BRIAN LESLIE JAMES
versus
THE CITY OF MUTARE
and
ORBERT LENOS MUZAWAZI
And
TATENDA NHAMARARE

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 4 March 2015, 25 March 2015

Opposed Application

Ms *E Mpanduki,* for the applicant
Ms *F Mahere,* for the 1st respondent

CHIGUMBA J: This is an application for an interdict and other consequential relief, brought by a resident of the city of Mutare, who operates a business which trades as Manicaland Meat Products. The applicant owns immovable property in Mutare, is a rate payer, and a former mayor of Mutare. Applicant is aggrieved because the city of Mutare, a local authority, placed an advertisement in the Manica Post, on 29 November 2013. The advertisement was for the purpose of changing the city's old tariffs for payment of rates and licence fees, and replacing them with new ones. The issue that falls for determination is whether the advertisement complied with the provisions of s 219 (2) of the **Urban Council's Act [Chapter 29: 15] (**hereinafter referred to as the Act). The relief that the applicant is seeking, in the event that the court finds that the Act was contravened, is that:

1. The first respondent shall with immediate effect, cease levying or charging the new tariffs, charges, deposits and service charges as contained in the new budget for 2014 as approved by council on 9 January 2014 and shall revert to the charges applicable for the year 2013.

2. In respect of any increased tariffs, charges and deposits and service charges, actually charged since 1 January 2014, first respondent shall refund the amount of the increase implemented forthwith, and in any event by no later than 30 days from the date of this order by refunding cash to the Payor or with the consent of the Payor by crediting the account of the Payor.
3. First respondent shall not implement the new tariff charges, deposits and service charges for 2014 until such time as it has placed the necessary advertisements in a newspaper in accordance with s 219 (2) of the Act, in the manner specified and setting out the proposed tariffs charges and deposits and any existing tariffs charges or deposits and thereafter fully complied with subs (3), (4) and (5) of s 219 aforesaid.
4. A copy of this order be served on the Respondents as soon as possible after issue and failure by the respondents to comply with it forthwith shall constitute contempt of court.
5. Respondents shall jointly and severally pay Applicant's costs on the legal practitioner client scale.

I have taken the trouble to set out in full the terms of the draft order sought by the applicant, for reasons that will become clear when the court determines the various preliminary points that were raised on behalf of the respondents, at the hearing of the matter. First, let us examine the facts. On 31 March 2014, a 'court application in terms of r 64' was filed against the City of Mutare, a local authority responsible for the management administration of the City of Mutare in terms of the Act, the town clerk of the City of Mutare, and the non-executive mayor of Mutare, who is responsible for for the day to day implementation of council policy through management. The basis of the application was to seek an order impugning the increases in rates and other charges, by the first respondent, on the basis that the advertisement placed in the Manica Post and flighted on the 6th of December 2013, did not comply with the relevant provisions of the Act. The advertisement read as follows:

"**CITY OF MUTARE**

PROPOSED TARIFFS FOR 2013

> NOTICE is hereby given in terms of section 219 of the Urban Council's Act [cap 29; 15] that the Mutare City council proposes to review tariffs for the categories mentioned below with effect from *1 January 2014*.
>
> Owner's rates and supplementary charges, Water and sewage charges, Shop Licence Fees, Cremation Charges, Refuse Disposal, Rents High Density, Rents low density, Burial Charges, Licence and health registration Certificates, public health fees, Housing administration Charges, parking Charges, Traffic Enforcement fees, Ambulance Fees, Vehicle Licence Fees, Hire of Stadium and halls, swimming pool Charges, other related Charges.
>
> A copy of the proposals will lie open for inspection at Civic Centre and all District offices during normal working hours between 0800hrs and 1630hrs on any working day…Ant ratepayer who has any objections to the proposed tariffs can lodge his/her objections in writing to the town clerk within 30 days from the first date of publication.
>
> O.L. Muzawazi
>
> Town Clerk."

Applicant's first bone of contention with the manner of publication was that s 219 of the Act requires that the advertisement show both the existing and proposed tariffs, and that consequently, the advertisement that was flighted failed to comply with this requirement. Applicant averred that the purpose of this requirement was to enable easy comparison to be done, between the old tariffs and the proposed new tariffs in the advertisement, without having to go through the trouble of travelling to the Council's offices to inspect the actual new charges. Applicant's second bone of contention was that he 'discovered' that the council had not passed a resolution by a majority of its members to fix the new charges in terms of s 219 of the Act, which meant that the advertisement was flighted prematurely. Lastly applicant was aggrieved because when he went to inspect the new charges on 29 November 2013, he was advised that the new charges were not yet ready for inspection. He was finally able to inspect the new charges on the 4 December 2014.

On the 29 November 2013, applicant's Legal practitioners addressed a letter to the respondents in which the alleged invalidity of the advertisement was pointed out. On 9 January 2014, at a Special Council meeting, the second respondent presented for approval, the proposed new tariffs which were approved via a resolution. No advertisements were published as requested by the applicant, and the new tariffs were subsequently implemented. It is common cause that ratepayers are now paying increased rates. Applicant attached affidavits by three such

affected ratepayers. On 25 February 2014, another letter was dispatched to the first respondent on behalf of the applicant, protesting the implementation of the new tariffs, and applicant did not get the courtesy of a reply, or an explanation. Applicants aver that the ratepayers were shortchanged by being denied their statutory right to object, and by the unlawfulness of the advertisement which was defective and which contravened the Act. Applicant averred that the first respondent sought to mislead its ratepayers, in an article on the front page of the Manica Post, dated 14 February 204, by stating that there would be no increase in rates and commercial licences, which is contrary to the 2014 budget approved by council on 9 January 2014.

The respondents filed their opposing papers to the application on 17 April 2014. The opposing affidavit filed on behalf of the first respondent was deposed to by Mr. Tawanda Martin Kanengoni, its legal officer. A point *in limine* was raised that the application purported to have been filed in terms of r 64 of the **Rules of the High Court 1971**, which rule specifically makes provision for applications for summary judgment. It was contended that this error rendered the application fatally defective, when it was coupled with the fact that the relief being sought demonstrated clearly that applicant was seeking to challenge the validity or propriety of administrative action taken by the first respondent. It was submitted that the Administrative Court was the proper court to determine a challenge to administrative authority. First respondent averred that a single advertisement in the Manica Post cost USD$2 798-64, and that it was this prohibitive cost that led it to leave the proposed new tariffs to lie open for inspection at its offices, rather than to burden the ratepayers further by passing onto them the cost of flighting six pages (+/-16 791-84) first respondent would have been required to pay a total USD$33 583-68 for the two advertisements, whereas each time the notice was published in its abridged form, it cost USD$478-00.

First respondent averred that it did not deliberately flout the law; it made a calculated decision to save the ratepayers further more onerous charges to their accounts. First respondent contended that it complied substantially with the provisions of the Act, more so because the notice called upon those with objections to come forward. First respondent averred that a resolution regarding the tariffs was passed at a council meeting on 12 November 2013 by a majority vote of the councilors present. First respondent denied that the applicant was unable to inspect the schedule of proposed new tariffs as alleged, and contended that applicant's, written

objections were considered and rejected by it, during the statutorily provided 30 day period from the date of publication. It was averred by the 1st respondent that the council meeting which was held on 9 January 2014 was convened to consider objection to the proposed new tariffs in terms of s 219 (3) of the Act. Council concluded, at that meeting, that applicant's objection did not warrant a revision of the tariffs.

Mr. Orbert Linos Muzawazi, second responded, deposed to a supporting affidavit and confirmed that the contents of the first respondent's founding affidavit were true and correct. Mr. Tawanda Nhamarare, the third respondent, deposed to a similar supporting affidavit. On 6 may 2014, applicant filed an answering affidavit in which he acknowledged that an error had been made in labeling the application as being one brought in terms of r 64. He denied that such an error rendered the application fatally defective. Applicant denied that only the Administrative Court had the requisite jurisdiction to determine the issues raised, and contended that this court could determine the matter in terms of s 3 of the **Administrative Justice Act [Chapter 10:28]**. Applicant maintained that, no matter how prohibitive the cost of flighting the advertisement was, the first respondent was duty bound to comply with s 219 of the Act, and did not have any discretion to proceed in the manner that it did. He contended that s 219 of the Act was peremptory.

Applicant filed a notice of application to amend on 6 May 2014, in which it was proposed to delete r 64, and substitute it with Order 32, as the heading of its application. . The applicant's legal practitioner of record, Mr. George Lentaigne Ingram Lock deposed to an affidavit in support of the application for amendment, in which he stated that he used a precedent from another matter and failed to realize that the application was erroneously referred to as being brought in terms of r 64. He urged the court to have regard to the draft order in order to satisfy itself that the application was clearly not one for summary judgment. Applicant's heads of argument were filed on 25 June 2014. In the heads of argument, it was submitted that the tariffs which were approved and implemented by the first respondent are null and void for non compliance with the Act, more particularly, the advertiments which were published in the Manica Post on 29 November 2013, and 6 December 2013, directly contravened the provisions of s 219 of the Act. Section 219 of the Act provides as follows:

"219 Charges by resolution

(1) A council may, by resolution passed by a majority of the total membership of the council—
(*a*) fix tariffs or charges for—
(i) the supply of electricity or water or of refuse removal services; or
(ii) the conveyance of sewage or trade effluent in public sewers and its treatment at a sewage treatment works; or
(iii) any other services which a council may provide in terms of this Act;
(*b*) …
(*c*)
(2) Before any tariffs, charges or deposits fixed in terms of subsection (1) come into operation a statement setting out the proposed tariffs, charges or deposits and any existing tariffs, charges or deposits for the same matters shall—
(*a*) be advertised in two issues of a newspaper; and
(*b*) **be posted at the office of the council for a period of not less than thirty days from the date of the first advertisement** in the newspaper.
(3) If a statement has been advertised in terms of paragraph (*a*) of subsection (2) and within the period of thirty days referred to in that paragraph **objections to the proposed tariffs, charges or deposits are lodged—**
(a) **by thirty or more persons** **who are voters or who are users of the service to** which the tariff, charge or deposit relates; or
(*b*) where there are less than thirty such users of the service concerned, by not less than fifty *per centum* of the number of such users; such tariffs, charges of deposits **shall be reconsidered by the council, together with the objections so lodged,** and they shall not come into operation unless the resolution is again passed by a majority of the total membership of the council:
Provided that the council may in these circumstances, by such resolution, fix lower tariffs, charges or deposits than those objected to without further advertising.
(4)…" (the emphasis is mine)

It is my considered view that before going off on all sorts of tangents pertaining to the peremptory provisions of s 219 of the act, it is necessary to consider firstly, whether the objection filed by the applicant was done so properly, and secondly, based on the relief being sought, whether the applicant has the locus standi to purport to bring this application on behalf of every ratepayer in Mutare. Section 291(3) (a) is clear. Objections may be lodged by thirty people or more. Section 291(3) (b) is equally clear. Where the users of the services are less than thirty people, at least half of their number, whatever it may be, must lodge the objection. Once objections are lodged as provided by s 219 (3), the tariffs and charges of deposits shall be reconsidered by council. Council is at liberty, by a resolution passed by a majority of councilors present, to pass or approve whatever rates or deposit charges it pleases, after a consideration of the objections properly lodged. My reading of the act is that an objection which is properly lodged will trigger reconsideration of the proposed rates by council. Reconsideration may or may not result in a downward variation of the charges.

The court was referred to the case of ***Tengwe Estates (Pvt) Ltd* v *Minister of Lands & Anor***[1] on behalf of the applicants where it was held that:

> "…in many cases, the legislation expressly stipulates that certain formalities must be complied with and certain procedures followed when the power is exercised. As a general principle if these are not observed, the action taken will be invalid…where a statutory provision has the effect of depriving an individual of his rights and liberties, the courts render a strict interpretation of the provisions in favor of safeguarding the individual rights and freedoms as enshrined in the Constitution"

It was submitted further, that s 219 of the Act, which permits the first respondent to fix and amend charges, tariffs and deposits, affects citizen's rights to administrative justice as enshrined in s 68 of the Constitution. **Section 68 of the Constitution of Zimbabwe** which provides that[2]. **Section 3 of the Administrative Justice Act** provides as follows[3] **Section 2 provides for Interpretation and application[4].** It is common cause that the 1st respondent is an administrative authority.

My reading of the interpretation section of the Administrative Justice Act is that any action taken by the respondent or any of its employees, is administrative action, and that in exercising discretion in any administrative action, the conduct must be reasonable, and substantively and procedurally fair. **Francis Bennion** in his book **Statutory Interpretation @ p 21-22 writes as follows:**

> "Where a duty arises under a statute, the court, charged with the task of enforcing the statute, needs to decide what consequences Parliament intended should follow from breach of the duty. This is an area where legislative drafting has been markedly deficient. Draftsmen find it easy to use the language of command. They say that a thing 'shall' be done. Too often they fail to consider the consequences when it is not done…" See ***Chiroodza* v *Chitungwiza Town Council & Anor***.[5]

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[1] 2002 (2) ZLR 137(H)

[2] Amendment (No. 20) Act 2013-Right to Administrative Justice

1. Every person has a right to Administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

[3] [cap 10:28] Duty of Administrative Authority.

1. An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall -
   (a) Act lawfully, reasonably, and in a fair manner

[4] 'administrative action' means any action taken or decision made by an administrative authority
'administrative authority' means any person who is an officer, employee, member, committee, council, or board of state or a local authority or parastatal

[5] 1992 (1) ZLR 77(H)

In the Affretair case, (***Affretair (Pvt) Ltd & Anor* v *M K Airlines (Pvt) Ltd)***[6], at p 21, McNALLY JA said:

> "It seems to me, to put it in simple terms, that the role of the court in reviewing administrative decisions is to act as an umpire to ensure fairness and transparency.'Fair' was Lord Denning's favorite word in his decisions on administrative matters. 'Transparency' is a more modern but equally valuable word which, I venture to suggest, could usefully be used in such decisions to connote openness, frankness, honesty and the absence of bias, collusion, favoritism, bribery and corruption, and underhand dealings and considerations of any sort.
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> The duty of the courts is not to dismiss the authority and take over its functions, but to ensure, as far as humanly possible, that it carries out its functions fairly and transparently. If we are satisfied it has done that, we cannot interfere just because we do not approve of its conclusion. But at the other end of the scale, if the conclusion is hopelessly wrong, the courts may say that it could only have been arrived at by reference to improper considerations or by failure to refer to proper considerations. In these cases we reason backwards from the effect to the cause. We say 'the result is so bizarre that the process by which it was reached must have been unfair or lacking in transparency'." See also ***Silver Trucks (Pvt) Ltd & Anor* v *Director of Customs & Excise***[7]

I accept the correctness of the submission, however, that, before delving into the merits of the matter, before deciding whether or not the respondents contravened the provisions of s 219 of the Act, we must determine if the applicant is properly before the court, and whether the relief that he seeks flows from what Parliament intended to happen when the Act was breached. Was it the intention of Parliament that the ratepayers be refunded to a man, or that council be ordered to go back to the old rates, more than a year after implementing the new charges? Why did the Act provide that objections must be lodged within thirty days of the date of the advertisement? And finally, what is the effect of a council resolution by a vote of the majority of councilors present? If my interpretation of s 219 (3) (a) and (b) is accepted as being correct, it follows that there was no proper objection filed before the first respondent and the respondents were at liberty to pass any resolution that they so wished with regards to the proposed new tariffs. Applicant wrote two letters on his own behalf. He attached three supporting affidavits to this application before us. What he was required to do in order to qualify for consideration of his objection was to mobilize thirty ratepayers of the first respondent. Clearly s 219 (3) (b) does not apply because it is common cause that the first respondent has more than thirty ratepayers. There was no valid objection before the first respondent.

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[6] 1996 (2) ZLR 15 (S)
[7] 1999(2) ZLR 88(H)

Applicant is a former mayor of the 1st respondent. He ought to have been sufficiently appraised of the provisions of the Act to realize that an objection by one person would be of no force or effect. The respondents may or may not have contravened the provisions of the Act as alleged by the applicant. It may well be that the respondents failed to act lawfully by contravening the provisions of the Act which provide for the manner of advertising. But the applicant, being aggrieved by such administrative decision, may not approach this court on the basis that respondents contravened the Act and failed to correct their decision through a reconsideration of the proposed new tariffs when he himself failed to comply with the relevant provisions of the Act that would have brought about the relief that he now seeks. It is for that reason that the relief that the applicant is seeking is incompetent. Applicant does not have the requisite *locus standi in judicio* to seek relief on behalf of all the ratepayers of Mutare. Although he himself has a direct and substantial interest in the matter, he ought to have followed the provisions of s 219 (3) (a). It is only after following that provision that applicant could have approached this court for a determination of whether the right to administrative justice of thirty proven ratepayers of Mutare had been contravened.

It is my view that the various preliminary points raised by the parties were not dispositive of the issue that fell for consideration. It is not necessary to catalogue them, or to pronounce on their correctness or otherwise. This matter cannot be determined on the merits because the applicant is not properly before us. He should have mobilized thirty ratepayers in Mutare who could support their assertion of rate-paying status. All thirty should have lodged their objections in writing to the council. The objections ought to have been lodged within thirty days of 29 of November 2013, and of 6 December 2013. The Council would have been obliged to circulate each objections then hold a meeting and reconsider whatever issue would have been raised in the objections. One objection by one ratepayer need not detain council business. The objection will not be properly before council. In order to trigger reconsideration of proposed tariffs by council, thirty ratepayers needed to object within the prescribed time period. That not being done, council did not contravene the provisions of s 219 by failing to consider applicant's objection. There was nothing to stop council from passing a resolution to bring into effect the proposed new tariffs.

Counsel for the respondents made a very sound argument for costs to be levied against the applicant on a punitive scale. Not only were the papers filed of record discordant with the rules of this court, the relief sought was incompetent, and not premised on the papers filed of record. There was no class action before us, yet the relief sought had the effect of reversing financial transaction with regards to each and every ratepayer in Mutare. Applicant, being a former mayor of Mutare, ought to have been more conversant with the provisions of the Act which he sought to enforce. The basis of his application fell away because he himself had not complied with the relevant provisions of the Act. For these reasons, the application is dismissed with costs on a legal practitioner and client scale.

Messrs Henning Lock, applicant's legal practitioners
Messrs Matsika & Associates, 1st Respondent's legal practitioners