the terms set out in paragraphs 1, 2, and 3 of the interim relief sought pending the return date. It is convenient to start with interrogating the position of the fourth respondent. The fourth respondent took the objection that it could not be interdicted from carrying out a lawful process. The fourth respondent averred that its involvement is peripheral. It has nothing to do with the dispute surrounding the recall of the applicants from the third respondent. It submitted that its role was of an administrative nature in that after being advised of the vacancies in the Harare City Council, it had no discretion but to carry out the functions set out in sections 121 and 121 A of the Electoral Act. The fourth respondent averred that it did not perform any deliberative or quasi-judicial functions in relation to carrying out its mandate. The fourth respondent averred that the court could not competently bar the performance of a lawful function without negating the doctrine of separation of powers.

Section 121 (1) of the Electoral Act, Chapter provides as follows-

> "121 Casual or special vacancies in councils to be notified to responsible Minister and Commission
> (1) A casual or special vacancy on a council shall be notified in writing by the Town Clerk or Chief Executive Officer of the Council concerned to the Minister responsible for the Rural District Councils Act, [*Chapter 29:13*] or the Urban Councils Act [*Chapter 29:15*], as the case may be, and the Commission, no later than twenty one days after the Town Clerk or Chief Executive Officer becomes aware of it.
> (2) Upon being notified of a vacancy in terms of subsection (1) the Commission shall publish a notice in accordance with s 121 A (2)."

Section 121A (2) provides as follows:

> "(2) Not less than twenty-eight or more than sixty six days before the day appointed for any by election to fill a casual vacancy or a special vacancy, the Commission; shall by notice published in a newspaper and posted at its office –
> (a) State the number of vacancies to be filled and, where appropriate, the words in which the vacancies have occurred; and

(b) fix a place of places within the council area at which, and a day or days, not less than fourteen or more than twenty one days after the publication of the notice in the newspaper, on which a nomination court will act in terms of s 46 to receive nominations of candidates for elections of mayor, as the case may be; and
(c) fix a day or days, not less than thirty or more than forty-five days after the nomination day or last nomination day as the case may be fixed in terms of para (b; on which a poll shall be taken if a poll becomes necessary."

The fourth respondent then submitted that the relief sought by the applicant amounted to asking the court to interdict lawful actions which conduct was not permitted at law. In the case of *Judicial Service Commission* v *Zabani & Ors* 2017(2) ZLR 114 (SC) at p 121F-122C, PATEL JA stated:

> "Generally speaking, it is not permissible for a court to interdict the lawful exercise of powers conferred by statute, see *Gool* v *Minister of Justice and Another* 1955(2) SA 682(C) at 688F-G. This approach applies a fortiori where a court is called upon to interdict the lawful and *bona fide* performance of a constitutional duty. In the instant case, the court *a quo* failed to assess whether or not it was constitutionally appropriate to grant the interdict. See *National Treasury and Others* v *Opposition T. Urban Tolling Alliance & Ors* 2012(6) SA 223 (CC) at para 66. In so doing, it failed to observe the time honoured doctrine of separation of powers. As we underscored in *Doctors' for Life International* v *Speaker of the National Assembly and Or*s 2006(6) SA 416(CC) at para 37:
>
> > "Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the process of other branches of government unless to do so is mandated by the Constitution."

This principle was also clearly articulated in *International Trade Administration Commission* v *SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) at para 95:

> "Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government; courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy laden as well as polyentric."

The applicants inadvisedly did not file and answering affidavit to the fourth respondent's opposing affidavit. The applicants did not challenge the fourth respondent's contention that it is entitled to rely on the presumption of regularity of a notice of a vacancy in council issued in terms of s 121(1) of the Electoral Act: The applicants did not also challenge the fourth respondent's contention that it did not enjoy any review powers in relation to the vacancy notice

and that the duty to facilitate the holding of by-elections was peremptory. Indeed the fourth respondent does not and is not required to determine the propriety or otherwise of the process of the recall of the applicants. The fourth respondent's duty would in my view not extend further than authenticating the notice that has been generated by the authority empowered and mandated to generate or issue it. Once the notice was authenticated as to its source, the fourth respondent is required to act upon it without question.

The applicants contend that their recall by the first respondent does not result on their removal from their positions as councilors because the provisions for removal from office consequent upon a recall by the political party under whose ticket the representative elected applies only to members of the legislature and not to mayors, chairpersons and councilors. In the final relief sought, the applicants ask the court to make declarations of invalidity of the process of recall which was done by the first respondent. Until the declaration of invalidity has been made by the court, the fourth respondent is required by law to carry out the administrative functions of seeing through the electoral process run its legislated course.

The applicants argued that their purported recall was unlawful because the second respondent had misinterpreted the provisions of s 278 as read with s 129 of the Constitution after receiving advice of the expulsion of the applicants from membership of the first respondent. Section 121(1)(k) of the Constitution provides as follows:

> "129 Tenure of seat of Member of Parliament
> (1) The seat of a member of Parliament becomes vacant –
> (a) to (j) ….
> (k) if the member has ceased to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned; by written notice to the Speaker or the President of the Senate, as the case may be, has declared that the Member has ceased to belong to it;
> (l) to (n)……."

Section 278 of the Constitution provides as follows:

> "278 Tenure of seats of members of local authorities
> (1) the seat of a mayor, chairperson or councillor of a local authority becomes vacant in the circumstances set out is s 129, as if he or she were a Member of Parliament, any reference to the Speaker or President of the Senate in section 129(1)(k) being construed as a reference to the Minister responsible for local government.
> (2) An Act of Parliament must provide for the establishment of an independent tribunal to exercise the function of removing from office, mayors, chairpersons and councillors, but any such removal must only be on the grounds of –

(a) inability to perform the functions of their offices due to mental or physical incapacity;
(b) gross incompetence;
(c) conviction of an offence involving dishonesty, corruption or abuse of office; or
(d) wilful violation of the law including local authority law.

(3) A mayor, chairperson or councillor of a local authority does not vacate his or her seat except in accordance with this section."

The applicants argued that they could only be removed from office upon the set-up of an independent tribunal established through an Act of Parliament to exercise the functions of removing them from office and only on grounds set out in para(s) (c) to (e) of subs (2) of s 278 of the Constitution. They submitted that s 129(1)(k) of the Constitution did not apply to them. The respondents submitted that the provisions of s 129(1)(k) as read with s 278 as quoted applied to the applicants.

In order to determine whether the applicants have a *prima facie* case to the relief which they seek, I have to consider whether their argument that s 129(1)(k) of the Constitution is not applicable to them but only to Members of Parliament is *prima facie* sound. I am unable to agree with the applicants' contention because the law is clearly expressed in s 278. Section 278(1) provides for an instance when the seats of mayor, chairperson or councillor becomes vacant. That instance is the one provided for in s 129(1)(k) *mutatis mutandi* read with s 278(1). Section 278(1) is clear in its import. It simply provides that in the case of cessation of membership of the political party on whose ticket, mayors, chairpersons and councillors were elected, they lost their seats in the same manner that Members of Parliament lose their seats for the same reason or circumstance. The section provides that the notice of cessation of membership of the political party concerned is given to the Minister responsible for local government who is the second respondent *in casu*. Therefore the first instance of removal from office by reason of a seat becoming vacant by operation of law is where the mayor, councillor or chairperson ceases to be a member of the political party that sponsored such person's election to the position concerned. *In casu*, the applicants have not disputed that they were expelled by the first respondent. The first respondent notified the second respondent who in turn directed that the third respondent should notify the fourth respondent of the vacant seats. The paper trail or procedure cannot be faulted as it followed the provisions of the applicable law.

The other instance when the mayor, chairperson or councillor may lose their seats is in respect to the commission of acts set out is s 278(2) of the Constitution. An Act of Parliament must provide for the set-up of an independent tribunal to enquire into the removal from office of the mayor, chairperson or councillor on grounds enumerated in s 278(2). The correct interpretation of s 278 930 puts paid to the applicants argument. The subsection (3) provides that a mayor, chairperson or councillor can only lose their seat in instances listed in s 278. The grounds for removal are therefore limited to only two. The first one is the one in s 278(1) and the next is that provided for in s 278(2). Consequent on the view that I have taken that the applicants have misinterpreted the provisions of s 278 of the Constitution as read with s 129(1) (k), the applicant have failed to establish *a prima facie* case to the interim relief claimed. In any event, the relief they seek in the interim amounts to asking the court to interfere with the exercise of legislated power reposed in the fourth respondent without legal justification

The applicant's case is not one which has justifiable legal ground to constitute a case which if proceeded with to trial would likely succeed. The applicant's case is devoid of merit. I need to consider the issue of costs. Ordinarily costs follow the event. I am not persuaded to depart from the rule. I order as follows:

IT BE AND IS HEREBY ORDERED THAT:

"The urgent application be and it is hereby dismissed with costs."

M.E. Motsi & Associates, applicants' legal practitioners
Mwonzora & Associates, 1st respondent's legal practitioners
Civil Division, 2nd respondent's legal practitioners
Chihambakwe, Mutizwa & Co., 3rd respondent's legal practitioners
Nyika Kanengoni & Partners, 4th respondent's legal practitioners