BOTHWELL PROPERTY CO (PRIVATE) LIMITED
versus
CITY OF HARARE
and
TENDAI MAHACHI N.O. (THE TOWN CLERK)

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 10 May 2016, 15 June 2016

Opposed Application

A. Makoni, for the applicant
C. Kwaramba, for the respondent

CHIGUMBA J: It is a sign of the hard economic times that have gripped this country that most administrative bodies have been forced to become more and more aggressive about collecting revenue for service delivery. Unfortunately the delay in aligning the laws that govern the conduct of these administrative bodies, with the provisions of the new Constitution, has forced them to continue to rely on compliance procedures that have no place in a Constitutional democracy. The issue that arises for determination in this matter is whether the first respondent, an administrative body, is duly authorized to disconnect water supplies to its consumers without a court order where they are in arrears, and if so, whether the law that authorizes it to do so is in line with the Constitution. Put differently, is the right to water which is enshrined in the Constitution subject to limitations in a democratic society? Is there a converse right of a body that administers the availability, potability, consumption, and distribution of this precious resource to collect revenue from consumers if such revenue is vital to their operations? Perhaps it is vital that a distinction be immediately recognized between the rights of consumers of water who have fully paid up what is due and owing for their consumption and those whose accounts

are in arrears and are not bothered about it, and those consumers whose accounts are in arrears and who have sought the protection of the courts.

This is an application for confirmation of a provisional order which was granted on an urgent certificate. The interim order which was granted on 18 May 2015 compelled the respondents and all their employees to restore water supplies to applicant's premises, number 66 Jason Moyo Avenue, Harare. Both respondents and all the first respondent's employees were also interdicted from interfering with applicant's possession and control of the premises and its water supply, pending the finalization of the matter. Both respondents were ordered to pay costs of suit on a legal practitioner-client scale. The terms of the final order sought are a final interdict prohibiting the disruption of the water supply to the applicant's premises without a court order, and an order that the termination of applicant's water supply on the basis of a disputed water bill, in the absence of a court order, is unlawful self -help.

The background of this matter appears in the founding affidavit which was deposed to by *William S. Kidd*, who was duly authorized to do so by a resolution made by the applicant's board of directors. The applicant is a company which is duly registered in accordance with the laws of Zimbabwe. It is common cause that the 1st respondent is a municipal authority which is constituted in terms of the *Urban Council's Act [Chapter 29:15]*. The second respondent is cited in his official capacity as being the person responsible at the time, for the implementation of any court orders made against the first respondent. It is common cause that the first respondent has a monopoly on supplying piped water for domestic consumption, in the greater Harare metropolitan area. It is also common cause that the applicant received water supplies from the first respondent at the given address.

The dispute between the applicant and the first respondent arose over the water bills which were generated by the first respondent for the payment of rates, and the consumption of water. Although the bills raised by the first respondent purport to be 'water bills', in reality both parties accept that the bill is a combined water and rates bill. Although rates are levied every quarter, they form part of a consumer's combined indebtedness to the first respondent for water, and constitute part of the monthly water bill. Applicant averred that it had been diligently paying its monthly water bill, and attached some receipts as proof of this assertion. A dispute arose as to what the correct amount outstanding was, culminating in a letter of complaint addressed to the first respondent in which the applicant requested that a proper reconciliation of its payment be

made, as against the balance alleged to be outstanding. Applicant's concern was that its payments were not being credited to its account. There was an allegation of collusion by members of 1st respondent's staff, and a suggestion that the fraud squad be called in to investigate the misallocation of funds.

Applicant complained that it was having to continually pay disconnection and interest charges, which it would just find tacked onto its account without prior knowledge or notice. It was averred that applicant's account ought to have had a credit balance had a proper reconciliation been done by the first respondent. On 11 May 2015, the applicant's water supply was disconnected. The bone of contention is that the disconnection was done without notice to the applicant. The applicant then approached this court on an urgent basis seeking the restoration of water to its premises and an interdict to bar further disconnections pending the finalization of the matter by the courts. The interim relief sought was granted on an urgent basis and it is not necessary to revisit its requirements. What is before us today is a consideration of the requirements of a final interdict, and the ancillary relief sought. The applicant averred that the respondents erred at law, by arbitrarily disconnecting its water supply despite the existence of an order of this court granted in similar circumstances under HH 195-14.

The respondents filed a notice of opposition on 1 July 2015, which was deposed to by *Josephine Ncube*, in her capacity as the first respondent's chamber secretary at that time. She averred that; - the allegation that payments were misposted which was made by the applicant was a diversion. The applicant was unable to substantiate this allegation when given an opportunity to do so. The dispute alluded to by the applicant was illusory, a diversionary tactic to put off the evil day and cough up what it owed. The payments made by applicant whose receipts were attached to the papers were received and allocated to its account but contrary to the applicant's assertions, the payments did not discharge its total indebtedness, or leave its account with a credit balance. The disconnection of water supplies to the applicant was lawful and justified to enable first respondent to continue to provide safe and clean water.

It was maintained on behalf of the first respondent that the disconnection of water supplies was justified at law, in terms of s 8 of the Water By-Laws 164-1913 which allow it to disconnect water supplies by giving 24 hours' notice in writing, without compensation and without prejudicing its right to obtain payment for water already consumed. The disconnection is entirely up to the first respondent's discretion if there is failure to pay any sum due. The By-

Law's parent is s 69 (2) (e) (i) of schedule 3 of the Urban Council's Act [*Chapter 29:15*] (the act), which provides that By-Laws for the cutting off of water on less than 24 hours' notice may be made, for failure to pay any charges which are due.

It is common cause that the first respondent's opinion is that applicant has failed to pay charges which are due. The question is whether in these circumstances, it is entitled to disconnect water supplies on 24 hours notice, what form the notice should take, and whether it is entitled to do so without the benefit of a court order or a resolution of its dispute with the consumer. Are these arbitrary and draconian disconnections a necessary evil which we must bless in recognition of the fact that the costs of litigation are high and the process too longwinded to make it viable for the first respondent to fulfill its mandate to provide safe and potable water? These submissions about public policy and practicability have their proponents. Is disconnection a reasonable tool to ensure compliance by consumers? Is it reasonably justifiable in a democratic society which recognizes that no right is absolute?

In its reply to the opposing affidavit dated 27 August 2015, the applicant maintained its stance that a proper reconciliation of its account needed to be done, and that the disconnection was neither lawful nor justified, therefore it amounted to self-help. At the hearing of the matter both parties stood by their heads of argument. It was submitted on behalf of the applicant that s 77 (a) of the Constitution[1], ought to guide the court in its consideration of the issues before it. It reads:

> **"77 Right to food and water**
> 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."

The parties are agreed that this court must decide whether disconnecting water supplies where the ratepayer disputes the amount due, on 24 hours written notice or otherwise is a reasonable legislative measure within the limits of the first respondent's resources, which can be taken to ensure that the right of every consumer to safe, clean and potable water is achieved. A necessary offshoot of the stating of that issue which must be determined is a consideration of the fact that it is not every consumer who disputes their indebtedness to the first respondent. Some

[1] Constitution of Zimbabwe Amendment Number 20 Act, 2013

consumers will have paid diligently, and in full. How far should their right in terms of s 77 (a) of the Constitution be curtailed? Does the state have unlimited resources to achieve the right to safe, clean and potable water?

According to the applicant's heads of argument the court should determine whether the disconnection of water supply to it was unlawful, because of the first respondent's failure to give adequate notice to it, and because that action constituted self-help, which is not permitted, at law. On the issue of notice, it was submitted on behalf of the applicant that first respondent did not serve any notice of its intention to cut off water supplies on the caretaker at Bothwell house. It was also submitted that no evidence of the 24 hour notice allegedly served on the applicant was attached to the opposing papers, therefore 1st respondent cannot rely on SI 164-1913 as read with s 198 (3) and 69 of the third schedule to the Urban Council's Act, as it seeks to do.

On the issue of self-help, it was submitted on behalf of the applicants that the dispute between the parties was real and not illusory as alleged by the first respondent. Copies of reconciliation schedules were attached to the founding affidavit. The dispute pertains to the amount which was due and payable to the first respondent at the time of the disconnection. Applicant referred this court to the case of *Farai Mushoriwa* v *City of Harare*[2], which it alleges was decided on facts similar to this matter under consideration. According to the applicant, the court in that case found that s 8 of the first respondent's By-Laws SI 164-1913, as read with s 198 (3) and 69 of the third schedule to the Urban Council's Act, does not give the first respondent an unfettered discretion which allows it to disconnect one's water supply water at will. It was held further that where the water bill is challenged, the matter must be referred to a court of law for adjudication before water can be disconnected.

The first respondent denied that the case of *Farai Mushoriwa* (*supra*), is on all fours with this one on the facts, and denied that the findings in that case ought to be followed in these circumstances. The stance adopted by the first respondent is that the case has been appealed against therefore the operation of that order was suspended by the noting of the appeal and is not binding until the appeal is conclusively determined. I concede this point in favor of the first respondent but reiterate however, that, barring an explicit order by the Supreme Court setting this case aside, at best, it is of persuasive value to this court, but not binding. The order would be

[2] HH 195-14

binding on the parties to it, unless set aside. At the moment it is suspended pending determination of the appeal. Let us examine the facts and the conclusion reached in that case.

The applicant disputed the amount on a bill for water supplied to him by the respondent council. He provided proof that he had discharged the sum total of his indebtedness and argued that the money stipulated to be due and owing by council was for a bulk water meter not connected to his premises. He approached the court for relief on an urgent basis when council disconnected his water supply without resolving the dispute. The order to reconnect water supplies was made with the consent of the parties. Subsequently, council again disconnected the water supply and only restored it after contempt of court proceedings were instituted and its officials were threatened with imprisonment. The issue that arose for determination was whether the disconnection was unlawful and what should happen in instances where there was a dispute regarding the quantum of liability. Council claimed that in terms of the water By-Laws it had the unfettered discretion to disconnect water supplies at will.

It was held that council did not have such unfettered discretion, that its discretion only came into play after it had been proved that the amount in dispute was actually due from a consumer. It was held further that in terms of s 44 of the Constitution every agency of government must respect and protect the rights and freedoms set out in the declaration of rights, more particularly s 77 of the Constitution which enshrines a fundamental right to water in the Constitution. Water cannot be denied to a citizen without just cause. Section 8 of the water By-Laws was found to contradict the Constitution and the Urban Council's Act because it authorised the arbitrary deprivation of the rights of citizens without providing compensation, and allowed council to be a judge in its own cause.

The facts in *Mushoriwa* (*supra*) are distinguishable from the facts in the matter under consideration for the following reasons. Firstly, there was evidence on record that the applicant had paid in full. In this case the applicant refused to make any more payments until a reconciliation of the account had been done. It is therefore not clear from the papers filed of record whether indeed the applicant's payments had been misposted as alleged. It is also not clear what the amount due and owing was, although it appears to be common cause that some payments were made by applicant. Secondly, in *Mushoriwa* (*supra*) council had deliberately and intentionally flouted an order that it reconnect water supplies. That order was extant and binding

on council and what was now before the court was an application for a spoliation order and confirmation of an interdict. The court held that;-

> "The respondent has sought to arrogate to itself the right to determine when the amount claimed is due by simply laying claim to payment without proof by due process or recourse to the courts of law. What it seeks to do is to oust the jurisdiction of the courts, so that it can operate as a loose cannon and a law unto itself. It seeks to extort money from the applicant without the bother of establishing its claim through recognized judicial process. The disconnection of water supplies without recourse to the courts of law is meant to arm-twist and beat the applicant into submission without the bother of proving its claim in a court of law".[3]

The court granted a provisional order which stipulated that the termination of Mushoriwa's water supply on the basis of a disputed water bill in the absence of a court order was unlawful self-help and interdicted the respondent council from such conduct, as well ordering that the water supply be restored. I find the reasoning relied on y the court in Mushoriwa's case highly persuasive, and find that indeed, the facts of that matter appear to be on all fours with the facts of the matter under consideration except for the abovementioned distinguishing factors. I reiterate that it cannot be overemphasized that the court in Mushoriwa's case did not stipulate that council cannot in any circumstances disconnect water supplies to a consumer. The conclusion of the court, is confined to the circumstances which were before it, where water supplies had been terminated despite a court order interdicting council from doing so, and despite the clear evidence on record that applicant had discharged his indebtedness in full, of a dispute which appeared clearly ex facie the papers filed of record.

Having put Mushoriwa's case in the proper context, I now turn to the applicable law in this case. S8 of the 1913 water By-Laws provides as follows;-

> "The council may, by giving 24 hours' notice, in writing without compensation and without prejudicing its right to obtain payment for water supply to the consumer, discontinue supplies 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 by-law". (my underlining for emphasis)

The By-Laws were borne out of s69 (2) (e) (i) of Schedule 3 of the *Urban Council's Act*, which stipulates that;-

> "Without derogation to the generality of sub-paragraph (i), by-laws relating to matters referred to in that sub-paragraph may contain provision for all or any of the following;
> (a)…

[3] 2014 ZLR 515(H) p520F-H

(b) 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
(c)…"

It has not been suggested that the By-Laws are *ultra vires* their parent act. It is common cause that the act permits the crafting of By-Laws which provide for the disconnection of water supplies at short notice. I am not persuaded that just because the By-Laws provide for the disconnection of water supplies at short notice, they are the basis on which such disconnection may be done without a court order. It is my view that a proper interpretation of s8 will show that it allows council to give 24 hours' notice which must be in writing, of its intention to discontinue water supplies, and then to recover what is due afterwards. My reading of s 8 (a) is that is that it is not the determination of the consumer's failure to pay which is permitted to be in the unfettered discretion of the council, but the calculation and determination of what is due.

In other words council is permitted to determine what is due and outstanding for purposes of contemplating disconnection of water supply, and for purposes of giving the requisite 24 hour notice, but it is not entirely up to council to determine whether the consumer has <u>failed to pay.</u> Such an interpretation of the water by-laws avoids the absurdity that the Legislature intended to council to have the unfettered discretion to arbitrarily disconnect water supplies to a consumer who disputed the sum due, or who disputed being in arrears, without a court order. According to s 2 of the new Constitution[4]:-

"2 Supremacy of Constitution
(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
(2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them."

There is a school of thought that s 8 of the water By-Laws 164-13, as read with s 69 (2) (e) (i) of the Urban Council's Act, is inconsistent with s 77 of the Constitution which entrenches the right to water, and that, accordingly, it is invalid to the extent of the inconsistency. It is my view that s 8 of the water By-Law, interpreted correctly, can be construed consistently with s 77 of the Constitution. In holding this view I rely on the wording of s77 itself, which makes the right to safe , clean and potable water subject to the limits of the resources available to the state

[4] Constitution of Zimbabwe Amendment (No. 20) Act, 2013

when it takes reasonable legislative and other measures to achieve the progressive realisation of this right.

The Constitution recognizes that the realization of the right to safe, clean and potable water is not an event, it is a process which must be guided by the limits of the resources available to the state. It is arguable that s8 of the water By-Laws is a limit on the right to clean, safe and potable water. It is a reasonable legislative measure which is required by the state in order to achieve a progressive realisation of the right to water enshrined in s 77 of the Constitution. If my interpretation of s 8 is accepted, that what is within council's unfettered discretion is the determination of the sum due, not the determination of whether the consumer has failed to pay, then and in that case s 8 of the water By-Laws in not inconsistent with s 77 and other provisions of the Constitution. The determination of failure to pay can only be made in the course of an adjudication process, ergo, all disputes of payment must be brought before courts of law for determination.

It was submitted on behalf of the first respondent that the draconian measure of arbitrary disconnections was a necessary evil if it was to have the resources required to continue to provide clean, safe and potable water. It was contended that the legal process is expensive, cumbersome, and slow, and that, if council were to be subjected to that requirement, its ability to continue to provide safe clean and potable water would be severely compromised, its operations would be hamstrung. What is compounding matters is the current economic situation where the majority of consumers are simply unable to pay their water bills but they need it on a daily basis. S86 of the Constitution sets out the basis on which the fundamental rights and freedoms which reset out in the Constitution may be limited. It provides that all the fundamental rights and freedoms must be exercised reasonably and with due regard to the rights of others. It provides that fundamental rights may be limited only in terms of a law of general application and to the extent that the limitation is fair, treasonable and justifiable in a democratic society, based on openness, justice, human dignity and freedom, taking into account the following factors;-

> **"86 Limitation of rights and freedoms**
> (1) …
> (2) …
> —
> (*a*) the nature of the right or freedom concerned;
> (*b*) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public

safety, public order, public morality, public health, regional or town planning or the general public interest;
(*c*) the nature and extent of the limitation;
(*d*) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
(*e*) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
(*f*) whether there are any less restrictive means of achieving the purpose of the limitation.
(3) …
(*a*) ...
(*b*)…
(*c*)…
(*d*)…
(*e*) …
Water is fundamental to life. Lack of water leads to death. It cannot be in the public interest for the right to access to it to be arbitrarily denied, even if the rights of others who have paid their bills is prejudiced. I hold the view that none of the principles set out in s96(2) (a-(e) are necessary in a democratic society when it comes to the right to clean safe and potable water.

S94 of the Constitution enshrines principles of public administration and leadership, and sets out the basic values and principles of public administration and leadership, which bind public administration in all government bodies including institutions and agencies of the state. The principles include, amongst other things;-
(1)…
(*a*) a high standard of professional ethics must be promoted and maintained;
(*b*) …
(*c*) public administration must be development-oriented;
(*d*) services must be provided impartially, fairly, equitably and without bias;
(*e*)…
(*f*) public administration must be accountable to Parliament and to the people;
1st respondent must be guided by s94 of the Constitution when it comes to the dilemma of disconnecting water supplies as a method of forcing compliance or inducing consumers to pay. 1st respondent is accountable to the taxpayer and to consumers who use its services. It is not fair to disconnect water supplies where a consumer genuinely disputes the quantum of liability. Only the courts can adjudicate on whether either party has sufficient evidence to support their position. S265(1) (a) of the Constitution enjoins councils to, within their spheres—
(*a*) ensure good governance by being effective, transparent, accountable and institutionally coherent"

Section 68 of the Constitution provides that;-

68 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.
(2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.
(3) An Act of Parliament must give effect to these rights, and must—
(*a*) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;
(*b*) impose a duty on the State to give effect to the rights in subsections (1) and (2); and

(*c*) promote an efficient administration.
The *Administrative Justice Act [cap 10; 28]* fulfills the requirement of s68 (3) of the Constitution. It commenced on the 3rd of September 2004. It provides for the right to administrative action and decisions that are lawful, reasonable and procedurally fair; the entitlement to written reasons for administrative action or decisions; and for relief by a competent court against administrative action or decisions contrary its provisions. There is no doubt that the 1st respondent is an administrative authority in terms of s2 (1) of the *Administrative Justice Act,* and that when it disconnects water to consumers such action is administrative action in terms of the act. It is an action taken or decision made by an administrative authority. An administrative authority has the responsibility in terms of section 3, to;-

3 Duty of administrative authority
(1) …
(*a*) Act lawfully, reasonably and in a fair manner; and
(*b*) ..
(*c*) where it has taken the action, supply written reasons therefor…
(2) In order for an administrative action to be taken in a fair manner as required by paragraph (*a*) of subsection (1), an administrative authority shall give a person referred to in subsection (1)—
(*a*) adequate notice of the nature and purpose of the proposed action; and
(*b*) a reasonable opportunity to make adequate representations; and
(*c*) adequate notice of any right of review or appeal where applicable."

It is apparent from the record that no written notice, as contemplated by s 3, was given to the applicant in this matter. In order for the notice to be deemed fair, it ought to have been adequate (s 3 (2) (a), and to have provided for a reasonable opportunity to make adequate representations. A standard clause on the first respondent's monthly water bills, which include quarterly rate payments, that failure to pay the quoted amount will result in a disconnection within 24 hours without further notice cannot and is not adequate notice as contemplated by s 3 of the Administrative Justice Act. It provides no reasonable opportunity to make adequate representations. It gives no notice of a right to appeal or review. (s 3 (2) (a)-(c). Section 3(3) appears to give the first respondent an out. The requirements of s 3 (2) (a)-(c) can be dispensed with if the Urban Council's Act and Regulations allow it. I have already found that in my opinion s8of the water By-laws 164-1913, as read with s 69 (2) (e) (i) of Schedule 3 of the Urban Council's Act do not allow arbitrary action such as a disconnection of water supplies where the sum due is disputed, without an adjudicating process to determine the question of whether the consumer has failed to pay.

Is it reasonable and justifiable to disconnect water supplies to a consumer who has disputed the sum due? Does this action take into account the need to promote efficient administration and good governance? Does this action promote the public interest? In my view it

does not. There must be judicial review of administrative action in order for the public to maintain its confidence in the actions of administrative bodies who after all are funded by taxpayers and ought to be accountable to them. Is it lawful, reasonable or fair to disconnect water supplies to a consumer where the sum deemed due is disputed? I hold that it is not. The requirements of a final interdict are;-

(a) A clear right
(b) Injury actually committed or reasonably apprehended
(c) Absence of a similar remedy by any other ordinary remedy
(d) The balance of convenience See *Setlogelo* v *Setlogelo*[5], *Tribac Private Limited* v *Tobbacco Marketing Board*[6], *Flame Lily Investment Company Private Limited* v *Zimbabwe Salvage Private Limited & Anor*[7], *Boadi* v *Boadi & Anor*[8].

It is my view that the applicant has discharged the onus on it, on a balance of probabilities, to fulfil the requirements of a final interdict. It is common cause that the applicant is a lessee at the premises where the first respondent disconnected its water supplies without a court order. The applicant was actually injured by the first respondent's action and it is common cause that there is no other ordinary remedy which the applicant can rely on because the first respondent has a monopoly on the provision of water for domestic consumption in the greater Harare area. The balance of convenience favors the confirmation of the interim interdict. The first respondent's prejudice can be cured by an appropriate order as to interest on the disputed sum when it is resolved, and costs. The applicant on the other hand cannot conduct its business without water for sanitation and other purposes.

The doctrine of the margin of appreciation is one whose application merits particular consideration if and when proper submissions are made by both the first respondent and its consumers, in the proper circumstances. It is similar to the provision in the Constitution which seeks to give a margin to an administrative body to use a draconian measure to recover service charges from consumers on the basis that it is necessary in democratic society. For instance it is

[5] 1914 AD 221

[6] 1996 (2) ZLR 52 (SC) @ 56

[7] 1980 ZLR 378

[8] 1992 (2) ZLR 22

arguable that the right to water is not absolute, that it can be curtailed in the interest of quick recovery of service charges to enable the first responded to continue to provide safe clean and potable water to other consumers who pay promptly and are not in arrears.

Disposition

It is arguable that s 8 of the water By-Laws is a limit on the right to clean, safe and potable water. It is arguable that it is a reasonable legislative measure which is required by the state in order to achieve a progressive realisation of the right to water enshrined in s 77 of the Constitution. If my interpretation of s 8 is accepted, that what is within council's unfettered discretion is the determination of the sum due, not the determination of whether the consumer has failed to pay, then and in that case s 8 of the water By-Laws in not inconsistent with s 77 and other provisions of the Constitution. The determination of failure to pay can only be made in the course of an adjudication process, ergo, all disputes of payment must be brought before courts of law for determination. Disconnecting water supply before the dispute of the amount due is finalized is putting the cart before the horse.

It is an arbitrary and draconian remedy which is not justifiable in a democratic society. It is not a reasonable legislative measure calculated to bring about a progressive realisation of the right to safe, clean and potable water which is enshrined in s 77 of the Constitution. It contravenes s 68 of the Constitution which guarantees the right to administrative justice which is legal, quick, efficient, fair, proportionate, impartial and both substantively and procedurally fair.
It is apparent from the record that no written notice, as contemplated by s 3, was given to the applicant in this matter. In order for the notice to be deemed fair, it ought to have been adequate (s 3 (2) (a), and to have provided for a reasonable opportunity to make adequate representations. A standard clause on the 1st respondent's monthly water bills, which include quarterly rate payments, that failure to pay the quoted amount will result in a disconnection within 24 hours without further notice cannot and is not adequate notice as contemplated by s 3 of the Administrative Justice Act.

Section 10 of part 4 of the sixth schedule to the new Constitution (saving and transitional provisions) provides that all existing laws will continue in force but must be construed in conformity with the Constitution. Any inconsistency between the new Constitution and an existing law must be construed in conformity with the Constitution. The 1913 water By-Laws

must be construed in conformity with the Constitution, to the extent of any inconsistency. The 1913 water By-Laws must be construed to be in conformity with the Administrative Justice Act, and with s 68 of the Constitution which guarantees the right to administrative justice which is fair and reasonable. Arbitrarily disconnecting water supplies on 24 hours' notice where there is a dispute as to the quantum of liability contravenes s 68 of the Constitution. In my view the 1st respondent has unfettered discredition to determine the sum due, but it would be a violation of s68 of the Constitution to allow it unfettered discretion to disconnect water supplies on 24 hours' notice in these circumstances. Section 198 (3) of the Act, which confers power on the first respondent to do any act or thing which in its opinion is necessary for administering or giving effect to any by-laws of the Council does not trump the Constitution even if it is couched in peremptory terms.

It is void to the extent of any inconsistency with the provisions of the Constitution. I am persuaded that this section does not support the assertion that the first respondent's discretion in that regard is absolute or unfettered for the same reasons advanced the court in *Mushoriwa's* case. If the Legislature's intention is to confer unfettered discretion on the first respondent to disconnect water supplies where the quantum of liability is disputed, then in my view it is up to the Legislature to expressly say so, when the Urban Council's Act is aligned with the new Constitution, to avoid confusion. In the interim we hold that 1st respondent does not have such unfettered discretion where the quantum of liability is disputed in general, and more particularly in the circumstances of this case.

There must be judicial review of administrative action in order for the public to maintain its confidence in the actions of administrative bodies who after all are funded by taxpayers and ought to be accountable to them. Is it lawful, reasonable or fair to disconnect water supplies to a consumer where the sum deemed due is disputed? I hold that it is not. Have the requirements of a final interdict been met? I hold that they have, for the reasons stated above. In the result, the application for confirmation of the provisional order is granted, with costs. It is accordingly ordered that:

1. The first respondent, all of its employees and assigns shall not disconnect applicant's water supplies at Bothwell House number 66 Jason Moyo Avenue Harare, without a court order expressly authorizing it to do so.
2. The first respondent shall pay costs of suit.

Makoni Legal Practice, applicant's legal practitioners
Mbidzo, Muchadehama & Makoni, respondents' legal practitioners