BERNARD GABRIEL MANYENYENI
versus
THE MINISTER OF LOCAL GOVERNMENT,
PUBLIC WORKS AND NATIONAL HOUSING
and
ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 17 and 29 June 2016

Urgent chamber application

L Madhuku, for the applicant
E Mukucha, for the respondents

MAKONI J: The applicant approached this court, on a certificate of urgency, seeking the following relief

> "1.1 It is ordered that pending the final resolution of this matter either in the Court of first instance or on appeal,
> (d) The letter of re-suspension of the Applicant from the 1st respondent dated 6 June 2016 be and is hereby suspended.
> (e) The applicant be and is hereby allowed to continue to carry out Council business and receive allowances in line with his post of Mayor;
> (f) The first respondent be and is hereby ordered to refrain from suspending dismissing or engaging in any other activity with a view to removing applicant from the office of Mayor of Harare;
>
> TERMS OF THE FINAL ORDER
>
> 1. The letter of re-suspension of the applicant from the 1st respondent dated 6 June 2016 be and is hereby declared null and void.
> 2. The 1st respondent be and is hereby interdicted from suspending the applicant until the Supreme Court has determined the appeal in SC324/2016.
> 3. The first respondent to pay the costs of this application on a legal practitioner client scale."

The background to the matter is that on 20 April 2016 the first respondent suspended the applicant, in terms of s 114 (1) (d) of the Urban Council Act [*Chapter 29:15*] (the Act) from carrying out the functions of the Office of the Mayor and Councillor. The applicant brought an urgent chamber application before this court under HC416/16 wherein he challenged the powers of the first respondent to suspend him. A judgment was rendered

dismissing his application. He then appealed to the Supreme Court. The suspension lapsed by operation of the law after the expiry of 45 days before he was brought before a competent tribunal as envisaged by s 278 (2) of the Constitution of Zimbabwe Amendment (No 20) Act, 2015 (The Constitution) to answer to his charges. On 6 June 2016, he resumed his duties as Mayor and Councillor.

On 7 June 2016, the first respondent, again, suspended the applicant. The letter of suspension reads

> "With reference to the above cited matter, it has come to my attention that on 27 July 2015, you were advised in writing of very serious allegations of corruption at Easipark and City parking and ordered by Honourable S Kasukuwere in terms of Section 316 of the Urban Councils Act [*Chapter 29:15*] to cause a forensic audit of the two entities and to provide a preliminary report to the Minister on same within six weeks of the engaging of the auditors.
>
> Subsequent to this, the Auditor General advised you in writing on 25 January, 2016 to expand the forensic audit to all the entities under Harare Sunshine Holdings Private Limited.
>
> While on paper you purported to implement the Auditor General's advice, you in fact instructed official who manage these entities not to allow the audit. In the result, the auditors appointed to carry out the audit were prevented from doing so by the entities with your knowledge and support.
>
> This was a gross violation of duty and abuse of office on your part. The allegations of corruption levelled against entities under Harare Sunshine Holdings Private Limited are very serious and the failure to attend to the matter first brought to your attention on 27 July 2015 constitute gross dereliction of duty bordering on incompetent and corruption to the detriment of the residents of the City of Harare.
>
> In the circumstances, and light of the gravity of the matter, I am compelled to suspend you with immediate effect from the office of mayor of the City of Harare and Councillor for Ward 17 in terms of section 114 (1) of the Urban Councils Act [Chapter 29:15] as read with section 278 (2) (b) and of the Constitution of Zimbabwe.
>
> Please not that during the period of the said suspension, you shall not conduct any business for and on behalf of Council, and you shall not be eligible to receive any allowance."

The applicant then instituted the present proceedings. The basis for approaching the court is three fold.

1) The first letter of 7 June 2016 does not comply with s 114 in that it does not specify any grounds thereof. In the alternative the second suspension is exactly on the same ground and the previous suspension.
2) There is no scope under s 114 (1) of the Act for a second suspension whether on the same or different grounds if the allegations founding the previous suspension were never determined by an independent tribunal in terms of s 278 of the Constitution

3) The first respondent is not permitted by s 114 as read with s 278 of the Constitution to re-suspend a mayor whose suspension has lapsed by operation of the law, in circumstances where the grounds for the re-suspension are based on facts which were known to the first respondent at the time of the first suspension.

The respondents opposed the application and raised two points in *limine vis res judicata* and material non-disclosure. On the merits, the respondents averred that the applicant had not been re-suspended. He had been suspended based on fresh grounds entirely different from the grounds pertaining to the first suspension.

I will first of all deal with the points *in limine*.

Res judicata

Mr *Mukucha* submitted that it was clear that the same issue that the court is being asked to determine has been dealt with by Dube J in HH 274/16. The question is whether the first respondent has power to suspend the applicant. Dube J held that the first respondent had power to suspend the applicant. The only power that the first respondent does not have is to remove the applicant from office.

In response, Mr *Madhuku* contended that the applicant had made it very clear that the application is based on the second suspension, which he has characterised as a re-suspension. The issue before Dube J was whether the first respondent had power to suspend. In this application, the applicant is saying that the first respondent cannot re-suspend the applicant. He contends that the second suspension is a continuation of the process that the first respondent started.

The learned authors Herbestein and Van Winsen: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th Ed at p 609 stated the following, on the plea of *res judicata*.

> "A defendant may plead *res judicata* as a defence to a claim that raises an issue disposed of by a judgment in rem and also a defence based upon judgment in personum and delivered in a prior action between the same parties concerning the same subject- matter and founded on the same cause of action."

In dealing with the definition of subject matter in *Tsvangirai & Ors* v *Registrar General* 2002 (2) ZLR 653 (S), Gwaunza AJA (as she then was) quoted with approval *Horowitz* v *Borck & Ors* 1988 (4) SA 160 (A) at 178 where the following was stated.

> "The requisites of a valid defence of *res judicata* in Roman Dutch law are that the matter adjudicated upon, on which the defence relies, must have been for the same cause, between the same parties and the same thing must have been demanded (my emphasis)"

See also *Gwaze* v *National Railways of Zimbabwe* 2002 (1) ZLR 679 (S).

The question to be determined is whether the applicant is demanding the same thing as he demanded before Dube J.

It is common cause that the same parties approached before Dube J. The cause of action was the suspension letter of 20 April 2016. The issue before Dube J was whether the Minister had power in terms of the Constitution to suspend the applicant.

In casu, the cause of action is the re-suspension letter dated 7 June 2016. The issue before me is whether the first respondent has power to re-suspend after the first suspension would have lapsed through the operation of the law. From the above, it is clear that what the applicant is demanding in the present proceedings is different from what he was demanding before Dube J. The plea of *res judicata* cannot therefore succeed.

Material Non-Disclosure

Mr *Mukucha* submitted that the applicant misrepresented to the court that he had been re-suspended when in actual fact it was a fresh suspension based on a misconduct with a different set of facts. The fact that there is no disclosure in the papers that the suspension of the applicant is based on a new charge of misconduct which one amounts to non-disclosure of material facts. For authority for his proposition, he relied on *Graspeak Investments (Pvt) Ltd* v *Delta Corporation (Pvt) Ltd & Anor* 2001 (2) ZLR 551 H at 554 D and 555 C.

He prayed for dismissal of the application with punitive costs.

Mr *Madhuku* submitted that he could not comprehend the submissions by Mr *Mukucha*. The founding affidavit refers the court to the judgment by Dube J as attached Annexure A, the Notice of Appeal as Annexure B and the current letter of suspension as Annex C. The applicant is saying that the letter by the first respondent purports to suspend him on the basis of new charges. The applicant further contends that the letter does not comply with s 114 of the Act. He is taking issue with the first respondent's position that there are new grounds as there is no reference in the letter to the sub paragraph of s 114 of the Act.

The case cited by Mr *Mukucha* ,*Graspeak Investments supra* is on point regarding the principle of material non-disclosure. The case dealt with failure by an applicant in an urgent matter, to make full disclosure of material facts, the need for and the consequences of the applicant's dishonesty and concealment of material facts. Ndou J, (as he then was) after examining a number of authorities on the issue, concluded that he said the following at p 555D:

> "The courts should, in my view, discourage urgent applications whether *ex parte* or not, which are characterised by material non-disclosures, *mala fides*, or dishonesty. Depending on the circumstances of the case, the court may make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants".

In *casu*, I agree with Mr *Madhuku*'s sentiments. It was difficult to follow the first respondent's argument. The applicant in his founding affidavit and in para(s) 5, 6 and 7 states the following:

> "5. In HC 416/16, I approached this Honourable Court on an urgent basis and the respondents herein were the same respondents in that urgent application. That application ended with a judgment delivered by the Honourable Justice Dube. Attached herewith that judgment, being HH274/16 as Annexure A.
>
> 6. I have appealed against that judgment. I attach here with my notice of Appeal to the Supreme Court as Annexure B.
>
> 7. Annexures A and B are intended to place before this Honourable Court the entire background to this urgent application with a view to setting the stage for legal basis of the present application.

The attached judgment by Dube J gives a very detailed background of the matter. He also attached his current letter of suspension. In my view, the applicant has placed all material facts before the court which are necessary for the determination of this matter. There was no material non-disclosure by the applicant. I will therefore dismiss the point *in limine*.

I will now proceed to deal with the matter on the merits.

Mr *Madhuku* advanced two main arguments in support of the applicant's case.

The first one is that s 114 of the Act, when construed in conformity with the Constitution, does not permit the first respondent to re-suspend the applicant in the manner contemplated by the first respondent's letter of 6 June 2016.

The second one is that the letter of 6 June 2016, does not specify a ground or the grounds why the applicant was being suspended.

The second argument by the applicant challenges the validity or otherwise of the suspension letter. I will deal with that point first.

Mr *Madhuku* submitted that the first respondent deliberately avoided specifying the ground on which the suspension was based. This was to avoid the obvious fact that he was suspending the applicant on the same ground as his previous suspension which had lapsed by operation of law. Section 114 of the Act only allows a suspension under one or more grounds enumerated under it.

Mr *Mukucha* fumbled and mumbled on this point. At one point he fell short of making a concession that there was an omission. Later, he then argued that the applicant must be clear of the charges he was facing. He appreciated the charges he is facing. He reverted to the initial position that there is a possibility of an omission but it is not fatal to the suspension. There was no prejudice on the part of the applicant.

Section 114 provides:

"Section 114 Suspension and dismissal of councillors

(1) Subject to this section, if the Minister has reasonable grounds for suspecting that a councillor-

(a) has contravened any provision of the Prevention of Corruption Act [*Chapter 9:16*]; or
(b) has contravened section one hundred and seven section one hundred and eight or section one hundred and nine; or
(c) has committed any offence involving dishonesty in connection with the funds or other property of the council; or
(d) has been responsible-
(i) through serious negligence, for the loss of any funds or property of the council; or
(ii) for gross mismanagement of the funds, property or affairs of the council; whether or not the councillor's responsibility is shared with other councillors or with any employees of the council; or
(e) has not relinquished office after his seat became vacant in terms of this Act; the Minister may, be written notice to the councillor and the council concerned, suspend the councillor from exercising all or any of his functions as a councillor in terms of this Act or any other enactment."

The above section list possible grounds of suspension under subpara (a) to (d). The first respondent must be specific on the ground or grounds relied on by him for the suspension. It has to be either subpara (a) or (b) or (c) or (d) or any of the above combined. The use of the disjunctive word "or" means that they are separate grounds enumerated in the subparas. The legislature avoided the use of the conjunctive word "and" which might have saved the first respondent's letter. In *Tengwe Estate (Pvt) Ltd* v *Minister of Lands & Anor* 2002 (2) ZLR 137 (H) at 141 G Hungwe J, in dealing with the particular words "and" and "or" said "or" can never mean "and". He was quoting with approval Mackinnon CJ in *Sutherland Publishing Co Ltd* v *Caxton Publishing Co Ltd* (1938) CH 174 at 201,1937 4 All ER 405 (CA) at 421 E.

The first respondent in his first letter of suspension was actually specific regarding the ground for suspension. He referred to s 114 (1) (b) as is required by the Act. Reference in the current letter to s 278 (2) (b) and (d) of the Constitution does not assist the first respondent. It

provides for grounds for removal by an independent tribunal which is yet to be established by an Act of Parliament. His letter must rise of full in terms of s 114.

Mr *Mukucha* sought to argue that there is no prejudice to the applicant as he appreciates the charges he is facing. He was referring to the particulars given in para 1 to 4 of the letter of suspension. Particulars can only inform a ground for suspension. They provide sufficient detail to enable a party to make a meaningful reply.

What is clear from the above is that the letter of the first respondent dated 6 June 2016, does not comply with s 114 of the Act. What is the effect of the non-compliance s 114(1) on the letter.

Mr *Madhuku* argued that the letter is invalid for failure to comply with s 114 of the Act.

In *Tengure Estate supra,* Hungwe J held that failure to comply with a statutory requirement will render the process voidable at the instance of the affected party. He went on to quote Griedman J in *Naidoo* v *Director of Indian Education* 1982 (4) SA 267 N at 277F where he stated:

> "It seems to me, however, that, where something which is voidable is set aside, it is set aside with all its consequences, both the decision itself falls away; and the consequences of that decision".

The first respondent's letter and the consequences thereof cannot escape the above fate.

In view of my finding on this point, it will not be necessary for me to deal with the first point raised by the applicant.

In the Provisional Order and in terms of para (f) the applicant seeks an order that the first respondent be and is hereby ordered to refrain from suspending, dismissing or engaging in any other activity with a view to removing the applicant from the office of Mayor of Harare.

My view is that it is incompetent to grant such relief, at this stage, for two reasons.

(i) It has the effect of trial nature. See *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188H.

(ii) It is too wide. Assuming the first respondent has the authority to suspend the applicant for a new infraction, committed immediately upon my rendering judgment, I would have tied the 1st respondent's hands.

In the Provisional Order, the applicant seeks the grant of the interim relief pending the final resolution of this matter either in the Court of first instance or appeal. Dube J, in her judgement made a finding regarding the incompetency of such a Provisional Order. I agree with her position and would add that there are different considerations for an application for stay pending appeal and for those pending the return day. In any event it is incompetent for the applicant to make an application for stay pending appeal before he has even seen the reasons for judgment in this matter.

I will therefore proceed to grant the Provisional Order as amended by deleting para (f) of the interim relief.

In the result I made the following order.

It is ordered that pending the determination of this matter,

1. The letter of re-suspension of the Applicant from the 1st respondent dated 6 June 2016 be and is hereby suspended.
2. The applicant be and is hereby allowed to continue to carry out Council business and receive allowances in line with his post of Mayor.

TERMS OF THE FINAL ORDER

1. The letter of re-suspension of the applicant from the 1st respondent dated 6 June 2016 be and is hereby declared null and void.
2. The 1st respondent be and is hereby interdicted from suspending the applicant until the Supreme Court has determined the appeal in SC324/2016.
3. The first respondent to pay the costs of this application on a legal practitioner client scale.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners