COMBINED HARARE RESIDENCE ASSOCIATION
and
BORROWDALE RESIDENTS AND RATE PAYERS ASSOCIATION
and
CLEVER RAMBANEPASI
and
IAN MAKONE
and
ELVIS RUZANI
versus
MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS AND NATIONAL HOUSING

HIGH COURT OF ZIMBA BWE
MUNANGATI-MANONGWA J
HARARE, 4 & 20 OCTOBER 2022 & 11 JANUARY 2023

Opposed Matter

Mr T Biti, for the applicants'
Mr D Machingauta, for the respondent

MUNANGATI-MANONGWA J: This is an application challenging the constitutionality of the provisions of s 314 of the Urban Councils Act [*Chapter 29:15*] as being *ultra vires* the provisions of ss 264 and 265(1) and (2), s 274 and s 276 of the Constitution of Zimbabwe. The applicant applies that s 314 of the Urban Councils Act [*Chapter 29:15*] (hereinafter referred to as "the Act") be set aside. The application is opposed.

The respondent raised two points *in limine* which I dismissed as having no merit. The respondent had raised the issue of the *locus standi* of the first and second respondents. He argued that the fact that the two applicants are residents and rate payers is not sufficient to establish legal standing particularly in the light of the fact that they did not indicate the district in which they reside under the City of Harare. The court did not find merit in this argument in that, the fact that the applicants are rate payers and residents of Harare is sufficient as they have an interest in the manner that the affairs of the city are being run by the Urban Council. Whether they stay in Mufakose or Greendale is neither here nor there as the test is whether the applicants

have a real and substantial interest in the matter. Where the provisions of an Act like this one are under scrutiny, it does not matter which constituency or district one hails from because the Act applies to all Urban Councils irrespective of the city hence the applicant could be from Mutare or Chegutu. Equally it is not necessary for the applicants to produce a register of the number of members under the association as the association is an entity and can litigate in its own name. That aside, there are still three other litigants whose legal standing has not been challenged, hence the matter could still be heard. In essence the challenge by the respondent even if it had succeeded, would not have prevented the case from proceeding.

The respondent raises the issue of joinder. Counsel for the respondent submitted that the City of Harare and a company called GEOGENIX B.V. ought to have been joined to the proceedings as the applicants had referred to a contract between the two parties. It was argued that the two parties ought to be heard as the order sought will affect their rights. This argument is not only devoid of merit but is untenable. This is an application challenging the constitutionality of the provisions of an act as not conforming to the dictates of the Constitution. It has nothing to do with contracts between the parties mentioned. The application has everything to do with putting to test whether the section cited is not contrary to the provisions of the cited sections of the constitution. The issue rises above individuals, entities or contracts. It pertains to whether the section deserves to live or should be decimated for want of conformity. The argument presented having no merit the court dismissed the same.

The section that is under scrutiny reads as follows:

> "**314 Minister may reverse, suspend, rescind resolutions, decisions, etc. of councils**
> (1) Where the Minister is of the view that any resolution, decision or action of a council is not in the interests of the inhabitants of the council area concerned or is not in the national or public interest, the Minister may direct the council to reverse, suspend or rescind such resolution or decision or to reverse or suspend such action.
> (2) Any direction of the Minister in terms of subsection (1) to a council shall be in writing.
> (3) The council shall, with all due expedition, comply with any direction given to it in terms of subsection (1)."

It is the applicant's argument that the section gives the Minister unnecessary powers to make decisions even on non- policy issues. The applicants submit that the section allows the respondent to interfere with the running of council business when he is not an elected councilor.

Mr *Biti* argued that central government cannot and should not interfere with running of

councils in the light of s 274 of the Constitution which allows urban and local authorities to represent and manage the affairs of the people in their areas. He submitted that the preamble to Chapter 14 of the Constitution which pertains to Provincial and Local Government is instructive where it provides as follows in (b):

> "*Whereas it is desirable to ensure:*
> (a)…….
> (b) the democratic participation in government by all citizens and communities of Zimbabwe; and
> (c) the equitable allocation of national resources and the participation of local communities in the determination of development priorities within their areas;
> *there must be devolution of power and responsibilities to lower tiers of government in Zimbabwe.*"

Mr *Biti* submitted that the lower tiers of government are thus clothed with the powers and responsibilities to run their affairs in terms of s 274 and s 265 of the Constitution which speak to urban local authorities and provincial and metropolitan councils and local authorities respectively. He submitted on behalf of the applicants that the democratic participation by citizens in government and by local communities in the running of the affairs of the areas they reside in is thwarted when the respondent invokes the powers in s 314 of the Act.

It was further argued that the provisions of s 264 of the Constitution clearly seek to empower people at local level and enhance their participation in making decisions affecting them. The section further takes cognizance of the right of communities to manage their own affairs hence the interference by the Minister runs contrary to the objectives of the whole exercise of devolution. Mr *Biti* argued that regard being had to the provisions of s 264 there is no doubt that local authorities must govern and run their own affairs. The applicants maintained that a provision of an Act of Parliament allowing the Minister to be the ultimate arbittor and governor of local authorities cannot pass the test of being in tandem with the constitutional provisions pertaining to devolution.

The applicants made further reference to s 276(1) and subs 2 of the Constitution which they argued cements the extent of the powers of a local authority to govern the local affairs of the people within its area the exercise of which cannot be interfered with by the Minister in the manner so provided by s 314 of the Act. The applicants thus argued that if the provisions of ss 264, 265 and 276 of the Constitution are juxtaposed with the provisions of s 314 of the Act it is

clear that the latter is *ultra vires* the Constitution as the provisions defeat the purpose of devolution.

The respondents opposed the application on the basis that s 314 of the Act is consistent with the provisions of s 265(3) of the Constitution which gives the respondent the administrative obligation and powers to intervene in the operations of Councils and even give out directives.

Section 265(3) reads:

"(3) An Act of Parliament must provide appropriate mechanisms and procedures to facilitate co-ordination between central government, provincial and metropolitan councils and local authorities."

Mr *Machingauta* for the respondent submitted that s 314 provides for the mechanisms that ensure that the actions of Councils are put to check if they are contrary to national development. He submitted that national government cannot be complacent when local authorities are making bad decisions or resolutions or actions that have a negative impact on the inhabitants of an area. He sought to bring in the issue of GEORGENIX B. V and the City of Harare involving a contract pertaining to a dump site. In the heads of argument the respondent went to the extent of submitting that City of Harare should abide by the contract it signed pertaining to waste management. Suffice that this submission is irrelevant as the issue before the court pertains to the constitutionality of s 314 of the Act and the issue before the court has nothing to do with the validity of the contract between the aforementioned parties. Simply put, the issue is, does the section under scrutiny live up to the dictates of the Constitutional provisions pertaining to devolution and the independence of local authorities. The challenge is on whether the powers granted to the Minister do not violate the constitutional provisions.

In deciding a constitutional issue a court needs to be cognizant of the tenets that apply thereto. Pertinent is what is to be considered before arriving at a decision of such immense importance as the Constitution is the supreme law of the land. In *Democratic Assembly for Restoration and Empowerment & 3 Ors* v *Saunyama & 3 Ors CCZ/19* at p 11 of the cyclostyled judgment, MAKARAU JCC writing for the court stated that a court has to properly interpret the Constitution then examine the challenged legislation "to establish whether it fits into the framework of the constitution. This approach gives the Constitution its rightful place, one of primacy over the challenged legislation….Only thereafter is the challenged legislation held

against the properly constructed provision of the Constitution to test its validity. In other words, one does not stretch the Constitution to cover the challenged legislation but instead one assesses the challenged law, and tries to fit it like a jigsaw puzzle piece into the big picture which is the Constitution. If it does not fit, it must be thrown away."

Thus the process has to be consciously and meticulously carried out before the challenged law can be adjudged to be *ultra vires* the Constitution. In my view certainty has to be arrived at after the outlined due process before pronouncement that the legislation under scrutiny is to be thrown away as unconstitutional. It is important that a conscious decision be made because such a decision spells the demise of the legislation in issue or the permanent severance of the section complained of.

Suffice that any powers exercised by the executive have to have legal basis. Any laws passed have to be rooted in the law. This is the principle of legality. Thus all state action has to be authorized by the Constitution or a recognized compliant law. Hence legality is premised on the tenet that there must be lawful authorisation for the exercise of public power. The case of *Fedsure Life Assurance Ltd* v *Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374(CC) astutely brings out this principle as follows:

> "It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them, by law. At least in this sense, then, the principle of legality is implied within the terms of the interim constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to determine here. We need merely to hold that fundamental to the interim constitution is a principle of legality."

In my view the reference to interim constitution in the case is not relevant and the principle remains applicable as it is of a universal legal nature operating as a legal tool to assess suitability of, and compliance of legislation with constitutional dictates.

The court emphasised that the principle of legality is a value neutral procedural requirement hinged on the common law *ultra vires* doctrine. The two facets of the principle of legality as a component of the rule of law are procedural legality and substantive legality and both components have to be satisfied. Thus conduct must not only be lawful because it has complied with the procedures prescribed by law, but has to comply with the substantive requirements of the law as well. Thus in considering whether s 314 of the Act is constitutional or not, the issue of legality is pertinent as is the rule of law. Thus the powers conferred on the

Minister or the respondent *in casu* have to measure up to the dictates of the Constitution, failure of which the powers cannot stand. It is incumbent on a court considering a constitutional matter to act as a watchdog and ensure that the exercise of public power conforms with the constitutional dictates and the principle of legality.

The current Constitution of Zimbabwe which came into effect in 2013 is a special document born out of the will of the people as evidenced by their participation. The ethos that runs throughout the provisions thereto is people orientated and defines Zimbabweans as a people. The current Constitution ushered in a democracy which was lacking in the previous constitution which was a document arising out of a compromise between the white colonialists and our liberation movements. In my view the previous Constitution came out of an impasse, there had to be a compromise and hence it did not reflect the will of the people of Zimbabwe unlike the current Constitution.

The concept of devolution and having power cascading to local communities coupled with the mantra by the government not to leave anyone behind in the quest for development attests to the self- governing concept that is evident in the preamble to Chapter 14 which inter alia speaks of "**the democratic participation in government by all citizens and communities**."

In denying that s 314 of the act runs contrary to the provisions of the constitution the respondent has maintained that the powers given to the Minister to reverse, suspend rescind resolutions of councils is hinged on the provisions of s 265 ss 3 of the Constitution. That section reads as follows:

> (3) An Act of Parliament must provide appropriate mechanisms and procedures to facilitate co-ordination between central government, provincial and metropolitan councils and local authorities.

It is clear that the objective of the mechanisms and procedures to be so provided in the act is to facilitate co-ordination between the different tiers of governance. The definition of facilitate is "*to make a process easy or easier*" or "*make smooth or smoother*" or "*smooth the way for*." In my mind the section enjoins the legislature to enact an Act with provisions which enable smooth co-ordination or a rational working relationship between the stated tiers of government for the realization of what are stated as the general principles governing provincial and local government which appear in s 1 as follows:

"**265 General principles of provincial and local government**

(1) Provincial and metropolitan councils and local authorities must, within their spheres—

(*a*) ensure good governance by being effective, transparent, accountable and institutionally coherent;

(*b*) assume only those functions conferred on them by this Constitution or an Act of Parliament;

(*c*) exercise their functions in a manner that does not encroach on the geographical, functional or institutional integrity of another tier of government;

(*d*) co-operate with one another, in particular by—

(i) informing one another of, and consulting one another on, matters of common interest;

(ii) harmonising and co-ordinating their activities;

(*e*) preserve the peace, national unity and indivisibility of Zimbabwe;

(*f*) secure the public welfare; and

(*g*) ensure the fair and equitable representation of people within their areas of jurisdiction.

Thus provision of appropriate mechanisms and procedures to facilitate co-ordination can only relate to the manner of doing things, the streamlining of processes so as not to create disharmony, liasing and even providing clear guidelines wary of the fact that each tier must exercise its functions in a manner that does not encroach on the geographical, functional or institutional integrity of another tier of government. In that regard, it cannot be said that the powers conferred on the respondent are born of the provisions of s 265. Reversing, suspending, rescinding resolutions and decisions are drastic actions which are not supported by s 265 of the Constitution. In fact such powers are not even contemplated by that section as they do not form part of mechanisms and procedures facilitating co-ordination of the tiers of government. Section 265 refers to the relationships between the different tiers of government and how it can be natured to enable a democratic functional environment conducive for development.

It does not escape the court's mind that s 314 of the Act starts with "where the Minister is of the view that any resolution, decision or action of a council is not in the interests of the inhabitants of the area concerned or is not in the national or public interest…." It is improper that the Minister as an individual decides that a decision or resolution is in his view not in the interests of the inhabitants of the concerned area. No provision is made for consultation with the inhabitants of the area concerned and in the case of the nation or public interest there is no provision of how the Minister can objectively reach such a conclusion. This becomes arbitrary given that local authorities are constituted by members who are elected by registered voters within the areas for which the local authorities are established as per s 265 ss 2 of the

Constitution. Thus a decision by a local Council is a decision of the people in that area as arrived at by their elected representatives sitting in that local authority. Hence for the Minister to reverse, suspend and rescind resolutions without consultation whatsoever is tantamount to acting contrary to the provisions of the Constitution which provide the residents with powers to manage their own affairs. There can be no empowerment that surpasses the giving of authority to the people to decide, manage, and administer their affairs through their democratically elected representatives which representatives are in turn accountable to the local residents.

The Minister cannot exercise power nor perform functions beyond that conferred by the law as all his actions have to have a legal basis. Without conforming to the principles of legality the powers conferred by s314 cannot be exercised in a constitutional democracy. The Constitution unequivocally confers local authorities with governing and management powers which should not be clandestinely interfered with. Pertinent are the following constitutional provisions attesting to that:

> "**274 Urban Local Authorities**
> (1) There are urban local authorities to represent and manage the affairs of people in urban areas throughout Zimbabwe.
> (2) Urban local authorities are managed by councils composed of councillors elected by registered voters in the urban areas concerned and presided over by elected mayors or chairpersons, by whatever name called.
> ……..
> **276 Functions of local authorities**
> (1) Subject to this Constitution and any Act of Parliament, a local authority has the right to govern, on its own initiative, the local affairs of the people within the area for which it has been established, and has all the powers necessary for it to do so.
> (2) An Act of Parliament may confer functions on local authorities, including—
> (*a*) a power to make by-laws, regulations or rules for the effective administration of the areas for which they have been established;
> (*b*) a power to levy rates and taxes and generally to raise sufficient revenue for them to carry out their objects and responsibilities."

The above provisions of the Constitution assert the powers of urban local authorities in a representative capacity to manage the affairs of the people in urban areas. This means that the elected representatives take charge of the people's affairs. Section 276 enhances the powers by stating that a local authority has the right to govern *on its own initiative* the local affairs of the people within its area and has all the powers to do so subject to the Constitution and any Act of Parliament. There can be no clearer provision on the mandate of a local authority. The constitutional conferment of managerial and governance powers on urban local authorities is

sacrosanct as it is premised on the will of the people who in a participatory manner elect representatives to make decisions on their behalf pertaining to their social welfare and general affairs in their locality. That sanctity is defiled when the respondent *moru mero* and in his view decides that, that which has been decided by the people through their elected representatives is not in their interests. The whole purpose of devolution is in the court's view premised on bringing power to the people by way of cascading governance through the tiers of government.

Central to the objectives of devolution is the giving of power of local governance to the people and enhancing their participation in the exercise of the powers of the state in making decisions affecting them. The right of communities to manage their own affairs and further their development coupled with the transfer of responsibility and resources from national government with the aim of establishing a sound financial base for each province, metropolitan and local authority as provided in s 264 of the Constitution can only be fostered by ensuring the independence of these tiers of government. In fact, such participation in governance at different levels fosters peace and unity amongst the people of Zimbabwe as contemplated by s 264 of the Constitution given that communities are in charge of their affairs and enjoy the democracy brought about by the revolutionarised Constitution borne out of their participation. The section further calls upon the provincial, metropolitan and local authorities to carry out their responsibilities efficiently and effectively in a transparent accountable and coherent manner. In essence local authorities have full powers to run their affairs and determine what is in the interests of the local communities and ultimately feeding into the public and national interest hence the demand to carry out their responsibilities efficiently and effectively.

Given the aforegoing, the provisions of s 314 of the Act which singularly give unfettered powers to the Minister to reverse, suspend, rescind resolutions or decisions made by the people through their democratically elected representatives can only be *ultra vires* the Constitution more particularly the decision being taken by an individual without consultation whatsoever. Such overriding powers which have no checks and balances are a danger to democracy as enshrined in the Constitution particularly given the objectives of devolution as outlined in Chapter 14 of the Constitution. It is tantamount to disregarding the will of the people as constitutionally provided through the democratic election of representatives sitting in the local authorities. Given the aforegoing there is absolutely no justification for the existence of s 314 of

the Act in the form it is hence counsel for the respondent was at pains to justify its existence citing s 265(3) of the Constitution whose provisions do not speak to the Minister's actions. Finally s 314 of the Urban Councils Act [*Chapter 29:15*] fails the constitutionality test when juxtaposed against ss 264(2), 265(1) and (2), 274 and 276(1) of the Constitution. The provisions of that section are *ultra vires* the constitution hence are declared invalid.

It is therefore ordered as follows:

1. Section 314 of the Urban Councils Act [*Chapter 29:15*] is *ultra vires* the provisions of ss 264(2), 265(1) and (2), 274 and 276(1) of the Constitution of Zimbabwe and is hereby declared invalid.
2. The respondent to pay costs.

The court is cognizant of the further progression of the matter *vis* confirmation of the order in terms of s 175 of the Constitution as read with s 31 of the Constitutional Court Rules.

Tendai Biti Law, applicants' legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners