CHRISTOPHER MAGWENZI ZVOBGO
versus
CITY OF HARARE
and
DOMINIC MUZAWAZI

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 7 March and 21 September 2005

Opposed Application

Mrs *S Jarvis*, for applicant
Mr *T Biti*, for 1st respondent

MAKARAU J: This is an application for review, brought by the applicant to set aside as null and void, the proceedings of a committee of inquiry set up by the first respondent under the second respondent, to inquire into certain alleged misconduct by the applicant.

INTRODUCTION

1 The applicant and 17 other employees of the City of Harare were suspended from duty on 24 June 1999, following the findings of a committee of inquiry duly set up by the Minister of Local Government and National Housing ("the Minister"), in terms of the Urban Councils Act [*Chapter 29.15*], ('the Act").

2 At the time of the suspension of the applicant and the other employees, the affairs of the City were under the management of a Commission headed by one Elijah Chanakira, and appointed by the Minister on 8 March 1999 in terms of section 80 of the Act, following the suspension of the elected councillors on 25 February 1999. In terms of this section, a commission so elected would act as council in terms of the Act. The appointment of the Commission in terms of section 80(3) of the Act was for a period of six months. I shall revert in detail to this provision of the Act.

3 At its meeting of 30 June 1999, the Commission resolved to appoint a special committee to inquire into the allegations faced by each of the suspended 18 employees, the applicant included.

4 It is common cause that after the first six months of its appointment, the Commission remained in office up to early 2002 when a mayor and councillors were elected for the City following a ruling by the Supreme Court directing that elections for these officials be held.

5 The Commission, having been appointed on 8 March 1999, could validly act as a council in terms of section 80 (1) and (3) of the Act for a period of six months, up to 7 September 1999.

6 On a date that has not been disclosed in the papers filed of record but after the first six months of its lifetime, the Commission appointed a committee in accordance with the resolution of 30 June 1999. This committee was dissolved before it conducted any inquiries into the alleged misconduct and another committee, presided over by the second respondent, was set up in its place.

7 The second committee commenced inquiries into the allegations of misconduct by the applicant and in October 2000, the applicant raised an objection to the continuation of the proceedings on the basis that the committee lacked jurisdiction and legitimacy to conduct the inquiry as it was appointed by a commission that itself was illegally purporting to act as council for the City of Harare. The objection was overruled with the committee holding that it had the necessary jurisdiction as it was appointed under a resolution passed during the first six months of the lifetime of the commission.

8 The issue raised at this stage but that went unresolved, was whether the extension of the lifetime of the commission beyond the first six months of its lifetime was valid or rendered the re-appointed commission an illegal authority whose acts were null and void *ab initio.*

9 Dissatisfied with the ruling of the committee, the applicant immediately filed this application, seeking the relief that I have detailed in the opening part of this judgment. The application was opposed.

10 The hearing of the application was by consent held over pending determination of another application filed before his court directly challenging the legality of the commission.

11 At the hearing of the application, this court and the Supreme Court had in two separate matters, passed judgements in which the extension of the lifetime of the Commission beyond the first six months was described as illegal. The illegality of the Commission after the first six months of its lifetime was thus not in issue before me.

12 In its opposition, the first respondent argued that the committee headed by second respondent was appointed in pursuance of a resolution passed during the first six months of the lifetime of the Commission and was therefore not tainted by any alleged illegality attaching to the Commission as subsequently re-appointed. In oral argument, this ground was abandoned. Instead, it was strenuously argued that since the commission was the only authority running the affairs of the City, its otherwise illegal acts must be legitimated on the basis of efficacy. Thus, reliance was sought for this contention on the Kelsian general theory of efficacy.

THE ISSUES

13. As indicated above, it was not in issue before me that the re-appointed commission was a not a legal authority, capable of running the affairs of the City and bringing about legal consequences by its transactions. The parties appeared to have accepted as correct and binding, the *dicta* by SANDURA JA in *Lottie Stevenson v The Minister of Local Government and Others* SC 38/02 that the re-appointments of the commissioners was unlawful. In determining whether the appointment of a commission in terms of section 80 of the Act postponed the holding of elections in terms of the Act, the learned Judge of Appeal had this to say at page 10 of the judgment:

"*Consequently, the Minister could not avoid having a general election of councillors by continually re-appointing the commissioners. In my view, section 80(5) of the Urban Councils Act was not enacted for that purpose. The Power given to the Minister by that section was intended for use, as a temporary measure, during the period preceding the holding of elections as required by the Electoral Act. The re-appointments of the commissioners were, therefore illegal."*

14. This court had expressed similar sentiments in *Combined Harare Residents Association and Another v The Registrar –General* HH 210/2001. In that matter, HUNGWE J had to determine whether the power granted the Minister to appoint Commissioners in terms of the Act could be used to indefinitely postpone the holding of elections for councillors and for a mayor for the City. In useful *dicta*, the learned judge had this to say at page 9 of the judgment:

"*The matter which gave urgency at the inception of this application, at least from the papers, was that the term of office of the current Commissioners expires at the end of December 2001. There is a real danger that should there be no duly elected mayor in office by 31st December 2001, then the City of Harare will grind to a halt as it will not be legally able to expend any money for any purpose. This fear arises from the fact that the Minister cannot lawfully reappoint Commissioners ad in finitum. Any such re-appointment is illegal."*

15. I agree that the re-appointment of the commission after the first six months period was not in accordance with the provisions of the Urban Councils Act and was therefore illegal. No useful purpose will be served by my giving further reasons as to why the re-appointment of the commission offends against the provisions of the Act over and above the sentiments expressed by SANDURA JA and HUNGWE J in the cases cited above. Further, the parties to the dispute before me have properly in my view, accepted this as representing the correct position at law.

16. The fact that the resolution to appoint a committee of inquiry into the alleged misconduct of the applicant was passed during the lawful tenure of the commission was not relied upon in oral argument as making the proceedings of the committee legitimate. Although no reason was given for abandoning the argument, it is my view that such abandonment was proper. It is common cause that the committee presided over by the second respondent was appointed after the commission had exhausted its lawful tenure. It is my view that the fact that the

committee was appointed by an illegal commission in pursuance of a resolution passed during the lawful years of the commission does not clothe the committee with legitimacy as the passing of the resolution and the appointment of the committee are two separate juristic acts. Both must emanate from a commission or council lawfully in office. In law, one cannot envisage a situation where the resolution of a legal entity, lawfully constituted, can lawfully be carried into effect by an unlawful body, and in the absence of some validating procedure, create, and confer legal rights and obligations on the parties concerned.

17. This I believe, is the basis upon which the first respondent placed much reliance on the Kelsian theory of efficacy as some form of validation of the transactions of the commission after it had exhausted its lawful lifetime.

18. There are other adjectival issues that I think best disposed of at this stage so that they do not cloud the real issue before me. The first one relates to the amendment sought by the applicant to his draft order to include a declaration that the subsequent dismissal of the applicant by the first respondent was null and void. The first respondent objects to the amendment on the basis that it will introduce a new cause of action. I think not. The subsequent dismissal of the applicant was directly predicated on the proceedings that have been challenged and in the event that such are found void *ab initio,* then the dismissal will fall away by way of domino effect as anything resting on the void proceedings will have to fall with the proceedings. In this regard, the amendment is not necessary even if it will not prejudice the respondent and does not seek to introduce a new cause of action.

19. The second adjectival issue relates to the attempt by the applicant in his heads of argument to have the proceedings of the committee set aside on the basis that in terms of the Act, a suspension lapses after six months. The applicant attempts to argue that the proceedings before the commission were merrily proceeding well after the six months deadline. This ground for review was raised for the first time in the heads of argument and does not appear in the body of the applicant's founding affidavit, by which his application stands or falls.

20. The first respondent properly in my view, objected to the review of the purported dismissal of the applicant on this basis. It is common cause that this was not the case that the respondents were brought to court to meet. The case was not brought by the application before me and an attempt was made to smuggle it into the courtroom through the applicant's heads. It cannot properly constitute an issue for me to decide.

21. It is therefore my view that the sole issue that remains for my determination is whether the Kelsian theory of efficacy has any application in domestic law in general and in this particular case.

22. Although the point was not articulated, it appears to me clear that the since the illegality of the commission is undisputed, the onus rests squarely on the first respondent to prove that there is a basis upon which its actions can be validated by this court.

THE KELSIAN THEORY

23. It is not intended to fully critique the theory but to briefly outline its essential elements for the purposes of understanding the premise of the disposition I make at the end of the judgment. The theory has been described in detail in the judgements cited in this judgment and it is not necessary that I burden this judgment with such detail but to acknowledge, with respect, the work done by the courts whose judgments I now seek to use.

24. "*The Kelsian authority from which the doctrine (*of revolutionary legality) *is based is not a rule of law, but a convenient theory which serves to validate the court itself and therefore to validate the court's actions, (and) serves as a justification for the court involving itself in fundamental questions arising from a revolution"*[1]

25. The Kelsian general theory of law and state was developed by Professor Hans Kelsen and holds that in the legal system of every state, there is a fundamental law, which he describes as "the *grundnorm*", from which all other laws derive

[1] Per Davies J in *Matanzima v President of the Republic of Transkei* 1998 (4) SA 989.

their legal validity. This *grundnorm* and the entire legal system based on it depend for their validity, on their efficacy and the acquiescence of the people to the binding nature of the *grundnorm* and the other laws deriving validity from it.[2]

26. The Kelsian theory found expression in this jurisdiction in the infamous constitutional case of *Madzimbamuto v Lardner-Burke N.O. And Another N.O* 1968 (2) SA 284 where the fact that the rebel government was in effective control of the country was used to declare it the government of the day and to clothe its actions and laws with legitimacy on that basis. The court went on further to find that the existing *grundnorm,* being the 1961 Constitution given by the colonial government had become either completely defunct or had been entirely suspended and the court, which had been appointed under the defunct *grundnorm,* transmogrified and embraced the new order and derived authority from the fact that the new order allowed it to function and enforced its orders. (See also *R v Ndhlovu and Others* 1968 (4) SA 515 (R, AD).

27. The Kelsian doctrine as applied in the *Madzimbamuto* matter was applied with slight modification in the matter of *Matanzima v The President of the Republic of Transkei* (supra) where the revolutionary government of Transkei of 1988 was declared lawful and its laws legitimated *ab initio* on the basis that it was in effective control of the administration of the country and the people had by and large acquiesced in its laws and were behaving in conformity with its mandates.

28. In the matter of *Binga v Administrator-General SWA and Others* 1984 (3) SA 949, MOUTON J gave effect to the submission by counsel in that matter to the effect that the law abhors a vacuum and acts of government necessary to peace and good order which would be valid if emanating from lawful government, must be regarded in general as valid when proceeding from an actual though unlawful government. He upheld the application of a South African law conscripting indigenous South West Africans to serve in the South African army before that country gained independence as Namibia.

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[2] See *Mantanzima v President of the Republic of Transkei* (supra).

29. From the above, it appears to me that the theory of efficacy has found expression mainly in international law situations to avoid vacuums created by the toppling of one *grundnorm* by another. It is therefore in my view only applicable in situations where the *grundnorm* has been suspended or has become defunct and a vacuum has thereby been created and will remain if the court does not validate the new grundnorm.

30. It further appears to me to have been applied in cases of revolutionary changes to entire governmental regimes where such change is deemed successful, the measure of success being the response of the governed people to the coup and the fact that there is no other government in opposition to the new order.

31. It further appears to me to be nothing other than a useful weapon in the arsenal of that court which intends to capitulate or seek to recognise the illegal regime as the other option would be for the court to fearlessly declare the law as he or she sees it to be, whatever the future consequences will be, a course that BEADLE CJ and other judges in *Madzimbamuto* shied away from. (See page 329 ff of the judgment).

THE KELSIAN THEORY AND DOMESTIC LAW

32. The first hurdle that the theory faces in domestic law is the absence of a change in the *grundnorm.* Domestic law itself finds expression and validity under a fundamental law. It is itself not the fundamental law and needs no independent validation other than that which the grundnorm confers on it. In the absence of a change in the *grundnorm*, the theory cannot be invoked to validate illegal acts done under domestic law.

33. The theory is not meant to fill all vacuums of power no matter how created and particularly, cannot fill vacuums created by the domestic law as such vacuums should be filled by making reference to the *grundnorm* and applying domestic remedies. The theory has been invoked to fill vacuums created at national level where one regime has been ousted from power in a manner not anticipated or provided for in the *grundnorm.*

34. It cannot be invoked to destroy the grundnorm by legitimising acts that are illegal under the *grundnorm*. Thus, an unconstitutional act cannot in my view be declared valid and legitimate by invoking the theory as this will lead to unprecedented anarchy and self help in domestic law. Illegal bodies may set themselves up without reference to central governments on the flimsy reason that they are effective, the people accept their mandate, and there is no other equivalent body opposing them in the sphere of society they chose to operate in. One need not think beyond the operations of the black market in foreign currency in this country presently to realise the potentially dangerous precedent that may unwittingly be set by upholding the contentions that permanence, efficacy and general acceptance by the public are the only determining features of validating an illegal authority under domestic law.

35. It is my further view that the court is not placed in a dilemma by the existence of a perceived vacuum in domestic law. Its omnipotence granted and guaranteed by the *grundnorm* is not rendered impotent by a vacuum in domestic law, as is the situation when there is a vacuum at international law. Thus, the need for the court to recognize and validate the illegal in exchange for its continued existence and recognition does not arise.

36. In arriving at this finding, I find some support in the dicta of LORD REID in *Madzimbamuto v Larder-Burke* [1969] AC 645 where the Privy Council rejected the application of the doctrine to give legitimacy to the usurping authority in the then Rhodesia. In disposing of the matter, the House of Lords held that there was no vacuum in Rhodesia triggering the application of the doctrine, as the whole of its existing laws remained intact and of full force. It is therefore my view that the doctrine as applied to give legitimacy to revolutionary governments in the past, has no application in the domestic law domestic sphere but remains a political tool used at international law to lag power vacuums created by revolutions and rebellions. Whether the principle can be further developed and adapted for application in some aspects of domestic law is an issue that I need not consider in this matter.

THE FACTS

37. In *casu*, there has been no suggestion that there were changes in the fundamental law of the land that created a vacuum to be filled by the invocation of the theory. There has been no revolution nor change of regime that replaced the Constitution of Zimbabwe as presently formulated. The Constitution remains the Supreme Law in the land and the Urban Councils Act that was promulgated under it remains valid and in force.

38. The vacuum sought to be filled by the application of the theory is in my view fictional. It was created not by the absence of relevant domestic laws but by the mis-application of those laws. Domestic remedies in the form of the express provisions of the Urban Councils Act abound on how to fill the alleged vacuum. A Commission was allowed to remain in office past its legal mandate, thereby creating the fictional vacuum. It is my view that to legitimise the clearly illegal in the circumstances of this matter would be to offend against the clear letter of the law as contained in the Urban Councils Act and to usurp the functions of Parliament and seek to legislate from the bench by excusing that which parliament has decreed illegal.

DISPOSITION

39. While failure to abide by the provisions of domestic law does not in my view trigger the application of the theory, the consequences of holding that the actions of the illegal Commission were void *ab initio* are not lost to me.

40. It has been submitted by counsel for the first respondent that to unscramble the actions of the illegal commission is simply unimaginable. This is true. Salaries have been paid. Rates have been levied and collected and services have been rendered by the illegal entity. While it is conceded that the illegal Commission transacted business for and on behalf of the City of Harare under the genuine but mistaken belief that it had a lawful mandate to do so, the mistaken belief on the part of the commissioners is in my view no basis in law for this court to usurp the functions of Parliament and validate that which Parliament has expressly decreed

to be illegal. It is my further view that the function properly reposes in Parliament, if it is so minded and so advised, to retrospectively confer validity on the transactions enacted by the illegal commission and which were invalidly done in good faith. The function of this court in this matter ends with declaring the law. It cannot confer validity on illegal acts on the basis that has been alleged or on any other basis.

41. In the result, the application is granted as prayed and an order is made as follows:

41.1. The proceedings of the special committee of inquiry set up by the first respondent in 1999 to inquire into alleged acts of misconduct by the applicant are hereby set aside as null and void *ab initio*.

41.2. The first respondent shall bear the applicant's costs.

Atherstone & Cook, applicant's legal practitioners.
Honey &Blankernberg, first respondent's legal practitioners.