

REPORTABLE ZLR(11)

(1) DANISO WAKATAMA (2) IVORY MATANHIRE (3) JAPHET
KABANGA (4) BINDURA MUNICIPALITY v TINASHE
MALVERN MADAMOMBE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & CHEDA JA
HARARE, NOVEMBER 8, 2010

T Mpofu, for the appellants

L Uriri, for the respondent

GARWE JA: At the conclusion of the hearing of this appeal, this Court dismissed the appeal with costs and indicated that the reasons for that decision would follow in due course. These are the reasons.

This is an appeal against the judgment of GUVAVA J in which she set aside a council resolution rescinding the election of the respondent and the second appellant as mayor and deputy mayor of the Bindura Municipality respectively and declaring the first appellant as the duly elected mayor of the Bindura Municipality.

The background to this matter is as follows. The respondent was one of several candidates who were elected in 2008 as councillors of the Bindura Municipality. On 1 August 2008, the council of the Bindura Municipality held its first meeting at which the respondent and the second appellant were elected mayor and deputy mayor respectively. On 13 October 2008 one of the councillors C Mazembe, drafted a motion for the rescission of the

resolution in terms of which the respondent had been elected mayor. In the same draft C Mazembe made it clear that the intention was to move a motion to pass a vote of no confidence on the respondent as mayor. In the draft a number of allegations of impropriety on the part of the respondent were given as justifying the motion. The motion, having been seconded by other councillors, was referred to the acting chamber secretary who in turn referred the same to the third appellant who was the town clerk.

On 24 October 2008 the town clerk convened a council meeting to deliberate on the motion. The respondent queried the correctness of the procedure that had been followed. When it became clear that some of the councillors present supported the procedure adopted, the respondent declared the meeting closed and left the chamber in the company of three other councillors. The remaining councillors continued with the motion under the chairmanship of the second appellant who was the deputy mayor. Following those deliberations the resolution in question was rescinded and the appointment of the respondent and the second appellant as mayor and deputy mayor was rescinded. Immediately thereafter the first and second appellants were elected mayor and deputy mayor respectively.

In the court *a quo* the respondent sought an order declaring the election of the first and second appellants to be null and void and further declaring the respondent as the lawfully elected mayor of the Bindura Municipality. The court *a quo* was of the view that s 89 of the Urban Councils Act [Cap. 29:15] (“the Urban Councils Act”) on which the appellants sought to rely related to general resolutions of council in ordinary meetings and did not apply to the situation where council sought to remove a duly elected mayor from office. In particular the court *a quo* was of the view that a councillor elected as mayor cannot be lawfully removed from the position by a resolution passed by councillors in a meeting in

the absence of the seat of the mayor falling vacant as provided for under s 103 of the Act. In the result the court *a quo* granted the declaration sought by the respondent. Against that order the appellants have appealed to this Court.

In their notice of appeal and heads of argument the appellants raised several issues. In essence they attacked the decision of the court *a quo* on the following basis:

- (a) That the court erred in failing to understand that all questions, including the election of mayor, arising before a council meeting, are decided by a resolution by a majority and that in terms of the Urban Councils Act the council has the power to rescind or alter all its resolutions.
- (b) As the Minister of Local Government, Rural and Urban Development who administers the Urban Councils Act had not been cited, such non-joinder was fatal and the court *a quo* should have dismissed the application on that basis alone.
- (c) In reviewing the proceedings of a statutory body lawfully vested with discretion, the jurisdiction of a court of law is limited to the question whether or not that body exercised its discretion and not the correctness of the conclusion arrived at by it.
- (d) That since it is the council which appoints a mayor of council, in terms of s 28 of the Interpretation Act [*Cap 1:01*] (“the Interpretation Act”), council has the power to dis-appoint a mayor and the consequential power to appoint another person into that vacant post.

It seems to me that there are two basic issues that fall for determination by this Court. The first is whether the non-joinder of the Minister of Local Government, Rural and Urban Development was fatal. The second is whether a duly elected mayor of council can be

removed from office by council through the instrumentality of a resolution passed by that council.

The question whether the non-joinder of the Minister is fatal need not detain this Court and can easily be disposed by reference to r 87 of the Rules of the High Court which provides:

“(1) No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of any party and the court may in any cause or matter determine the issues or question in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

(2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application -

(a)

(b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party;

But no person ...”.

The above provision is clear and allows of no ambiguity. The non-citation of the Minister is not, in the circumstances, fatal. Indeed, this Court restated this position in the recent decision in *Sobusa Gula Ndebele v Chinembiri Energy Bhunu* SC-29/11 (p2 of the cyclostyled judgment).

The second issue that falls for determination is one of interpretation and that is whether a duly elected mayor can be removed from office following a resolution of council to that effect. On a careful perusal of the provisions of the Urban Councils Act, it is clear that there is no specific provision dealing with the removal of a mayor from office. In order to

determine the intention of the legislature on this important issue, one must, I think, have regard to the entirety of the provisions of the Urban Councils Act and the Interpretation Act.

It is correct, as submitted by the appellants in their heads of argument, that in terms of s 28 of the Interpretation Act, the power to appoint necessarily includes the power to remove or suspend a person. Section 28 of the Interpretation Act provides as follows:

“28 Appointments

An enactment which confers power to make an appointment of a person to any office or post shall confer on the appointing authority –

- (a) power at the discretion of that authority to remove or suspend him; or
- (b) power exercisable in the like manner and subject to the like consent and conditions, if any, applicable on his appointment –
 - (i) to reappoint or reinstate him; or
 - (ii) to appoint another person in his stead or to act in his stead, and to provide for the remuneration of the person so appointed; or
 - (iii) to fix or vary his remuneration, to withhold his remuneration in whole or in part during any period of suspension from office, and to terminate his remuneration on his removal from office”.

However, on a careful reading of the Act, it is clear that such a power is not absolute and that the provision must be read against the specific provisions of a particular enactment. Section 2 of the Interpretation Act provides:

“2 Application of this Act

- (1) The provisions of this Act shall extend and apply to every enactment as defined in this Act, including this Act, which was in force in Zimbabwe immediately before the 1st November, 1962, or thereafter comes into force in Zimbabwe, except in so far as any such provisions –
 - (a) are inconsistent with the intention or object of such enactment; or
 - (b) would give to any word, expression or provision of any such enactment an interpretation inconsistent with the context; or
 - (c) are in such enactment declared not applicable thereto.
- (2) Nothing in this Act shall exclude the application to any enactment of any rule of construction applicable thereto and not inconsistent with this Act.”

Whilst there is no doubt that the Interpretation Act empowers an appointing authority to remove a person from office, that provision is a general provision which is applicable to enactments generally but cannot supercede the specific provision of a particular enactment. For purposes of this appeal, whilst one should not lose sight of the provisions of the Interpretation Act, regard must be had to the pertinent provisions in the Urban Councils Act.

The Urban Councils Act prescribes how a councillor is elected as mayor or deputy mayor and how such person ceases to hold such office. The relevant section is 103 which provides as follows:

“103 Election of mayor, deputy mayor, chairperson and deputy chairperson

- (1) At the first meeting of a council after it has been established and thereafter at the first meeting held-
 - (a) after the general election of councillors; or
 - (b) after an initial election of councillors referred to in section 17(1)(c); or

the councillors present at that meeting shall, under the chairmanship of the district administrator or in the case of the Harare and Bulawayo Municipal Councils the Provincial Administrator within whose province the municipal council lies, elect -

- (c) in the case of a municipal council, one councillor or other person to be mayor and thereafter another councillor to be deputy mayor;
 - (d) in the case of a town council, one councillor to be chairperson and thereafter another councillor to be deputy chairperson.
- (2) A person elected in terms of subsection (1) shall forthwith enter upon his or her office and shall hold office until the election or appointment of his or her successor in office.
- (3) A person elected in terms of subsection (1) shall cease to hold office as such when his or her successor is elected in terms of that subsection:
Provided that-
 - (i) if a deputy is elected in terms of subsection (4) to be mayor, he or she shall cease to hold office as deputy with effect from that election;
 - (ii) if a deputy chairperson is elected in terms of subsection (4) to be chairperson, he or she shall cease to hold office as deputy chairperson with effect from that election;

- (iii) if a mayor, chairperson, deputy mayor or deputy chairperson resigns, by notice in writing addressed to the town clerk, he or she shall cease to hold office as such with effect from the date the notice is received by the town clerk;
- (iv) if the seat of the councillor who is a mayor, chairperson, deputy mayor or deputy chairperson becomes vacant by virtue of section 78(2)(b), (c), (d), (e), (f) or (g), he or she shall cease to hold office as such with effect from the date that seat becomes vacant.”

It is clear from the above provisions that it is the process of an election that gives rise to the election of a mayor. Indeed subsection (2) makes it clear that a person so elected shall forthwith enter upon his or her office and shall hold office until the election or appointment of a successor. Section 48 of the Act also makes it clear that a person elected as mayor shall take office on the date on which he is declared or deemed to have been elected a mayor unless his predecessor’s term of office has not expired.

The submission by the appellants is that the council can, by ordinary council resolution, remove an elected mayor from office for any reason. In support of this submission they rely on the provisions of ss 84 and 89 of the Urban Councils Act. Section 84 of the Urban Councils Act provides:

“84 Meetings and special meetings of council

(1) A council shall hold its first meeting on such date and at such place as the Minister may fix and thereafter the council shall, subject to this Act, meet for the dispatch of business and adjourn, close and otherwise regulate its meetings and proceedings as it thinks fit:

Provided that the council shall hold an ordinary meeting –

- (a) as soon as is practicable after each general election; and
 - (b) at least once in each month.
- (2) Save as otherwise provided in this Act, at any meeting of a council –
- (a) all the councillors present at that meeting shall vote on every matter which is put to the vote;
 - (b) voting shall be by show of hands or by any mechanical means approved by the council;

- (c) all the questions coming or arising before that meeting shall be decided by a resolution passed by a majority of the votes cast and, in the event of an equality of votes, the mayor shall have a casting vote in addition to a deliberative vote.
- (3) The mayor may, at any time, and at the request in writing of not less than one-third of the total membership of the council or of six councillors whichever is the less, shall, within fourteen days of such request, call a special meeting of the council.
- (4) Written notice of any special meeting called in terms of subsection (3) shall be sent to each councillor at least twenty-four hours before the meeting and shall specify the object of the meeting, and no matters, other than those specified in that notice, shall be discussed at that special meeting.
- (5) ...
- (6) ...”.

And s 89 of the Urban Councils Act provides:

“89 Rescission or alteration of resolutions of council and committees

- (1) A resolution passed at a meeting of a council shall not be rescinded or altered at a subsequent meeting of the council –
 - (a) Unless –
 - (i) a committee has recommended that the resolution be rescinded or altered; or
 - (ii) a notice of motion to rescind or alter that resolution has been given at least seven days before the subsequent meeting to the chamber secretary and the notice of motion has been signed by not less than one-third of the membership of the council;and
 - (b) if the rescission or alteration occurs within six months from the date of the passing of the original resolution and the number of councillors present at such subsequent meeting does not exceed the number of councillors present when the original resolution was passed, unless at least two-third of the councillors or members, as the case may be, present at the subsequent meeting vote in favour of that rescission or alteration.
- (2) The chamber secretary to whom any notice of motion has been given in terms of subsection (1) shall send a copy of the notice to each councillor at least two days before the subsequent meeting at which the motion is to be moved.
- (3) Nothing in subsection (1) shall be construed as precluding a council from rescinding or altering a resolution passed at a previous meeting in a

manner other than that recommended by the committee or specified in a notice of motion, as the case may be.

(2) A resolution passed at a meeting of a committee of a council may be rescinded or altered at any subsequent meeting of that committee”.

The respondent on the other hand submitted that s 89 is a general provision which relates to meetings of council and does not empower the removal of a sitting mayor. The respondent further argued that it is s103 which provides for the vacation of office of mayor and that that section does not provide for such removal to be done through resolutions passed by council. Instead a successor can only be appointed where the seat of the councillor who is a mayor or deputy mayor becomes vacant by virtue of the provisions of s 103 as read with the provisions of s 78(2) of the Urban Councils Act.

Section 78(2) in relevant part provides

“Subject to subsection (3) if a councillor –

- (a) dies; or
- (b) resigns his office; or
- (c) ceases to be qualified for election as a councillor or becomes disqualified for such election in terms of section 119 of the Electoral Act [Chapter 2:13] (No. 25 of 2004); or

(c1) ceases to be a councillor in terms of subsection (7) of section forty- one; or

- (d) is absent without leave of the council-
 - (i) from the ordinary meetings of the council during a period of two consecutive calendar months; or
 - (ii) from the meetings of any committee of the council to which he has been appointed during a period of two consecutive calendar months, if the committee has held at least one meeting in each of those calendar months or from two consecutive meetings of the committee which are not held in the same calendar month or consecutive calendar months;or

- (e) is absent from the ordinary meetings of the council during a period of six consecutive calendar months, whether or not leave of the council has been obtained; or
- (f) ceases in terms of paragraph (b) subsection (1) of section 22 of the Provincial Councils and Administration Act [Chapter 29:11], to be a councillor; or
- (g) has been suspended in terms of section one hundred and fourteen for a period longer than thirty days;

his seat shall become vacant and such vacancy shall be deemed to be a special vacancy.”

An urban council is a creature of statute. It therefore derives its authority from the Urban Councils Act and other legislative provisions. As a corollary an urban council therefore can only do that which the law has specifically or impliedly authorised. It has no power to do anything that the law has not authorised.

Having carefully considered the provisions of the Urban Councils Act and the submissions made by both parties to this appeal, I am satisfied, on a correct reading of the Urban Councils Act, that there is no law that allows a council to remove a sitting mayor on the basis of a mere council resolution. It is clear that s 89 of the Urban Councils Act refers to rescission or alterations of council resolutions. The section cannot possibly apply to the removal of a mayor. The appellants have argued that at the end of the day a mayor is put into office through such a resolution and consequently that resolution can be rescinded in terms of the Urban Councils Act. I find myself unable to accept this submission. It is clear that it is the electoral process involving the councillors which results in one of them being elected mayor and another as deputy mayor. Such process is chaired by the district administrator as provided in the Urban Councils Act. The suggestion that this was an ordinary meeting which ended in a resolution is in my view untenable. The law requires that there be an election and that the person so elected enters office forthwith. There is no legal requirement for the passing of a resolution before the incumbent assumes the position.

The above interpretation is re-enforced by the provisions of s 103(3) which prescribe how a person who has been elected mayor or deputy mayor shall cease to hold office. In particular if the seat of the councillor who is a mayor or deputy mayor becomes vacant by virtue of any of the provisions of s 78(2) (b)-(g), he shall cease to hold office as such with effect from the date that seat becomes vacant. If the intention of Parliament was simply that a sitting mayor could be removed pursuant to an ordinary council resolution the Urban Councils Act would not only have said so but would not have gone further to make provision on how a person ceases to be mayor. To read the Urban Councils Act as making provision for the removal of a person as mayor through a resolution would render the provisions of s 103(3) superfluous.

Regard should also be had to the fact that prior to the amendment of the Urban Councils Act by Act 1/08, the Minister was empowered by s 54 to suspend a mayor and the President to dismiss him. Act 1/08 repealed s 54 and substituted it with s 103. It is s 103 that prescribes how a person elected as mayor ceases to hold such office. In doing so, the intention must have been that a mayor would only cease to hold office when his successor is elected or if the seat of a councillor who is a mayor falls vacant.

In any event the suggestion that a sitting mayor can be removed from office through a mere resolution can result in an absurdity. In this particular case it is clear that the councillor who moved the motion did so, on the basis that the mayor had misconducted himself. A list of the grounds of misconduct were cited in the motion. The respondent, who was mayor, was not asked to respond. Neither was there any inquiry. All that happened was that the councillors who remained behind voted to remove the mayor from office without any inquiry at all and without affording him the opportunity to be heard. If the appellants'

submission that a mere council resolution would suffice to remove a mayor from office were to be taken to its logical conclusion a situation could arise where there could be a motion by one councillor removing a mayor and another motion re-electing the same mayor by another councillor. This surely could not have been the intention of the legislature.

I am inclined to agree with the remarks by the court *a quo* that:

“The provisions of s 103(2) are peremptory and in the absence of a cogent argument as to why council should not comply with the said provision I am unable to find that s89 applies in the removal of a mayor from office”.

The appeal must therefore fail.

Before concluding it seems to me pertinent that I make certain observations on what are obviously gaps in the Urban Councils Act, not only on the removal of a mayor or deputy from office but also on the appointment of the same.

Prior to 2008, the voters in a council area elected an executive mayor who in terms of s 64 of the Urban Councils Act controlled the activities of the employees of the council and was responsible for the supervision and co-ordination of council affairs. As already noted the then s 54 of the Act empowered the Minister to suspend a mayor and the President to dismiss him or her from office.

In 2008, the Act was amended by the Local Government Laws Amendment Act 1/08. That amendment abolished the post of executive mayor in favour of a ceremonial mayor. That amendment made no provision empowering the Minister to suspend a mayor.

It is not clear why no specific provision was made for the removal of a mayor or his deputy but one possible explanation may be that since the mayor was now ceremonial whatever misconduct he committed would be committed in his capacity as a councillor and in terms of s 114 of the Urban Councils Act the Minister could suspend and dismiss him as a councillor in which case he would automatically cease to be mayor.

Further the amendment omitted to prescribe the qualifications of the ceremonial mayor. In terms of s 103 (c) the councillors elect one councillor *or other person* to be mayor and thereafter another councillor to be deputy mayor. What this means is that councillors are free to elect any person as mayor, including one who is not a councillor. Whilst the Minister can suspend a councillor including a councillor who has been elected mayor, he cannot act against a mayor who is not a councillor as no provision for such an eventuality has been made. Moreover, not only are the qualifications of a mayor missing from the Act but also the circumstances under which a person is disqualified from holding such office have not been spelt out. Consequently a councillor who has been elected mayor but is subsequently suspended and dismissed in terms of s 114 remains mayor.

Further the amendment added to the confusion by defining “elected councillor” as “a councillor other than an appointed councillor and includes a person elected or appointed as a mayor or deputy mayor in terms of s 103”. Such a definition would have made sense if the Urban Councils Act had restricted the office of mayor to elected councillors.

The above observations clearly suggest that when the Urban Councils Act was amended by Act 1/08, the legislature “forgot” to include a number of important provisions. The result is that there are gaps in the Act which have the potential to create problems such as those exemplified by the present case. The attention of the relevant government Ministry should be drawn to the contents of this judgment.

Having come to the conclusion that a duly elected mayor cannot be removed from office by ordinary council resolution, this Court was of the unanimous view that there was no merit in the appeal and for that reason dismissed the appeal with costs.

ZIYAMBI JA: I agree

CHEDA JA: I agree

Mushonaga, Mutsvairo & Associates, appellants, legal practitioners

Mbidzo, Muchadehama & Makoni, respondents, legal practitioners