THE MINISTER OF LOCAL GOVERNMENT,
PUBLIC WORKS AND NATIONAL HOUSING
versus
ELIAS MUDZURI
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 17 September 2003 and 25 February 2004

C Muchenga for the applicant
Advocate E Matinenga for the respondent

GOWORA J: On 29 July 2003, MAVANGIRA J granted a Provisional Order the terms of which were the following;

"A. TERMS OF ORDER MADE

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1) That the 1st respondent is hereby interdicted from carrying out any mayoral functions whilst on suspension including reporting for duty at Town House or any other public gathering or function as Mayor.

2) That the 1st respondent is hereby interdicted from interfering with any investigations into his allegations of misconduct.

3) That the 1st respondent pays the applicant's costs of suit.

B. INTERIM RELIEF GRANTED

Pending determination of this matter, the applicant is granted the following relief :-

1) That the 1st respondent is hereby interdicted from carrying out any Mayoral functions whilst on suspension including reporting for duty at Town House or any other public gathering or function as Mayor.

2) That the 1st respondent is hereby interdicted from interfering with any investigations into his allegations of misconduct

C. The relief claimed against the 2nd respondent is hereby dismissed with costs.

D. SERVICE OF THE PROVISIONAL ORDER

The applicant shall serve the provisional order granted in this application on the Respondents."

The applicant is seeking confirmation of the provisional order which relief is opposed by the respondent.

The background facts to this dispute are common cause. The respondent was in March 2002 elected as Executive Mayor of Harare. It is not in dispute that the respondent contested the mayoral elections under the banner of the opposition party MDC and in fact the majority of the councilors within the City Council belong to that party. The applicant on the other hand who is the Minister responsible for the administration of the Urban Councils Act belongs to the ruling party ZANU PF. On 29 April 2003 the applicant suspended the respondent from carrying out his functions as Mayor, such suspension being without benefits. The record does not reflect when the letter was received by the respondent, but it is not in dispute that on 30 April 2003 the respondent attended a meeting of executive mayors held at Bulawayo and which meeting was arranged by the Urban Councils Association of Zimbabwe. In addition, on 5 May 2003, the respondent reported for duty at Town House and went into the mayor's office with the intention of carrying out his functions as Mayor. On the same day a letter addressed to the applicant by the respondent's legal practitioners of record made it very clear that the respondent did not consider himself to have been properly suspended and that therefore as a result he intended to not only attend at Town House to carry out the functions of mayor but he would conduct himself as mayor as he was under no obligation to comply with an unlawful and arbitrary decision. These events are apparently what then prompted the applicant to seek the relief which was obtained by way of urgent chamber application and which is now before me for confirmation or discharge.

Whereas before MAVANGIRA J the applicant was seeking a temporary interdict, Mr *Muchenga* submitted that the applicant was now seeking a permanent interdict. He contended that in order for a court to grant a final interdict three requirements were necessary to be satisfied. He cited the following as the necessary requirements; that

the applicant must establish a clear right that actual injury must have been committed or was reasonably apprehended and the absence of similar protection by any other remedy.

WHETHER OR NOT THE APPLICANT HAS ESTABLISHED A CLEAR RIGHT

It was submitted on behalf of the applicant that as the suspension of the applicant had been effected in terms of section 54(2)(a) of the Urban Councils Act [*Chapter 29:15*], the applicant had demonstrated that it had a clear right to the permanent interdict which he was seeking and that the existence of the right, which right is a statutory one, was indisputable and was not open to any doubt. It was further contended that the suspension of the respondent had been effected lawfully as the applicant had reasonable suspicion that the respondent was guilty of misconduct.

Mr *Matinenga* submitted that the onus to establish the existence of a clear right was on the applicant. He contended that the applicant had not addressed what his right was and further that what constituted a clear right was a matter of substantive law. The right to suspend was enshrined in Section 54 of the Act but it was necessary to read further than the said section however. It was further contended that the applicant did have a right which however should be supported by evidence as to whether the right was a clear right or not which must be established on a balance of probabilities. It was contended further that all the Minister did was to make allegations against the respondent without bothering to substantiate the allegations in question. In his view it did not take the matter very far to show that the respondent did not have a defence, but there must be some reasonable investigations on which the reasonable suspicion is based.

He submitted further that the substantive right was created by Section 54(2) where there are reasonable grounds to suspect that there has been misconduct. The onus on the Minister when suspending a mayor was much higher than when a councilor is suspended in terms of section 113 and there must be reasonable grounds for suspecting that the mayor was guilty of misconduct warranting suspension. The person suspending the mayor must thereafter satisfy the court that the right to suspend may be relied upon. It was further submitted that the facts must clearly indicate that the person sought to be interdicted must not have a defence.

Section 54(2) of the Act provides as follows:

"The Minister may suspend a mayor -

(a) whom he suspects on reasonable grounds of having been guilty of conduct referred to in paragraph (a) of subsection (1); or

and while the mayor is so suspended he shall not carry out any functions as a mayor."

The functions of a mayor are detailed in section 64 of the Act as follows:

"(1) The mayor shall be responsible for:

(a) the supervision and co-ordination of the affairs of council and the development of the council area, and
(b) through the town clerk controlling the activities of the employees of the council concerned

(2) In addition to the responsibilities referred to in subsection (1), a mayor of a municipality shall have the following functions-

(a) presiding over all meetings of the council at which he is present; and
(b) presiding over all meetings of the council's executive committee at which he is present; and
(c) presiding over all ceremonial functions of the council; and
(d) signing orders, notices and documents that require execution or authentication by or on behalf of the council; and
(e) when necessary, causing investigations to be conducted into allegations of misconduct, whether on the part of councilors or employees of the council; and
(f) with the approval of the council fixing the conditions of service of employees of the council; and
(g) exercising any function that council may delegate to him in terms of subsection (3); and
(h) exercising any function that may be conferred or imposed upon him, whether in terms of this Act or any other enactment".

It is not open to any doubt that once a mayor has been suspended in terms of the provisions of subsection (2) of section 54 of the Act such mayor shall not carry out any of the functions that are referred to in section 64. The provisions of subsection (2) of section 54 are peremptory and the Minister would appear not to have any discretion at all in the matter, as the exercise of the functions of mayor during the period of suspension is prohibited by the Act and not by a decision of the Minister. Therefore the right of the

Minister to stop the mayor from exercising the duties or functions of mayor during the mayor's suspension under the Act is not in dispute. I do not understand the respondent to say that the Minister is not possessed of that right as the right derives by operation of law. It is also not in dispute that the respondent subsequent to his receipt of the letter of suspension carried on exercising the functions of mayor, his position being that the suspension by the Minister was null and void and he was therefore entitled to ignore the suspension and attend at his office and attend other functions in his capacity as mayor.

The position of the respondent is that before proceeding to suspend a mayor in terms of section 54(2), the Minister must satisfy himself that reasonable grounds exist for him to suspect that the mayor is guilty of conduct that renders him unsuitable to remain in the position of mayor. It is the further submission of the respondent that the Minister could not have had reasonable grounds to suspect him of being guilty of misconduct such as would render him (the respondent) unfit to be mayor and that in the circumstances, the Minister's failure to investigate the allegations prior to the suspension and the delay in appointing an investigative committee thereafter would tend to show that the decision by the applicant is clear proof of his abuse of his powers for political purposes. In respect of the Chegutu Town Council the applicant's ministry had commissioned a report which pointed to wrongdoing on the part of the Deputy Mayor but no action had been taken presumably due to the fact that he belonged to the same political party as the applicant. It was contended as well that the lack of an investigative process prior to the applicant making the decision to suspend the respondent tended to show that the applicant was not acting in the interest of the ratepayers of Harare who voted the respondent into office. Further the applicant's failure to act with speed in having the suspension dealt with has rendered the suspension of no force and effect and *ultra vires* the Act. As a consequence the Minister's perceived right to apply for an interdict to stop him from carrying out the duties of mayor cannot be confirmed as it is predicated on a nullity.

In her judgment in respect of the application for the provisional order MAVANGIRA J stated thus at p 9:

> "In my view it is important that sight is not lost of the fact that the first respondent did not make any attempt to legally challenge and have the suspension order of 29 April 2003 set aside. The suspension order stands and the first respondent must

abide by it until or unless it is set aside."

In this dispute the terms of the final order to be determined are not concerned with the appropriateness or otherwise of the suspension of the respondent by the applicant. There is before me no prayer for the setting aside of the suspension on the alleged grounds of lack of reasonableness on the part of the Minister. If I were persuaded that indeed the Minister had been unreasonable, I cannot grant an order that would result in the suspension being set aside or being declared a nullity as that is not an issue before me. In the event that the respondent intended to have a substantive order made regarding the suspension, it was up to him to make the proper application to this court instead of seeking a pronouncement which would not be of benefit to the parties or in the resolution of the dispute before the court. In my view it cannot assist a party to seek a declaration on a point or dispute when the court before which a matter involving such dispute cannot grant a substantive order in the terms being moved. Any court which makes a pronouncement on an issue not for determination before it will unnecessarily bind the court before which the dispute is eventually brought as the pertinent issues to the dispute will already have been determined in the absence of a specific prayer for appropriate relief. Such a pronouncement would also prejudice the litigants as the matter would have been already determined even though no specific relief would have been ordered. As already stated by MAVANGIRA J the respondent has not made any effort for the suspension to be set aside and as a consequence it stands and he must abide by it. I therefore decline to render a determination on whether or not the suspension was grounded on reasonable suspicion that the respondent had committed acts of misconduct as stipulated in the Minister's letter of suspension.

As I see it the right of the Minister to apply to court for an interdict against the respondent is not open for scrutiny as the prohibition against a suspended mayor carrying out the functions of a mayor is not as a result of the decision by the Minister to stop the mayor from so acting. The prohibition is by operation of law, such that had the respondent not insisted on carrying on with his duties as mayor, the Minister would not have been required to come to court for an order interdicting the mayor from so acting. Once a mayor has been suspended it is a consequence of the suspension that he ceases to carry out the duties and functions of mayor. In the absence of compliance by the mayor with the

provisions of the Act, it then behoves the official responsible for the administration of the Act to ensure that the provisions of the Act are abided with. In these circumstances it would be absurd in my view to find that the Minister did not have a clear right entitling him to seek an interdict.

WHETHER OR NOT THE APPLICANT HAS SUFFERED AN INJURY OR IF INJURY IS REASONABLY APPREHENDED

The respondent contended that in the event that the court found that the Minister indeed had a clear right, then it must be found against the Minister that there had been no injury to the Minister. The applicant on the other hand contended that the defiance by the respondent of the letter of suspension and his vowed intention to continue as mayor despite the intimation by the Minister in the letter to the respondent to stop acting as mayor during his suspension amounted to an injury as well as apprehension of harm in the future.

Neither counsel has referred to any authority on what constitutes injury for purposes of granting an interdict and despite diligent search I have not been able to find any. In the absence of case authority on the meaning of the word injury it becomes necessary to look at its ordinary everyday meaning.

The Shorter Oxford Dictionary describes the verb ‘injure’ as follows:-

> "to do injustice to, to wrong; to do outrage to in speech; to insult, revile, calumniate. To do hurt or harm to; to damage; to impair".

The same dictionary describes the noun ‘injury’ in the following terms:

> "Wrongful action or treatment; violation of another’s rights; suffering or mischief intentionally inflicted"

The applicant is the Minister to whom has been assigned the responsibility for the administration of the Act and he is the one who is in terms of section 54 given the power to suspend a mayor where he has reason to believe that such mayor is guilty of misconduct which renders him unfit to be mayor. A defiance of the suspension order and an avowed intention on the part of the mayor to carry on with the duties of mayor would be a clear violation of the provisions of section 54(2).

It cannot be in dispute that where an authority charged with certain administrative functions makes a decision which is thereafter openly defied such defiance causes impairment to the authority of the law. It would be erroneous in my view to conceive of harm or injury merely as actionable wrongs which can be claimable in monetary terms. The respondent refused to accept the authority of the applicant and the latter's capacity to send him on suspension. The stance of the respondent was that as he had been elected into office by the residents of Harare, it was they who had the capacity and right to send the mayor on the suspension and not the Minister, hence the respondent's stated intent to remain and act as mayor until the residents should have decided to the contrary. On these facts it cannot be doubted that indeed the Minister suffered an injury.

In *casu* the applicant has proved a clear right and it is therefore not necessary for him to show that he is likely to suffer irreparable harm or injury. In *Charuma Blasting & Earthmoving Services (Pvt) Ltd* v *Njainjai & Ors* 2000 (1) ZLR 85 (S) at 90E-G SANDURA JA stated as follows:

> "Since Charuma proved a clear right, it was not necessary for it to establish that it would suffer irreparable harm if the interim interdict was not granted. Support for this conclusion is found in what INNES JA (as he then was) said in *Setlogelo v Setlogelo supra* at 227. There the learned JUDGE of APPEAL said:
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> 'The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading in the well-known passage in Van der Linden's Institutes where he enumerates the essentials for such an application. The first he says, is a clear right; the second is injury. But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though prima facie established, is open to some doubt. In such cases, he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable harm to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party: van der Linden Inst (3,1,4,7). But he certainly does not lay down the doctrine that where there is a clear right the injury complained of must be irreparable in order to justify an application for an interdict.'"

I respectfully associate myself with those views and agree with counsel for the applicant that there is no requirement for him to prove that the injury is irreparable.

ABSENCE OF ANY OTHER REMEDY

In her judgment of 10 July 2003 in which she granted the provisional order MAVANGIRA J stated on page 8 of the judgment:

> "In this matter, it appears to me that if the interim interdict is granted but the grant of it is later shown to be wrong, the first respondent's suspension should fall away and the first respondent should resume his duties as Mayor. If on the other hand, the interim interdict is refused and the refusal is later shown to be wrong, then the applicant's authority and powers under the Act will have been irreversibly and irreparably disregarded or defied. This is particularly so as the applicant has no other adequate remedy available to him. As submitted by the applicant's counsel, a claim for damages is, in the circumstances, not available to the applicant and the interim relief sought is the only available remedy that he may use. I also agree with the applicant's counsel that the provisions of section 318 of the Act do not provide the applicant with a remedy as rights under the section accrue to the Council and not the Minister."

I believe that those remarks by the learned judge apply with equal force in this application which is to do with the confirmation of the provisional order. There is no other remedy available to the Minister. The respondent in opposing the confirmation of the order has not pointed this court to any other remedy that the Minister might avail himself of apart from the interdict.

In the result the application succeeds and the provisional order granted by this Honourable Court on 10 July 2003 is hereby confirmed and a final order is issued in the following terms:

1. The respondent is interdicted from carrying out any mayoral functions whilst on suspension including reporting for duty at Town House or any other public gathering or function as Mayor.

2. The respondent is hereby interdicted from interfering with any investigations into his allegations of misconduct.

3. The respondent is ordered to pay the applicant's costs of suit.

Attorney-General's Office, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners