NOMUTSA MUSHOMA CHIDEYA
versus
SEKESAYI MAKWAVARARA
and
TENDAI SAVANHU
and
PRISCA MUPFUMIRA
and
MISHECK MAHACHI
and
JAMISONE KURASHA
and
JUSTIN MUTERO CHIVAVAYA
and
ALFRED SIMBA JOME
and
CARLISON KATAFARE
and
MISHROD GUVAMOMBE
and
DOMINIC MUZAVAZI
and
A MARONGE
and
CITY OF HARARE
and
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS
AND URBAN DEVELOPMENT

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 2 November 2006 and 2 March 2007

Opposed Court Application

Mr *S. Moyo*, for the applicant
Mr *Zhou,* for 1st to 12th respondents

KAMOCHA J: The applicant in this matter was seeking a declaratur in the following terms:

"It is declared and ordered that:

1. The reappointment of the commission running the affairs of the City of Harare to serve a fourth term was unlawful, null, void and of no force and effect.

2. The appointment of an inquiring committee to inquire into the suspension of the applicant by the said commission was unlawful, null, void and of no force and effect.

3. The first respondent is not, at law, a Mayor of Harare and cannot, consequently, lawfully discharge any of the functions and exercise any of the statutory powers given to a Mayor of a city or municipality by the Urban Councils Act [*Chapter 29:15*]

4. The purported suspension of the applicant by the first respondent, purporting to discharge the functions and exercise the powers of a mayor of Harare was unlawful, null, void and of no force and effect.

5. The commission currently running the City of Harare does not have any authority to make any decision adversely affecting the contractual rights, statutory rights and powers of the applicant in his position and capacity as Town Clerk of the City of Harare.

6. The first, twelfth and thirteenth respondents be and are hereby ordered to pay the costs of this application jointly and severally the one paying, the others to be absolved."

The volume and coverage of the parties' papers in this matter, left me with the impression that the contentions of the parties generate more heat than light and may easily keep the vision of the real issues between them obscure to the impartial observer. However the main issues as perceived by this court are these:-

(a) whether or not the Minister could avoid having a general election of councillors by continually re-appointing the commissioners; and

(b) whether or not the judgment of the Supreme Court in the case of *Stevenson v Minister of Local Government & Others* 2002(1) ZLR 498 (S) was *obiter dictum*.

The applicant averred that the affairs of the City of Harare, in common with the affairs of other cities are, in terms of the Urban Council Act [*Chapter 29:15*]

meant to be run by an organ elected by residents and ratepayers of the city. There should be an elected council and elected mayor.

He asserted that a commission consisting of the 1st to 8th respondent and which commission appointed the 9th to the 11th respondents and on whose behalf the 9th to the 11th respondents accepted a mandate to carry out an inquiry into his suspension had its lifespan extended on several occasions and was in fact in its fourth term.

Further applicant contended that a chairperson of a commission could not exercise the statutory powers of a Mayor as there were only two ways in which the position of a Mayor may be occupied namely by election to the position or by Deputy Mayor becoming Mayor in the event of the Mayor being unavailable to discharge his statutory functions for any reasons.

Nevertheless, the 1st respondent purported to exercise the statutory powers of a Mayor. She suspended the applicant exercising the powers of a Mayor in terms of the provisions of section 139 of the Urban Councils Act [*Chapter 29:15*] "the Act". The Commission was alleged to have appointed members of the inquiring committee to inquire into his suspension. It was applicant's contention that the re-appointment of the Commissioners to serve a fourth term and the appointment of the inquiring committee to inquire into his conduct were unlawful, null, void and of no force and effect.

Furthermore, he contended that the chairperson of the commission could not, in any event exercise statutory suspension powers against him as she had financial interest in his suspension arising from certain allegations which he outlined which in my view appear to be irrelevant in the main and would serve no useful purpose except to cloud the issues to be determined. For instance, the allegations that the 1st respondent claimed accommodation and other expenses incurred by her and another person at Wild Geese Lodge only 10 kilometres away from her mayoral mansion provided to her as residence and that she made purchases of groceries and alcohol for consumption at her residence at the expense of the City of Harare, *et cetera et cetera,*

are to say the least irrelevant and would not assist the court in the resolution of this matter.

In arguing that the re-appointing of the commission after the first period of six months was illegal the applicant relied on decided cases of this court and the Supreme Court – (the highest court in the land).

I shall set out the relevant provisions of the Act *in extenso* before dealing with the cases concerned.

"80. Minister may appoint commissioner to act as council

(1) If at any time -

(a) there are no councillors for a council area; or

(b) all the councillors for a council area have been suspended or imprisoned or are otherwise unable to exercise all or some of their functions as councillors;

the minister may appoint one or more persons as commissioners, whether or not such persons are qualified through residence or ownership of property to become councillors, to act as the council in accordance with this section.

(2) ……

(3) A commissioner appointed in terms of subsection (1) shall hold office during the pleasure of the minister, but his office shall terminate –

(a) as soon as there are any councillors for the council are who are able to exercise all their functions as councillors; or

(b) six months after the date of his appointment; whichever occurs sooner. (Emphasis added).

Provided that, if the period of six months expires within three months before the date of the next succeeding general election, the commissioner shall continue to hold office until such general election.

(4) Before the termination of office of a commissioner appointed in terms of subsection (1) otherwise than at a general election or in the circumstances referred to in paragraph (a) of subsection (3), the Commission shall cause an election to be held on such date as may be fixed by the commissioner to fill the vacancies on the council as if they were special vacancies.

(5) If the Minister is satisfied that, after the termination of the office of a Commissioner appointed in terms of subsection (1), there will be no

> councillors for the council area who shall be able to exercise all their functions, the Minister may reappoint the Commissioner in terms of subsection (1).
>
> (6) ……."

The above provisions of section 80 of the Act have been the subject of judicial interpretation. In the case of *Combined Harare Residents Association and Anor vs Registrar General* HH 210 of 2001 HUNGWE J observed at page 9 of the cyclostyled judgment that:-

> "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 by 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 infinitum.* Any such re-appointment is illegal."

Before arriving at the above conclusions the LEARNED JUDGE examined the provisions of the Electoral Act in particular section 103 I (4)(b) at some length. He did the same with the provisions of section 80 of the Urban Councils Act and concluded that the first respondent was obliged to have fixed a date for the council general elections for the City of Harare as soon as a vacancy was created in the City of Harare. He went on to state that it followed from an examination of the provisions of the law that the appointment of Councillors was meant to be a stop gap measure. It was never intended by the legislature to be used by the Minister to usurp the right of the electorate to elect a body of its choice to govern its activities in Harare.

In terms of section 80(3) of the Act the term of a commissioner expires as soon as there are councillors for the council who are able to exercise all functions, or six months after his appointment or 9 months if a general election is due within 180 days of the expiry of the 6 months. In the result the LEARNED JUDGE rejected the argument advanced on behalf of the 1st, 2nd and 3rd respondents. See page 7 to 8 of the judgment.

MAKARAU J, as she then was had this to say in the case of *Christopher Magwenzi Zvobgo vs City of Harare and Dominic* Muzawazi judgment number HH 80 of 2005 at page 4:-

> "I agree that the reappointment 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 giving further reasons as to why the reappointment of the commission offends against the provision of the Act over and above sentiments expressed by SANDURA JA and HUNGWE J in 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."

The provisions of section 80 of the Act were considered by the Supreme Court in the case of *Stevenson vs Minister of Local Government & Ors* 2002 (1) ZLR 498 (S). After setting out the relevant provisions of section 80 of the Urban Councils Act SANDURA JA, with whom EBRAHIM JA concurred, had this to say at pages 505B to 506A-

> "As already stated, section 103 I of the Electoral Act provides that a general election of councillors shall be held in every fourth year on any day in the month of August fixed by the second respondent. When the Minister appointed the commissioners in March 1999 he must have been aware that the next general election of councillors was due in August 1999. Since the appointment of the commissioners did not mean that the election was postponed, it should have been held in August 1999, on a date fixed by the second respondent in terms of s 103 I of the Electoral Act.
>
> In any event, in terms of s 80(4) of the Urban Councils Act, before the termination of office of a commissioner, the commissioner is obliged to cause an election to be held on such date as he may fix to fill the vacancies on the council as if they were special vacancies. However, they did not do so
>
> In my view, the first respondent, being the Minister to whom the President assigned the administration of the Urban Councils Act, should have ensured that the commissioners whom he had appointed carried out their obligation to cause an election to be held before their term of office expired in September 1999.
>
> Having said that, it is clear beyond doubt that section 80(5) of the Urban Councils Act, in terms of which the commissioners were re-appointed, on two

> or three occasions, was not meant to be a vehicle for the postponement of a general election of councillors. In fact, the re-appointment of the Commissioners did not in any way whatsoever affect the legal obligation to hold a general election of councillors every fourth year.
>
> I say so because there is no provision in the Electoral or Urban Councils Act which states that once commissioners are appointed or re-appointed any general election of councillors which was due is postponed indefinitely.
>
> 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 ct. The re-appointment of the commissioners were, therefore, unlawful."

As mentioned at the beginning of the above passage EBRAHIM JA concurred. ZIYAMBI JA who dissented on the issue of *locus standi* did not indicate her stance on this particular point. Even if it is assumed that she dissented on that point as well that would not change anything since the judgment of the majority carries the day.

The respondents contended that the judgment of the court was *obiter dictum.* It therefore did not bind any lower court. They sought to persuade this court to find accordingly and thereafter deal with the matter as the court saw fit.

Wille's *Principles of South African Law* 7th edition by J.T.R. Gibson at page 8 describes *obiter dictum* as follows:

> "In the course of his judgment,, a judge sometimes expresses his opinion upon a point of law which is not necessary for the decision of the case; such an expression is termed an *obiter dictum. Obiter dicta,* even of the highest tribunal in the land, are not binding on any court, however humble, but if made by an eminent judge they are most valuable as reasoned statements, and they may very well influence the courts on a later occasion."

In *Petersen vs Jajbhay* 1940 TPD 182 at page 185 SCHREINER J as he then was had this to say:-

> "I come now to the argument relating to the remarks made by the Chief Justice and Mr Justice Watermeyer in *Jajbhay v Cassim.* It is contended that

> those expressions of opinion were *obiter dicta* and that I should examine the whole question afresh in the light of the actual decision given in that case. Now, there is no doubt that *obiter dicta,* however weighty, are not entitled to be regarded as binding upon any court however humble it might be. An inferior court – a magistrate's court – is entitled to disagree with an *obiter dictum* in the Appellate Division or in the Privy Council. And indeed if a magistrate holds a clear view of the wrongness of such a *dictum* it is his duty if there are no actual decisions binding him to give effect to the view he holds."

In the *Stevenson* case *supra* SANDURA JA first dealt with the issue of *locus standi* and after determining it the LEARNED JUDGE OF APPEAL proceeded to determine the next issue which was whether or not the 1st and 2nd respondent should be ordered to hold mayoral and council elections within sixty days from the date of the order, and setting aside the appointments of the commissions who where running the affairs of the City of Harare. The final issue to be determined was whether the Minister could avoid having a general election of councillors by continually re-appointing the commissioners. The LEARNED OF APPEAL's determination was that the re-appointments of the commissioners were, therefore, unlawful.

The respondents contended that since the LEARNED JUDGE OF APPEAL arrived at that conclusion without having been favoured with the benefit of hearing full argument on the issue his conclusion was therefore *obiter dictum.*

I have had the benefit of listening to both counsel on the same issue and have come to the same inescapable conclusion without being bound by the Supreme Court's conclusion. The reasoning in the judgment, however, appeals me. That is why I quoted the passage with approval. The same applies to the reasoning of HUNGWE J from page 6 to page 9 of the cyclostyled judgment. There is, therefore, no need for me to repeat the same reasons over and over again.

Similarly MAKARAU J as she then was rejected the argument as to avoidance of vacuum in the *Christopher Zvobgo* case *supra.* See page 9 to 10 of the judgment where the LEARNED JUDGE had this to say at paragraphs 39 and 41:-

> "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.

> 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.
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> … 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."

These sentiments appeal to me and I respectfully associate myself with them.

Turning to the issue of whether the pronouncement by SANDURA JA was *obiter dictum.* It seems to me that it may not have been *obiter dictum* since *obiter dictum* are described as judges' opinions upon points of law which may not be necessary for the decision of the case. *In casu* the pronouncement of the LEARNED JUDGE OF APPEAL were necessary for the issue to be decided. The Supreme Court had to determine the application which had been filed in this court in the light of the delay to deal with the application in this court. It accordingly determined the issues which were matters of law.

In any event assuming for a while that the LEARNED JUDGE OF APPEAL's conclusion was *obiter dictum* it is highly unlikely that if the provisions of section 80 of the Urban Councils Act were to be argued once more in the Supreme Court a different conclusion would be arrived at.

In the light of the foregoing the application succeeds. I would therefore grant it in terms of the draft.

Scanlen & Holderness, applicant's legal practitioners.
Manase & Manase, respondents' legal practitioners.