JAMES MUSHORE
versus
COUNCILLOR CHRISTOPHER L MBANGA N.O.
and
JOSEPHINE NCUBE N.O.
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 22 & 24 June 2016

Urgent chamber application

T. Mpofu, with him, *R. Moyo*, for the applicant
F. Mahere, with her, *C. Kwaramba*, for the respondents

MAFUSIRE J: This was an urgent chamber application. For interim relief the applicant sought two interdicts. The one was to restrain the respondents from interfering with, or in any way disabling him from accessing his office and other facilities. The other was to restrain the respondents from interfering with, or in any way disabling him from carrying out his duties as the third respondent's Town Clerk.

The application was opposed. The respondents argued, *in limine*, that the application was not urgent. I reserved judgment on that point. But for expedience, I heard argument on the merits. I reserved judgment on that too. But I undertook to deliver judgment on the point *in limine* first. If I found the matter to be not urgent, I would remove it from the roll. Only if I found it urgent would I proceed to deal with the merits as well.

I have found the matter to be not urgent. Below are my reasons.

The facts read like a soap opera.

The applicant beat several interests to land the post of Town Clerk for the City of Harare, the third respondent herein [hereafter referred to as "***the Council***"]. It is common cause, or I take judicial notice, that the applicant's appointment was made amid raging controversy. There were so many interests for, or in, that post, not least political. The applicant singles out the second respondent as part author of his problems. Indeed he leapt into a myriad of problems when he accepted the post. This application is all about such problems.

Of the second respondent, the applicant says, in my own words, she had also applied for the job. She was one of them beaten by him in the interviews. Now she was on a revenge mission. She was the acting Town Clerk. She wielded so much power that she practically made him dysfunctional. It was frustrating. Of course, the second respondent denies it all. She says all she does is to execute her own duties and to implement such of the Council's functions as are reposed in her office.

To the applicant, the second respondent may have been the human form of his problems. But they were legion and multifarious. He says or reveals as much. Certainly the totality of the documents and the arguments presented do so. For example, his letter of appointment was dated 24 March 2016. But on the same date, the Minister of Local Government, Public Works and National Housing, [hereafter referred to as "***the Minister***"] was also writing his own letter to the Council rescinding the applicant's appointment. The Minister said he was acting in terms of s 132[1] of the Urban Councils Act, *Cap 29: 15*.

The applicant's letter of appointment was signed by the Mayor, one B G Manyenyeni [hereafter referred to as "***Manyenyeni***"]. Despite the Minister's letter above, the applicant took up his post and, according to his papers, assumed duty on 1 April 2016.

In true soap opera fashion, Manyenyeni was suspended by the Minister, allegedly for Council's defiance of the Ministerial directive. That development was the subject of proceedings before this court, with Manyenyeni challenging the suspension.

In passing, I mention that Manyenyeni lost the challenge. But it was a pyrrhic victory for the Minister. Because of the state of the law, the suspension led to nowhere. Among other things, the forum or tribunal to deal with that suspension was non-existent. After 45 days Manyenyeni, was back to being Mayor of Harare. He was expressly welcomed back by the Acting Minister. But the next day Manyenyeni was suspended again, this time for alleged infractions unrelated to the appointment of the applicant. Again, there are proceedings currently before this court in connection with that development.

The Manyenyeni details above are not in the applicant's papers. But I have included them to place his application in the broader context.

In his papers, and as supplemented by oral argument, the applicant's cause of action is that the first respondent, on behalf of the third respondent, has violated his contractual and constitutional rights as the top-most or senior employee of the Council. This complaint stems from the letter written by the first respondent to the applicant dated 6 May 2016. In Manyenyeni's absence, the first respondent has been Acting Mayor. The letter reads:

"**RE** **<u>CESSATION OF DUTY</u>**

Reference is made to the above matter.

Please be advised that at its Special Council Meeting on 05 May 2016 which was convened in terms of Section 84[3] of the Urban Councils Act [Chapter 29: 15], Council [item 8] resolved that you must stop reporting for duty, pending the resolution of the matters which are in the High Court which deal with the issue of your appointment.

Pursuant to the said resolution, I now write to ask you to stop reporting for duty with immediate effect.

Council will communicate with you regarding the issue of your status in due course."

Despite the date, the letter was delivered only a month later, i.e. on 8 June 2016, a detail not lost to the applicant. Almost immediately, the applicant challenged the propriety of the respondents' conduct. Among other things, he saw no reason why his interests had to be "mortgaged" to some undisclosed proceedings allegedly before this court and to which he was not a party.

The applicant says when he reported for duty on the following day, he found the doors to his office and that of his secretary barricaded by key blockers. His secretary had been transferred to another department. The applicant then launched these proceedings.

Section 89 of the Urban Councils Act *inter alia* requires that for a council to rescind or alter its previous resolution, two-thirds [$^{2}/_{3}$] of the councillors must move the notice of motion. Part of the applicant's argument was that it was wrong for the Council to purport to have acted in terms of s 84[3]. The notice of motion supporting the resolution had been moved by only seven [7] Councillors, a far cry from the $^{2}/_{3}$ threshold. Two-thirds was said to be 16 Councillors.

The applicant argued that as Town Clerk, he had statutory duties to perform. For the time he had assumed duty, he had been seized with solving the salary problem and the dysentery/typhoid outbreak dogging the Council. It was urgent that he be allowed to return to work. The urgency of the matter also stemmed from the public interest. The residents have a right to have a functional council. They have a right to have a statutory appointee like the Town Clerk be allowed to execute his functions unhindered. Each day that he was out of office was a violation of such rights. The prejudice was irreplaceable because unless he was allowed back into office on an urgent basis, he could never reverse the time lost and go back to work the days lost, should the application eventually succeed on the ordinary motion court roll.

The applicant also argued that he had not been afforded the right to be heard before he was sent home. The procedure adopted by the respondents was highly prejudicial to him. If he had been suspended in the normal course of a disciplinary process, at least he could hope to be granted audience and be heard eventually. But with the process that the respondents had adopted, which had no name in employment law, his fate had been tied up with some indeterminate proceedings pending at the court.

Finally, the applicant pointed out, rather in passing, that since his appointment, he had not been paid his employment dues, such as salaries and benefits, or given the trappings of his office, such as a vehicle. But it was clear, both from the founding affidavit and counsel's submissions, that this was not the mainstay of the applicant's challenge.

In opposing the application, the respondents argued that they had not suspended the applicant. They were merely being cautious. They had appointed the applicant as Town Clerk. They had offered him a job ahead of everyone else who had applied, owing to his good performance at the interviews. They desired that the applicant executes his functions. But to his knowledge, there were forces against his employment. Among other things, the Minister had wasted no time rescinding his appointment in terms of s 132[1] of the Urban Councils Act. In terms thereof, the appointment of a Town Clerk of a council is subject to approval by the Local Government Board. No such approval had been obtained in respect of the applicant's appointment. In terms of s 314 of the Act, the Minister is empowered to reverse, suspend, rescind, etc., a council resolution which is not in the interests of the residents or the public. The respondents argued that the Minister's rescission was still operative as it had not been set aside.

The respondents annexed documents showing that the residents of Harare and Chitungwiza had filed a joint application with this court against the Council, the Minister and the Attorney-General, *inter alia*, challenging the Minister's rescission of the applicant's appointment, and also seeking the constitutional invalidity of certain sections of the Urban Councils Act, including those in terms of which the Minister had purported to act. Those are the proceedings which the letter of 6 May 2016 alluded to. Thus, until the controversy surrounding his appointment and assumption of duty was settled, the respondents had felt it prudent to let the applicant stay at home. He was still entitled to his salary and benefits.

The respondents further argued that Council's letter of 6 May 2016 was neither a rescission of its earlier resolution to appoint him - because that rescission had already been done by the Minister - nor an alteration of the earlier resolution - because Council had not

suspended or changed his employment conditions. The respondents argued that an employer is not obliged to provide an employee with work. That the applicant was not being paid was not because of the decision to stop him from coming to work, but was a result of the dire financial straits facing the Council. This was affecting every Council employee, not just the applicant.

That the applicant had been seized with solving the salary issue and the dysentery/typhoid outbreak was not true. At any rate, there were other line officers in Council already dealing with such issues such that the applicant's absence did not pause any immediate danger to anyone.

On urgency, the respondents argued that the test was objective. The court had to consider whether the perceived harm was irreversible. It is not every legal interest that is capable of urgent redress. *In casu*, not only was there no discernible harm to the applicant, but also any such harm as he might have perceived was not irreversible. Among other things, the applicant could always get his salary once the situation normalised. Or he could sue for damages. At best, what he was complaining about was purely a breach of an employment contract. But even with that, there has been no breach. All that has happened has been to ask him to stay at home. The doors to his office and that of his secretary had been blocked off for security reasons. An employer is entitled to regulate and deploy staff as it deems fit. The applicant's secretary was transferred to where her services were most needed. Nothing done by the respondents could possibly give rise to legal action, least of all, on an urgent basis.

Miss *Mahere*, for the respondents, referred to two cases in support of the contention that it is not every perceived wrong that gives rise to redress on an urgent basis. The first was *Document Support Centre [Pvt] Ltd* v *Mapuvire*[1]. The second was *Triple C Pigs & Anor* v *Commissioner-General – Zimbabwe Revenue Authority*[2].

In *Document Support Centre [Pvt] Ltd* the applicant wanted the respondents, or those occupying through him, evicted from certain premises. It wanted to take occupation in the next few days. It said it had already terminated its current lease elsewhere in anticipation of taking up occupation of the disputed premises. The court ruled the application not urgent. The headnote crisply summarises the judgment of MAKARAU JP, as she then was. It says in part:

[1] 2006 [2] ZLR 240 [H]
[2] 2007 [1] ZLR 27 [H]

> "Urgent applications are those where, if the courts fail to act, applicants may well be within their rights to suggest dismissively to the court that it should not bother to act subsequently, as the position would have become irreversible to the prejudice of the applicant. The issue of urgency is not tested subjectively. It is an objective one, where the court has to be satisfied that the relief sought is such that it cannot wait without irreparably prejudicing the legal interest concerned."

The learned Judge President, stressing that it is not every legal interest that is capable of protection by way of an urgent application, no matter how compelling the circumstances might be, gave the example of divorce proceedings. A spouse may find her spouse committing an act that renders the continuance of married life insupportable and would want to end the marriage there and then. While the circumstances may be compelling, the aggrieved spouse may not approach the court for a decree of divorce on a certificate of urgency. The same is true for most cases of damages for defamation, personal injury and/or accident damages to property.

In *Triple C Pigs*, an urgent chamber application was brought to stop the central revenue collection office, ZIMRA, from attaching, by means of a garnishee, the applicant's funds in order to recover certain outstanding taxes and penalties. The grounds of urgency were not clearly spelt out, save for argument by counsel from the Bar that unless the garnishee was stopped, the applicant would go bankrupt. No urgency was found to exist.

GOWORA J, as she then was, held that every litigant would want to have their matters heard urgently. The longer it takes to obtain relief, the more it seems that justice is delayed and thus denied. But the courts, in order to ensure the delivery of justice, endeavour to hear matters as soon as is reasonably practicable. In order to dispense justice fairly, a distinction is necessarily made between those matters that ought to be heard urgently and those to which some delay would not cause harm which would not be compensated by the relief eventually granted to such litigant.

The learned judge accepted the reasoning of GILLEPSIE J in two previous cases by himself; *General Transport & Engineering [Pvt] Ltd & Ors v Zimbabwe Banking Corporation Ltd*[3] and *Dilwin Investments [Pvt] Ltd v Jopa Enterprises Co Ltd*[4]that:

> "A party who brings proceedings urgently gains considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most

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[3] 1998 [2] ZLR 301 [H]

[4] HH 116/98

> litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it."

In casu, I find the circumstances of the applicant rather unfortunate. All sorts of interests are fighting over his post. At one time, as shown above, the fight claimed the scalp of the Mayor. In the case by the two residents associations that is said to be pending before this court, the applicant has not been cited. Yet it is about his post. And the case is the very reason cited by the respondents for the stay-at-home order.

However, whilst the applicant's situation may invoke sympathy, in my considered view, he just does not have, at least at this stage, sufficient grounds to litigate, less so, on an urgent basis. I find it hard to accept that the applicant's legal practitioners had carefully thought through their client's case and the possible legal remedies available to him before bringing this application in the form that it is in. Mr *Mpofu* seemed to be in some difficulty trying to stitch together a convincing legal argument. The applicant's cause is manifestly nebulous.

On urgency, the parties seemed *ad idem* that the court looks at the issue objectively, rather than subjectively. They were *ad idem* that the two paramount considerations were [i] "time" and [ii] "consequences".

By "time" was meant the need to act promptly where there has been an apprehension of harm. One cannot wait for the day of reckoning to arrive before one takes action. That was the *dicta* in *Kuvarega* v *Registrar-General & Anor*[5]which has stood the test of time and has been followed in numerous other cases.

Both parties were agreed that in this case time was really not the issue. The applicant had not slept on his rights. Council's letter of 6 May 2016 was served on him on 8 June 2016. The following day he was already writing back to challenge it. When the respondents would not budge, and in fact, were reacting by barricading the doors to his office and that of his secretary, the applicant ran to the law. He filed the urgent chamber application 6 days later, i.e. on 15 June 2016.

By "consequences" was meant the effect of a failure to act promptly when harm is apprehended. It was also meant the effect of, or the consequences that would be suffered if a court declined to hear the matter on an urgent basis. If the prejudice would be irreplaceable, then the matter should be deemed urgent. Put another way, if the remedy that the court could

[5] 1988 [1] ZLR 188 [H]

eventually grant, possibly in ordinary motion proceedings, would effectively be a *brutum fulmen* because it was too late, then the matter could be urgent.

Mr *Mpofu* argued that the days lost by the applicant locked out of office could never be retrieved. He argued that a patent illegality, such as that allegedly committed by the respondents in purporting to rescind a Council resolution by a motion sponsored by an insufficient number of councillors; or a breach of the statutory and constitutional rights, should always move the court to intervene on an urgent basis. A brazen illegality should never be allowed to subsist for any day longer.

Mr *Mpofu* further argued that the case was not a simple employer-employee situation. It was a complex matter. The situation was most fluid. If the matter was not heard there and then, as it had been presented, i.e. urgently, the court could well be faced with changed circumstances when it eventually decides to hear it later on.

In my view, none of Mr *Mpofu's* arguments satisfied the objective test of urgency, particularly the aspect of "consequences". The applicant has not been suspended. That he may not be getting his pay cheques and perks every month or the trappings of his office was not because of that stay-at-home order. He is due his salary and benefits. If he felt he was entitled to be provided with work, as he boldly declared in his founding affidavit, then he was ill-advised. It is trite law that there is no such obligation on the part of an employer. Professor Lovemore Madhuku, in his new work, *Labour Law in Zimbabwe*[6], says, at p 63:

> "The employer is obliged to receive the employee into service. This does not, however, oblige the employer to provide work for the employee, as there is no such general obligation on the employer under our law. An obligation exists where the employee's remuneration depends on the performance of work, such as remuneration based on commissions, or where the provision of work is necessary to maintain the employee's skills or reputation. There is also an obligation to provide work in case where failure to do so leads to degrading the status of the employee."

None of the exceptions cited by Professor Madhuku in the passage above was pleaded by the applicant.

The argument that the situation was quite fluid and could present different circumstances at the time that the court might eventually decide the matter on the ordinary roll was patently tenuous. A court decides a matter on the basis of the evidence or information presented to it.

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[6] Friedrich Ebert Stiftung, Harare, 2015, at p 63

Even if the stay-at-home order by Council was a suspension, and even if such suspension was without pay and benefits, still the matter would not pass the test for urgency. Suspensions with or without pay are common place in employment situations. Even if an employee perceives his suspension to be unlawful, he cannot, simply for that reason, seek redress on an urgent basis. There ought to be some compelling reasons why his or her case should jump the queue: see *General Transport & Engineering [Pvt] Ltd & Ors* v *Zimbank, supra.* The harm the employee suffers is not irreversible. If the employer was wrong, the employee can always get damages.

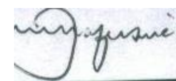
Mr *Mpofu* further argued that where there has been a blatant violation of the law, such as the respondents allegedly did, the court's refusal to offer immediate redress is tantamount to rewarding illegality. That is hardly the case. By declining to hear the matter on an urgent basis, the court is simply saying the determination of the grievance can wait for consideration in the normal way. There is no danger of an irreversible prejudice being suffered. That precisely was the case in this matter.

In the circumstances, the matter, not being urgent, should be removed from the roll.

As regards costs, there is no reason why they should not follow the event. The respondents wanted them at the higher scale. I see no justification for that.

Therefore, the matter is hereby removed from the roll as aforesaid, with costs on the ordinary scale.

24 June 2016



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