

REPORTABLE (44)

CITY OF HARARE
v
FARAI MUSHORIWA

SUPREME COURT OF ZIMBABWE
PATEL JA, UCHENA JA & ZIYAMBI AJA
HARARE, 25 SEPTEMBER 2017 & 20 SEPTEMBER 2018

F. Girach, for the appellant

T. Mpofu, for the respondent

Judgment No. SC 54/2018

PATEL JA: This is an appeal against the judgment of the High Court

granting a provisional order in favour of the respondent pursuant to an urgent chamber application filed by the latter. The relevant factual background is as follows.

In May 2013, the appellant sent to the respondent a bill of \$1,700 for water services rendered. The respondent disputed the bill claiming that it related to a bulk meter not connected to his leased premises. On 31 May 2013, the appellant disconnected the respondent's water supply. The respondent then filed an urgent chamber application to restore his water supply pending the resolution of the dispute. At the time when this appeal was heard, the respondent had vacated the premises in question.

High Court Judgment

The High Court found that the relevant legislation governing water supplies divested the appellant of any unfettered discretion to disconnect water supplies. In any case, where the appellant sought to do so for any alleged failure to pay, it could only disconnect upon proof that the consumer in question had failed to pay the charges due. Moreover, the appellant could not arrogate to itself the right to determine when payment is due without the requisite proof secured by due process or recourse to a court of law. The court opined that the right to potable water is enshrined in the Constitution and that the appellant, being a public body, cannot deny water to any citizen without just cause. Furthermore, the relevant by-law relied upon by the appellant was not only unconstitutional but also *ultra vires* its parent legislation because it conferred sole jurisdiction upon the appellant to determine any disputed bill without recourse to the courts.

Judgment No. SC 54/2018
Case No. SC 228/14

2

In the event, the court *a quo* granted interim relief, pending the final determination of the matter, ordering the appellant to immediately restore water supply to the respondent's rented premises and to refrain from interfering with the respondent's possession of the premises by terminating his water supply. The appellant was also ordered to pay the costs of suit on a legal practitioner and client scale. The final order sought in the provisional order contained an interdict prohibiting the appellant from interfering with, disrupting or terminating the respondent's water supply without the authority of a court order.

Grounds of Appeal

There are eight grounds of appeal in this matter. In essence, they relate, firstly, to the relief granted by the court *a quo* and, secondly, to the legality of the appellant's actions generally. As regards the first aspect, the appellant challenges the provisional order on the grounds that the requirements for spoliatory and interdictory relief were not met and that the interim relief granted by the court has the same effect as the final relief sought. As for the second aspect, the grounds of appeal are premised on the power of the appellant to make by-laws and rules for its effective administration and the proposition that it acted lawfully in terms of those by-laws. The appellant impugns the finding of the court that the relevant by-law is both unconstitutional and *ultra vires* the enabling Act. The appellant further asserts that the right to water is not absolute but subject to limitations necessary for regional and town planning.

Judgment No. SC 54/2018
Case No. SC 228/14

3

Power to Disconnect Water Supplies

The appellant derives its right to discontinue water supplied to its consumers from an antiquated Government Notice No. 164 of 1913, titled Bye-laws for Regulating the Supply and Use of Water within the Municipality of Salisbury. In particular, it relies not upon any specific by-law but upon a clause contained in its standard form contract governing the supply of water by meter, which contract is annexed as a schedule to the Bye-laws. Clause 8(a) of the standard contract stipulates that:

“The Council may, by giving twenty-four hours' notice in writing, without paying compensation and without prejudicing its right to obtain payment for water supplied to the consumer, discontinue the supply to the consumer–

- (a) if he shall have failed to pay any sum which in the opinion of the Council is due under these conditions or the Water Bye-laws;
- (b);
- (c);
- (d)”

The inclusion of this provision in the standard form contract as opposed to the Bye-laws is an issue that appears to have escaped both parties as well as the court *a quo* in their continual references to the Bye-laws without regard to the contract annexed thereto. Nevertheless, in terms of clause 1 of the contract:

“The Bye-laws and Regulations of the Council from time to time applicable to the supply of water shall be deemed to be incorporated in and form part of this agreement.”

Thus, the Bye-laws and the contract must properly be read together as a single composite instrument. Consequently, I do not think that the distinction between them is of any particular significance in determining the grounds of appeal herein.

Judgment No. SC 54/2018
Case No. SC 228/14

The original 1913 Bye-laws were framed under the provisions of s 19 of the Salisbury Water and Electricity Supply and Loan Ordinance 1911 (No. 10 of 1911). That section, in its relevant portions, provided as follows:

“The Council may from time to time make, alter and revoke bye-laws for all or any of the following purposes in connection with the supply or use of water from the Council’s or their authorised contractors’ works or anything incidental or relating thereto, namely :-

- (1);
- (2);
- (3);
- (4) as to ordinary and extraordinary supply and agreements relating thereto, and tariff of charges or fees;
- (5);
- (6) as to fixing and using of meters or anything relating thereto;
- (7);

(8) and generally for the good government and control of the works and the supply and use of water in the Municipality and any additional municipal area.”

I note that the power to cut off water for non-payment was expressly catered for in s 16 of the Ordinance itself, albeit in terms less compulsive than those stipulated in the standard contract. It allowed the consumer concerned a period of one week after lawful demand to pay the sum due before disconnection could be effected.

Notice of Disconnection

In his heads of argument and at the hearing of the appeal, Mr *Mpofu*, for the respondent, raised the point that the appellant had given notice of its intention to disconnect on the same day that it actually disconnected the respondent’s water supply, before the expiry of 24 hours and in clear breach of the prescribed period of notice. Mr *Girach*, for the appellant, contends that the invoices sent to the respondent specifically indicate that “*Water supplies may be disconnected without further notice if this account remains unpaid after due date*”. Since the stated due date is approximately three weeks after the billing date, it cannot be said that the requisite notice was not given. This contention finds some support in s 49 of the Bye-laws (as amended by s 2 of S.I. 489/1952) which provides that:

“Every account shall become due and payable on the date stated therein and the service of such account shall constitute notice that the supply of water may be cut off if payment is not made on or before such date.” (The emphasis is mine).

Notwithstanding this provision, I take the view that the argument proffered by Mr *Girach* is unsustainable. The threat of possible disconnection for non-payment by due date contained in the appellant’s invoices is nothing more than a standard

warning reiterated in every monthly rates statement sent out to owners or occupiers of property generally. It is obviously not the same as the very specific “*twenty-four hours’ notice in writing*” of impending and imminent disconnection, stipulated under clause 8(a) of the standard contract, for non-payment of sums previously invoiced and already due.

The respondent’s averment that his water supply was disconnected on the same day as the day on which the notice of disconnection was received does not appear to have been disputed by the appellant. If that averment is correct, it would follow that the appellant’s conduct was unlawful, but for reasons entirely different from those grounding the respondent’s claim of spoliation and the decision of the court *a quo* in that particular respect. That being the case, I do not agree with Mr *Mpofu*’s submission that the appellant’s failure to give the requisite notice of disconnection, if it is proven, affords a proper basis for dismissing the entire appeal, which has been mounted on other substantive grounds specifically addressed and determined by the court *a quo*. In any event, I take the view that those grounds relate to matters of considerable public importance warranting their comprehensive adjudication by this Court. This is particularly so as there are several extant decisions of the High Court with divergent findings and conclusions on the legality of water disconnections by municipal authorities.

Judgment No. SC 54/2018
Case No. SC 228/14

Propriety of Interim Relief Granted

Mr *Girach* submits that the grant of an interdict or spoliation order requires the establishment of a clear right. The case before the High Court involved a dispute of fact as to whether or not the respondent’s water bill was due. All that the respondent did

was to dispute the amount due as an excuse for refusing to pay the bill. The appellant consistently disputed any linkage to the bulk meter and contended that the water charges levied were not unlawful. Therefore, there was no proper legal basis for the provisional order granted *a quo*, which order also sets a dangerous precedent for the provision of utility supplies generally.

I agree with Mr *Girach* that the papers filed before the court *a quo* indicate an absence of clarity as to the status of the bulk supply meter. On the other hand, I am also persuaded by Mr *Mpofu* that this issue is of negligible relevance *in casu*. The uncontested factual position is that the respondent had regularly paid his bills on time and had constantly called upon the appellant to regularise his account after being billed for usage recorded on the bulk meter. Despite promises to look into the matter, the appellant did nothing to assist but proceeded to bill the respondent and eventually disconnected his water supply. In short, the respondent made all efforts to show that his bill was incorrect and not due, but to no avail.

Judgment No. SC 54/2018
Case No. SC 228/14

Furthermore, I am unable to accept the argument that the decision of the court below sets any dangerous precedent with the ensuing likelihood of chaos in the provision of utility services generally. The facts of this case are distinctive and peculiar to the circumstances of the respondent in his dealings with the appellant. In the event, I am satisfied that the respondent had established a sufficiently clear right entitling him to the interdictory and spoliatory relief granted by the court *a quo*.

Turning to the specific terms of the provisional order granted by the court *a quo*, Mr *Girach* submits that the interim relief granted pending the determination of the matter is the same as the final relief sought by the respondent. Moreover, it consists of a *mandamus* coupled with an interdict and is final and definitive in effect, thereby rendering moot any further determination on the return date.

The interim relief granted ordered the appellant to immediately restore water supply to the respondent's premises, and interdicted the appellant from interfering with the respondent's possession of the premises by interfering with or terminating his water supply. The final order sought declared the termination of the respondent's water supply on the basis of a disputed water bill in the absence of a court order to be unlawful self-help, and interdicted the appellant from interfering with, disrupting or terminating the respondent's water supply without a court order.

Judgment No. SC 54/2018
Case No. SC 228/14

At first glance, the terms of the interim relief granted and the final order sought appear to be substantially similar. On closer scrutiny, however, I am able to discern certain critical differences in both the wording and effect of the two orders. In particular, paragraph 1 of the interim relief was designed to restore the *status quo ante*; paragraph 1 of the final order is essentially declaratory of the alleged unlawfulness of the appellant's conduct in the absence of a court order. Again, paragraph 2 of the interim relief granted interdicts the appellant from any interference pending the finalisation of the matter; paragraph 2 of the final order restrains the appellant from interference without the authority of a court order.

Given these significant distinctions, I take the view that what is sought in the final order on the return date is materially different from what was granted by way of interim relief by the court *a quo*. Furthermore, I am unable to perceive any categorical finality or definitiveness in the terms or effect of the interim relief granted. It does not preclude the appellant from expediting the proceedings and resisting the confirmation of the provisional order on the return date. In particular, it leaves ample leeway for the appellant to argue the merits of its case on the premise that the absence of a court order does not *ipso facto* negate its right to disconnect water supplies in order to enforce payments due for water supplied to its consumers.

The Relevant Enabling Act

Judgment No. SC 54/2018
Case No. SC 228/14

9

At the hearing of the matter, Mr *Girach* raised the entirely new argument that the enabling law for present purposes was the Ordinance of 1911 and not the Urban Councils Act [*Chapter 29:15*]. Therefore, para 69(2)(e) of the Third Schedule to the Act could not be applied, as was done by the court below, to render the Bye-laws *ultra vires*. In response, and being quite justifiably aggrieved, Mr *Mpofu* countered that this argument was highly improper in light of argument to the contrary advanced and dealt with *a quo* as well as the thrust of the grounds of appeal and heads of argument filed before this Court.

I entirely agree with Mr *Mpofu* that this fresh attack on the judgment appealed against is entirely improper and should not ordinarily be entertained. Be that as

it may, it is abundantly clear that Mr *Girach* has completely misapprehended the legislative history of the Urban Councils Act as well as established legislative practice in the treatment of existing delegated legislation.

The original Ordinance No. 10 of 1911, as amended, remained in force and operational until 1963 when it was converted into an Act of Parliament, titled the Salisbury Water and Electricity Supply and Loan Act [*Chapter 132*]. Thereafter, in 1974, this Act was repealed by the Urban Councils Act [*Chapter 214*]. However, in terms of the savings provision incorporated in the latter Act, *i.e.* s 270, all by-laws or regulations made under any repealed Act were to continue in force as though they were made under the repealing Act. Eventually, Chapter 214 was repealed and replaced, in the 1996 Revised Edition of Statutes, by the Urban Councils Act [*Chapter 29:15*]. Once again, pre-existing subsidiary legislation was saved by virtue of s 321 of that Act which sets out its savings and transitional provisions. With specific reference to by-laws, s 321(1)(d) now provides that:

“any by-laws which were made or continued in force under the repealed Act and which were in force immediately before the date of commencement of this Act shall continue in force as though they were, and shall be deemed to be, by-laws, made under the appropriate provisions of this Act and may be amended or repealed as though they had been so made;”.

What emerges plainly and clearly from the foregoing is that the 1913 By-laws, having been made under the 1911 Ordinance but having continued and remained in force under the successive replacement Acts of 1963, 1974 and 1996, now continue in force as though they were made under Chapter 29:15. It follows that the validity of the

1913 Bye-laws stands to be examined and affirmed or negated by reference to the enabling provisions of the current Urban Councils Act.

Reasonableness of Delegated Legislation

One of the fundamental tenets of administrative law is that delegated legislation, including by-laws, may be reviewed and set aside on the ground of unreasonableness. This is the settled position not only in England, particularly after the famous case of *Kruse v Johnson* [1898] 2 QB 91, but also, albeit somewhat less consistently, under Roman-Dutch law. See generally Baxter: *Administrative Law*, at pp. 478-482. As observed by the learned author, “unreasonableness has always been a ground for review of delegated legislation but it was not until *Kruse v Johnson* that the concept was given an identifiable and specific meaning”.

Judgment No. SC 54/2018

Case No. SC 228/14

11

Kruse v Johnson concerned the validity of a by-law prohibiting any person from playing music or singing in any public place or highway within fifty yards of any dwelling-house after being requested by any constable, or an inmate of such house or his or her servant, to desist. The case was heard and determined by a specially constituted bench of seven judges appointed by the Chief Justice. It was held, with one dissenting opinion, that the by-law was valid. Lord Russell CJ, delivering the majority judgment of the court, opined as follows, at 99-100:

“In this class of case it is right that the Courts should jealously watch the exercise of these powers, and guard against their unnecessary or unreasonable exercise to the public disadvantage. But, when the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, ‘benevolently’ interpreted, and credit

ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them, and in the manner which to them shall seem meet, I think courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness. I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can be properly regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there."

Judgment No. SC 54/2018
Case No. SC 228/14

12

There are four clear rules of interpretation that emerge from this celebrated passage. Firstly, because of the representative nature of municipal bodies and the delegated authority that they administer, by-laws enacted by such bodies ought to be benevolently construed and supported if possible. Secondly, it is to be presumed that such by-laws will be reasonably administered by the authority responsible for administering them. Thirdly, courts of law should exercise great caution in questioning the validity of by-laws and should be slow to strike them down as being invalid on the ground of unreasonableness. And, fourthly, where the criterion of reasonableness is to be applied to any by-law, it should only be condemned if it is objectively found to be grossly unreasonable.

The concept of unreasonableness in relation to by-laws is similar to the equivalent *Wednesbury* principle, as applied in judicial review of administrative action. It was further elucidated by Diplock LJ in *Mixnam's Properties Ltd v Chertsey UDC* [1964] 1 QB 214, at 237, as follows:

“... the kind of unreasonableness which invalidates a by-law is not the antonym of ‘reasonableness’ in the sense in which the expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say: ‘Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*’”

Kruse v Johnson has been perennially affirmed and applied in our courts in adjudicating the validity of by-laws and other delegated legislation. See, for instance, *City of Salisbury v Mehta* 1962 (1) SA 675 (FC) at 678, 689, 692; *S v Nyamapfukudza* 1983 (2) ZLR 43 (SC) at 46; *Patriotic Front – Zimbabwe African People's Union v Minister of Justice, Legal & Parliamentary Affairs* 1985 (1) ZLR 305 (SC) at 323, 325, 330, 332; *S v Delta Consolidated (Pvt) Ltd & Ors* 1991 (2) ZLR 234 (SC) at 238. I

Judgment No. SC 54/2018
Case No. SC 228/14

entertain no doubt that the rules enunciated in that case continue to retain their soundness and authoritativeness in the present context.

As regards the need to exercise benevolence in the construction and application of by-laws, it was observed by Cozens-Hardy MR in the case of *Williams v Weston-super-Mare UDC (No. 2)* (1910) 103 LT 9, at 11, that the courts:

“ought to assume, and assume strongly, that the local authority is exercising their duty honestly and doing their best for the benefit of the locality; they being entrusted by Parliament with powers for that express purpose.”

The need for judicial restraint in the administrative realm is also captured in the maxim *omnia praesumuntur rite et solemniter esse acta*. It is trite that every

enactment by implication imports the principle underlying this maxim. See Bennion: *Statutory Interpretation*, at pp. 782-783. The maxim establishes the presumption that an enactment or delegated legislation is properly passed or correctly made, until the contrary is proved. As applied to the exercise of official or administrative functions, it must be presumed that the powers conferred will be fairly and reasonably administered and will not be abused.

It is also apposite to heed the remarks of Murray CJ in *R v Jeremiah* 1956

(1) SA 8 (SR) at 11:

“It might be contended, as counsel suggested, that the problem of dealing with these cases of unavoidable or justifiable 'standing or waiting' can be solved by relying on the discretion of the administrators of the bye-law to avoid the extreme and unreasonable results of a literal construction of the bye-law by refraining from enforcing it by prosecution in these cases of hardship. This has, however been decided in *Amoils v Johannesburg City Council*, 1943 T.P.D. 386 at p. 390, not to be the proper solution. The duty of the Court, according to that decision, is to endeavour, in its duty to give a benevolent interpretation to the bye-laws of a local authority by upholding them as far as is possible (vide *Kruse v Johnson*, *supra*; *R v Pretoria Timber Co. (Pty.), Ltd., & Another*, 1950 (3) SA 163 at p. 170 (A.D.)), to ascertain if there are not two reasonably possible interpretations of the bye-law. If there are two, and one of them produces, while the other avoids, unreasonable and harsh results, then the bye-law will be upheld by giving it the second construction. Needless to say, if the bye-law is incapable of any construction, other than that which produces unreasonable results, it cannot be saved and must be held to be *ultra vires*.”

In the context of the broad powers of review exercisable by the courts,

Bennion (*op. cit.*), at p. 144, opines that:

“The operation of the doctrine of *ultra vires* is wider in relation to byelaws than statutory instruments. This is because in relation to byelaws the courts regard themselves as entitled to examine not only the scope of the power but the reasonableness of its exercise”.

The learned author also affirms, at pp. 144-145, that the courts have the power to sever a provision which is *ultra vires* from the rest of the instrument or to set aside and disregard the invalid part, leaving the rest intact, unless the former is inextricably interconnected with the valid part. However, this does not necessarily entail “judicial surgery or textual emendation by excision”. He accordingly concludes, at p. 145:

“... the judicial process involved is not truly ‘severance’ but ‘modification’. The court has the power to modify the wording of an item of delegated legislation so as to leave it without any *ultra vires* effect. The only limit on the power is that it cannot be used to produce an instrument the overall effect of which the delegate, if made aware of the *ultra vires* point at the time of making the instrument, would or might not have approved.”

Insofar as concerns the exercise of any power or discretion conferred by any enactment, it is axiomatic that the functionary invested with the power to act or decide must comply with such rules of natural justice as are appropriate to the function to be performed as well as the time and circumstance in question. The two basic requirements in this regard enjoin the functionary concerned to decide without bias and to allow representations to be made before the decision is reached or any consequential action is taken. These basic tenets, as derived from the common law and embodied in the maxims *nemo debet esse judex in sua aut propria causa* and *audi alteram partem*, are now codified in s 3 of the Administrative Justice Act [Chapter 10:28] and reaffirmed in s 68 of the Constitution.

Whether Bye-laws are *Ultra Vires* the Enabling Act

As I have indicated earlier, the court *a quo* found clause 8(a) of the standard form contract (scheduled to the 1913 Bye-laws) to be *ultra vires* para 69(2)(e) of the

Third Schedule to the Urban Councils Act [*Chapter 29:15*], notwithstanding the broad powers of enforcement conferred upon urban councils by subs(3) of s 198 of the same Act. (In order to address the erroneous conflation resorted to by the parties and the court *a quo* that I have already alluded to, and for the sake of brevity and convenience, I shall refer to the Bye-laws as encompassing the standard contract annexed thereto, except where it is necessary to refer to the contract specifically).

Section 198 of the Act delineates the general powers of urban councils, and subs (3) provides that:

“Subject to this Act, a council shall have power to do any act or thing which, in the opinion of the council, is necessary for administering or giving effect to any by-laws of the council.”

Judgment No. SC 54/2018
Case No. SC 228/14

16

The Third Schedule to the Act prescribes the matters in respect of which urban councils may make by-laws. Paragraph 69 of that Schedule, in its relevant portions, reads as follows:

- “(1) The regulation and rationing of the supply and distribution of water.
(2) Without derogation from the generality of subparagraph (1), by-laws relating to matters referred to in that subparagraph may contain provision for all or any of the following—
- (a);
 - (b);
 - (c);
 - (d);
 - (e) cutting off the supply of water, after not less than twenty-four hours’ notice, on account of -
 - (i) failure to pay any charges which are due; or
 - (ii) the contravention of any by-laws relating to waste, misuse or contamination of water;
 - (f);
 - (g);

(h) fixing the duties of consumers in respect of meters and the settlement of disputes as to the amount of water supplied or the tariff applicable.”

In its judgment, the court *a quo* reasoned that the appellant could not rely on the Bye-Laws, as read with s 198(3) of the Act, for its purported claim to disconnect water supplies. This was because s 198(3) is subject to para 69(2)(e) of the Schedule which deliberately omits the words “in the opinion of the Council”, thus divesting the appellant of any unfettered discretion in the matter and rendering invalid the Bye-laws in question. The appellant could therefore only disconnect water supplies upon proof of failure to pay by due process or recourse to the courts.

While these conclusions are not entirely untenable, the approach adopted by the learned judge is, with great respect, somewhat narrow and unilateral. It overlooks several well-established canons of statutory interpretation which enjoin, *inter alia*, that the provisions of a statute must be construed not in isolation but as a unitary whole and in a purposive manner having regard to the overall objects of the statute.

Section 198(3) of the Act, in my view, is a broad enabling provision which empowers every urban council to do whatever it deems necessary to administer or effectuate its by-laws. The Third Schedule enumerates the myriad matters in respect of which a council may make by-laws. Paragraph 69 of that Schedule confers the power to make by-laws specifically for the purpose of regulating and rationing the supply and distribution of water. Although the powers exercisable under s 198(3) are “subject to this Act”, I do not consider them to be necessarily subservient to the essentially permissive

provisions of the Third Schedule. Those provisions are designed to categorise the broad range of by-laws that may be enacted. They do not *per se* circumscribe or curtail the powers deemed necessary or expedient to enforce such by-laws. In short, s 198(3) is to be read consistently with para 69 of the Third Schedule in a manner that attains rather than defeats the overriding objectives of good governance and just administration.

This leads me to what I regard to be the critical issue for consideration in this matter, to wit, the scope and application of the words “in the opinion of the council” as contained in s 198(3) of the Act and clause 8(a) of the standard form contract annexed to the 1913 Bye-Laws. Can these words be construed and applied in a manner that conforms with the Act and the applicable precepts of reasonableness or do they vitiate clause 8(a) so as to render it *ultra vires* in its entirety?

Judgment No. SC 54/2018
Case No. SC 228/14

18

Mr *Girach* contends that clause 8(a) is reasonable when taken in its context. If consumers were allowed to refuse to pay their water bills simply by disputing them, it would result in administrative chaos. It would be impractical from a debt management and solvency standpoint in a commercial context. Although para 69(2)(e) of the Third Schedule relates to charges which are due, it does not require that a court order must be obtained to warrant the disconnection of water supply. As against this, Mr *Mpofu* submits that clause 8(a) must be construed and applied reasonably so as to justify disconnection only in respect of non-payment of charges which are actually due. If this is not possible, the clause must be regarded as being *ultra vires* para 69(2)(e) of the Third Schedule.

I now turn to consider the relevant provisions of the 1913 Bye-laws in order to assess their reasonableness or otherwise in accordance with the governing principles that I have elaborated above.

I have already adverted to s 49 of the Bye-laws relating to the computation of the amount of water supplied to any consumer and the payment of charges incurred therefor. The section as amended provides as follows:

“The quantity of water which shall be registered by the meter as having been supplied to any consumer shall be deemed to be the quantity actually so supplied. The quantity of water so registered shall be paid for by such consumer at the rate or charge for the time being fixed by the tariff of the Council for water supplied by measure. Every account for the supply so registered shall become due and payable on the date stated therein and the service of such account in terms of section 61 of these regulations [*sic*] shall constitute notice that the supply of water may be cut off if payment is not made on or before such date.”

Judgment No. SC 54/2018
Case No. SC 228/14

19

The possible disputation of meter readings and charges due is regulated by

ss 50, 51 and 52 of the Bye-laws. In their relevant portions, they read as follows:

“50. Every consumer shall be bound by the entry in the books of the Council shewing such meter reading, in the absence of evidence shewing either that such entry has been incorrectly made or that the meter was at the time of such a reading in default, and it shall not be necessary to produce the person who read the meter or the person who made any particular entry in order to prove such reading or entry.”

“51. (1) If any consumer is dissatisfied with any particular reading of a meter supplied by the council, and is desirous of having such meter tested, he shall give written notice to the council within seven days of receipt of his account, and shall deposit with the council such sum as it may from time to time fix, and thereupon the meter shall be tested by the council.

(2) If, on being tested in terms of subsection (1), a meter is found to be –
(a) correct, the consumer shall forfeit to the council the sum which he deposited in terms of subsection (1);

(b) incorrect, the council shall install a new meter and refund the sum deposited to the consumer.

(3)”

“52. Should the meter at any time be out of order and register incorrectly, the Council will repair or replace the same as soon as possible, and the quantity of water to be paid for by the consumer from the date of the meter ceasing to register correctly up to the time of the repair or replacement shall be estimated by the Council upon the basis of the previous consumption of water upon such premises, or in the event of such an estimate being impossible, upon the basis of the subsequent consumption after such repair or replacement has been effected.”

The giving of any notice to a consumer under the Bye-laws is provided for in s 61 which reads as follows:

“Where any notice is required by these Bye-laws to be served on or given to any person it shall be served personally on such person or left at or served by post to his last usual place of abode or business, and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of post, and in proving such service it shall be sufficient to prove that the notice, order or other document was properly addressed and put into the post, and in case any such person shall be absent from the Territory any such notice may be served on any agent of such person known to the Council.”

Judgment No. SC 54/2018
Case No. SC 228/14

20

It is apparent that none of the provisions of the Bye-laws cited above was addressed or ventilated in the proceedings *a quo*. Yet they are critical in evaluating the validity of clause 8(a) of the standard form contract. This clause cannot be taken in isolation but must be considered within the entire context in which it appears.

The prescribed accounting, payment and disconnection process contemplated under the Bye-laws is as follows. The process begins with the presentation of an account based on the quantity of water registered on the relevant meter as having been supplied. The account must be delivered at or posted to the consumer’s usual place of abode or business. The account also serves as notice of possible disconnection in the event that it is not paid by the due date.

Should the consumer wish to question or dispute the account so received, he is entitled to demand that the meter be tested, by giving written notice to the Council within seven days of receipt of his account and paying the deposit fixed by the Council. The latter is then obligated to test the meter. If the meter is found to be correct, the consumer forfeits the deposit that he has paid. If the meter is found to be incorrect, the Council must install a new meter and refund the sum deposited.

Quite apart from the above scenario, where a meter is found to be out of order or incorrect at any time, the Council must repair or replace the meter as soon as possible. The quantity of water to be paid for by the consumer concerned is then estimated on the basis of his previous or subsequent consumption, depending on the circumstances of each case.

Judgment No. SC 54/2018
Case No. SC 228/14

21

In either scenario, the power conferred upon the Council to disconnect water supply upon 24 hours' written notice may only be invoked as the final resort. Furthermore, the opinion of the Council as to whether the consumer has failed to pay any sum due is not purely subjective. It is qualified and conditioned by the prior delivery of an account and the possibility of that account being challenged by the consumer and then rectified if the meter in question is found to be faulty or defective. In short, the Bye-laws provide for a dispute resolution mechanism that precedes the possible penalty of disconnection. Thus, the process, taken as a whole, is entirely consistent with the requirements of para 69 of the Third Schedule to the Act insofar as that provision

delineates the parameters for framing by-laws regulating the supply and disconnection of water.

Moving on to the question of reasonableness, the authorities cited above postulate that the delegated legislation that is impugned must be accorded a benevolent construction to the extent that this is possible. Additionally, it must be presumed that the legislation concerned will be administered by the relevant functionaries in a reasonable manner.

Having regard to these interpretive principles, it seems to me that this Court is at large to presume that the Council will exercise its discretion reasonably, not only in forming its opinion as to whether or not the consumer in question is in default with any sum due but also with respect to the attendant power to disconnect water supply to that consumer. I am fortified in this position by the existence of the dispute settlement process embodied in the Bye-laws, which process entitles the consumer to challenge the accuracy of meter readings and the consequent computation of his account. I am also satisfied that this process is largely consonant with the governing tenets of natural justice insofar as they dictate the absence of bias and an opportunity to make the requisite representations.

Lastly, I am guided by the cardinal rule that the courts must exercise great caution in striking down delegated legislation. They should only intervene if that legislation is found to be objectively grossly unreasonable, viz. manifestly unequal,

unjust, arbitrary or oppressive. In the present context, I am unable to discern any such grossly unreasonable feature in the operation or application of the Bye-laws under scrutiny. In the final analysis, I take the view that the 1913 Bye-laws, regarded as a whole, are not only compliant with and *intra vires* the enabling provisions of the Urban Councils Act but also perfectly concordant with the overarching notions of reasonableness.

Whether Bye-laws are Unconstitutional

In the context of a constitutional framework within which the right to water is not explicitly articulated, the right is often subsumed under the broader rubric of the fundamental right to a clean and healthy environment and sustainable development implicit in the right to life. The right to fresh air, clean water and a pollution-free environment is perceived to derive from the inalienable common law right to a clean environment. See, for instance, the decisions of the Supreme Court of India in *Vellore Citizens Welfare Forum v Union of India* (1996) 5 SCC 647 and *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664.

In South Africa, s 27 of the Constitution expressly provides for a right to have access to health care, food, sufficient water and social security. Insofar as concerns water, s 27(1)(a) dictates that “everyone has the right to have access to sufficient water”, while s 27(2) enjoins the State to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of this right.

According to N. Gabru: *Some Comments on Water Rights in South Africa* PER/PELJ 2005 Vol. 8 No. 1, at pp. 12-14, the nature of the obligation imposed by s 27 is not unqualified so as to impose any duty on the State to provide water on demand. The reference to “access” rather than the “right” to water means that the State’s duty is limited to only those sections of the population without the means to ensure access to health care, food, water and social security. Those who have the means already have access to those essentials, since they can afford it, and therefore cannot claim it from the State. Additionally, there is no explicit guidance in the Constitution itself as to the meaning of “sufficient” food and water, *i.e.* as to the quantity and quality of water that each individual is entitled to access. Sufficient food and water must therefore be measured in terms of an adequate standard of living, which in turn is linked to the necessities of life in accordance with the prevailing cost and standard of living in the country concerned. Thus, the availability of access to food and water depends upon the availability of the resources at the disposal of the State. The learned author further notes, quite correctly, that fundamental rights and freedoms are not absolute, their boundaries being demarcated by the rights of others and by the legitimate needs of society.

In the case of *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28 [2010 (4) SA 1] the Constitutional Court of South Africa was seized with an appeal from the Supreme Court of Appeal upholding the decision of the Johannesburg High Court. The High Court had found that the prepayment water system used in the township concerned was unconstitutional and unlawful. It ordered the City to provide free basic water supply of 50 litres per person per day and the option of a

metered supply to be installed at the City's expense. On appeal to the Supreme Court of Appeal, it was held that the quantity of water required for dignified human existence in compliance with s 27 of the Constitution was 42 litres per person per day. The court also concluded that the City had no authority in law to install prepaid meters and that the disconnection of water supply, once the free basic water limit had been exhausted, constituted an unlawful discontinuation of water supply.

On further appeal and cross-appeal, the Constitutional Court set aside the orders made by both the High Court and the Supreme Court of Appeal. The court adopted a more robust and practical approach to the realisation of social and economic rights generally. It is instructive to set out the reasoning of the court at length in order to illustrate the modalities for the progressive implementation of the right to water and other rights of the same genus. To quote O'Regan J, with whose pragmatic approach I respectfully concur:

“... section 27(1) and (2) of the Constitution must be read together to delineate the scope of the positive obligation to provide access to sufficient water imposed upon the state. That obligation requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. It does not confer a right to claim “sufficient water” from the state immediately.

.... The fact that the state must take steps progressively to realise the right implicitly recognises that the right of access to sufficient water cannot be achieved immediately. That the Constitution should recognise this is not surprising.

At the time the Constitution was adopted, millions of South Africans did not have access to the basic necessities of life, including water. The purpose of the constitutional entrenchment of social and economic rights was thus to ensure that the state continue to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life. It was not expected, nor could it have been, that the state would be able to furnish citizens immediately with all the basic necessities of life.“ [at paras. 57, 58 and 59]

“Moreover, what the right requires will vary over time and context. Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable.

Secondly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.” [at paras. 60 and 61]

“The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus it places a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness.

Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government’s adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.” [at paras. 66 and 67]

“.... What is clear from the discussion above is that the City is not under a constitutional obligation to provide any *particular* amount of free water to citizens per month. It is under a duty to take reasonable measures progressively to realise the achievement of the right.” [at para. 85]

“I have thus concluded that neither the Free Basic Water policy nor the introduction of pre-paid water meters constitutes a breach of section 27 of the Constitution.” [at para. 169]

Section 77 of the Constitution of Zimbabwe is framed in words that are almost identical to those used in its South African counterpart. It encapsulates the right to food and water in the following terms:

“Every person has the right to—
(a) safe, clean and potable water; and
(b) sufficient food;
and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right.”

Mr *Girach* submits that s 77 must be read with s 86 of the Constitution. He argues that no right is absolute and that every right must be exercised reasonably and with due regard to the rights of others. Rights come with responsibilities and obligations and there can be no right to water without paying for the cost of supplying it. In any event, the impugned Bye-laws are necessary for planned urban administration and are also fair and reasonable in a democratic society. Mr *Mpofu* counters that s 77 of the Constitution obligates the appellant to provide clean and potable water. To the extent that the Bye-laws allow the appellant to act arbitrarily, they must be regarded as impeding the progressive realisation of the constitutional right to water.

The first point to note about s 77 of the Constitution is that it is a fundamental human right enshrined in Part 2 of the Declaration of Rights. As such, it is directly enforceable in terms of s 85 of the Constitution if it has been, is being or is likely to be infringed. Nevertheless, being in the nature of a social right, I do not think that it is susceptible to unqualified application and enforcement. This emerges clearly from the wording of the section itself.

What the State is enjoined to do is to take reasonable legislative and other measures to achieve the progressive realisation of the rights to sufficient food and potable water. Moreover, its obligations in this regard are confined to measures within the limits of the resources available to it. In light of the relatively inchoate and somewhat nebulous scope of the rights conferred and the concomitant obligations imposed, I am inclined to regard s 77 as being essentially policy-oriented and hortatory in nature. This is not to render the provision entirely nugatory but rather to recognise that the extent of its practical enforceability is not necessarily self-evident in every circumstance.

My reading of s 77 of the Constitution is that the possible violation of its provisions is only implicated where the State or a local authority fails to provide any or adequate water supply to any given community or locality. It might also arise where, as appears to have been recently admitted by the appellant itself, having afforded an adequate water supply to most inhabitants, it is then discovered that such supply is in fact contaminated and therefore only potable at great risk. In contrast, it is difficult to envisage how the broad import of s 77 might be invoked in the case of a consumer, who has full or adequate access to water supply, but is deprived thereof by being disconnected for having failed to pay for water consumed and after having received due notice and warning to settle his account.

Even assuming that my overall construction of s 77 is flawed, I have no doubt that the powers conferred by the Bye-laws *in casu* can be appropriately scrutinised and evaluated to ensure that they comply with and do not infringe the requirements of s

77, no matter how imprecise and ill-defined those requirements may be. Having regard to my earlier assessment of the processes embodied in the Bye-laws pertaining to the supply of water, I take the view that the power to disconnect water supply exercisable by the Council is eminently reasonable and does not in any way contravene s 77 of the Constitution.

Bearing in mind the enormous economic and budgetary considerations that would ordinarily arise in the provision of safe and clean water to a large populace, it cannot be said that the disconnection of water supply by reason of non-payment for water consumed in any specific instance constitutes an infringement of the constitutional right to water. Indeed, it may be necessary to do so to ensure that the majority of non-defaulting consumers continue to enjoy their respective rights to water. In other words, the power to disconnect the water supply of any individual consumer in the manner prescribed is a necessary incident of the measures necessary to safeguard the rights of other consumers at large. This approach accords squarely with the dictates of s 86(1) of the Constitution, to wit, that fundamental rights and freedoms must be exercised reasonably and with due regard for the rights and freedoms of others.

In the premises, I am of the considered opinion that the application and enforcement of the 1913 Bye-laws do not negate or impede the progressive realisation of the right to safe, clean and potable water as envisaged by s 77 of the Constitution. Having concluded that there is no contravention of s 77, it becomes unnecessary to delve into the question as to whether the Bye-laws constitute a limitation that is fair, reasonable,

necessary and justifiable in a democratic society within the contemplation of s 86(2) of the Constitution.

Disposition

The particular facts of this case, insofar as they relate to the respondent himself, indicate that the appellant probably did not give him the requisite 24 hours written notice prior to disconnecting his water supply. On that basis, the appellant's conduct would have been unlawful, but for reasons different from those founding the respondent's cause of action. In any event, I am satisfied that the respondent did establish a sufficiently clear right entitling him to the interdictory and spoliatory relief granted by the court *a quo*. I also agree with the respondent's position that the interim order granted below is materially different from the final order sought on the return date and that it is not categorically definitive in its terms or effect.

Judgment No. SC 54/2018
Case No. SC 228/14

30

Turning to the larger issues *apropos* the validity of the impugned 1913 Bye-laws, I take the view that their provisions, construed in their entirety, are not only reasonable in their operation but also *intra vires* the enabling provisions of the Urban Councils Act. Furthermore, I am not persuaded by the respondent's contention that the Bye-laws are incompatible with the right to water enshrined in s 77 of the Constitution. Thus, the appellant's power to disconnect water supplies for non-payment of water accounts, provided it is reasonably applied and enforced, and exercised in strict compliance with the conditions prescribed in the Bye-laws, is both statutorily and constitutionally unimpeachable.

It follows from the foregoing that the appeal fails in relation to the specific interim relief granted by the court *a quo* in favour of the respondent, but succeeds in establishing the overall legality of the Bye-laws relied upon by the appellant. For this reason, I think it just and equitable that neither party should be penalised with the costs of this appeal or the costs *a quo*.

As regards the provisional order granted by the court *a quo*, the terms of the final order sought are obviously problematic and insupportable to the extent that they contemplate the authority of a court order as a prerequisite for the discontinuation of water supply in every instance. As for the interim relief granted, this has been overtaken by events and rendered otiose inasmuch as the respondent is no longer in occupation of the premises in question. In the event, the provisional order granted by the court below should be set aside in its entirety.

Judgment No. SC 54/2018
Case No. SC 228/14

31

In the result, it is ordered as follows:

1. The appeal be and is hereby partially allowed.
2. The provisional order granted by the court *a quo* be and is hereby set aside.
3. Each party shall bear its own costs in respect of this appeal and the application instituted in the court *a quo*.

UCHENA JA:

I agree.

ZIYAMBI AJA: I agree.

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners

Nyamayaro, Makanza & Bakasa, respondent's legal practitioners