

**MELUSI SIBANDA**

**Versus**

**CITY OF VICTORIA FALLS**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 7 February 2024

**Urgent court application**

*M. Ncube* for the applicant  
*T. Nkala* for the respondent

**DUBE-BANDA J**

[1] This is an urgent court application for a *declaratur*. After hearing and considering the evidence and submissions made by counsel, in an *ex-tempore* judgment I dismissed the application with costs for lack of merit. In a letter dated 12 February 2024 the applicant has requested for reasons for the judgment. These are they.

[2] In this application the applicant sought a *declaratur* and *mandamus* couched in the following terms:

It be and is hereby declared that:

- i. Respondent could not lawfully flight an advertisement for a vacancy for the position of Accountant Budgeting and Reporting with respondent having resolved to hire applicant for the same position in terms of its resolution No. 28/2023.

Consequential relief:

- ii. A *mandamus* be and is hereby issued directing respondent's management to finalise the hire of applicant in the said position.
- iii. Costs of suit.

[3] The application was opposed by the respondent and it filed a notice of opposition. The respondent will be referred to as either "respondent" or "council" as the context will permit.

Background facts

[4] This application will be better understood against the background that follows. In January 1997 the applicant secured employment with the respondent as a general hand. He rose through the ranks until he attained the position of accounting assistant. As he worked as an accounting assistant a position of Accountant (Budgeting and Reporting) arose within council and the applicant applied and attended the interview. Thereafter the applicant got to know that Council had recommended him for the position.

[5] According to the respondent, the applicant used a fake academic Ordinary Level certificate in applying for the position Accountant (Budgeting and Reporting). On 10 July 2023 the respondent charged him with two counts, *viz* fraud as defined in s 4(D) of the Victoria Falls Municipality Code of Conduct – 2000 (“Code of Conduct”); and absence from work for a period of five or more working days without reasonable excuse as defined in terms of s 4(D)(5) of the Code of Conduct. In count one it was alleged that he applied for the position of Accountant (Budgeting and Reporting) and tendered a forged Ordinary Level certificate. In the second count he was accused of being absent from work without authority or reasonable excuse from 9 June 2023 to 10 July 2023. The applicant was suspended from work pending a disciplinary hearing.

[6] A disciplinary hearing was conducted and the applicant was found guilty as charged and on 16 August 2023 he was dismissed from employment. Aggrieved by the decision to dismiss him from employment, he appealed internally to the Town Clerk. The appeal was dismissed. Again, aggrieved by the decision of the Town Clerk, he appealed to the Labour Court of Zimbabwe and such appeal is still pending finalisation.

[7] The respondent has since re-advertised the position of Accountant (Budgeting and Reporting). The applicant contends that the advertising of the position is unlawful because there is a standing council resolution directing that he be appointed in the position Accountant (Budgeting and Reporting). It is against this background that the applicant sought the relief stated above.

### Preliminary objections

[8] The respondent in its notice of opposition took three preliminary objections, being that there was no cause of action; that the application was bad at law; and that the matter was not urgent. At the commencement of the hearing Mr *Nkala* counsel for the respondent abandoned the objections in respect of no cause of action and that the application was bad at law. Counsel persisted with the attack on the urgency of the application and submitted that this court application was not urgent and should be struck off the roll of urgent matters.

[9] There was some confusion as to whether this was an urgent court application or urgent chamber application. I do not intend to burden this judgment with this issue. It is important though to note that the distinction between the two processes was succinctly stated by the Constitutional Court in *Mbata v Confederation of Zimbabwe Industries & Anor* CCZ 5/21 @ 10. This was an urgent court application. I heard submissions on the issue of urgency and observed that the attack on urgency basically turned on the merits of the application. I ruled that the matter was urgent. See *Chiwenga v Mubaiwa* SC 86/20; *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188; *Triple C Pigs and Another v Commissioner-General* 2007ZLR (1) 27; *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27. I now turn to the merits of the matter.

### Merits

[10] The applicant seeks a *declaratur*. The convenient starting point is s 14 of the High Court Act [Chapter 7:06] which provides as follows:

“14 High Court may determine future or contingent rights  
The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

[11] In *Zvomatsayi & Ors v Chitekwe No & Anor* 2019 (3) ZLR 990 (H) the court said a *declaratur* is one by which a dispute over the existence of some legal right or obligation is resolved. It is used where there is a clear legal dispute or legal uncertainty regarding administrative, executive action or constitutional rights. It may also be used to determine whether actual or pending action is lawful or legal. It is a simple means of curing illegal activity: with a *declaratur* the court gives a definitive and authoritative answer to the question

as to the legal position of a particular given state of affairs. A *declaratur* may also be sought even before a dispute exists, provided the right or obligation is not purely speculative, abstract, hypothetical or intellectual in nature. It is essentially a non-invasive remedy and is rather a toothless remedy. See *Zimbabwe Banks and Allied Workers Union & Ors v Steward Bank* 2019 (3) 462 (H); *Streamsleigh Investments (Pvt) Ltd v Autoband Investments (Pvt) Ltd* 2014 (1) ZLR 736 (S), at 750C – D.

[12] In essence the applicant is asking the court to declare that the flighting of an advertisement for a vacancy for the position of Accounting (Budgeting and Reporting) is unlawful because council resolved to hire applicant for the same position in terms of its resolution No. 28/2023. It is a principle of our law that a litigant must lay out or plead a basis for the relief he or she seeks in his founding affidavit. It is trite that an application stands or falls on its founding affidavit. See *Fuyana v Moyo* SC 54-06, *Muchini v Adams & Ors* SC 47-13 and *Austerlands (Pvt) Ltd v Trade and Investment Bank Ltd & Ors* SC 80-06; *Ahmed v Docking Station Safaris Private T/A CC Sales* SC 70/18. In *casu* the copy of a document referred to as a resolution attached to the founding affidavit is not signed. Section 88(3) of the Urban Councils Act [Chapter 29:15] is imperative in this regard, it says:

“(3) The minutes of a meeting of a council or committee shall, if in order, be confirmed as soon as possible and, when so approved, shall be signed by the chairman of the meeting at which they are confirmed.” (My emphasis).

[13] It is trite that the use of the term ‘shall’ is mandatory and peremptory and not permissive or directory. In *Sutter v Scheepers* 1932 AD 165 the court laid down certain guidelines at 173 174:

“A long series of cases both here and in England have evolved certain guiding principles. Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word ‘shall’ when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction *Standard Bank Ltd v Van Rhyn* (1925 AD 266).”

See *Doctor Daniel Shumba and Anor v The Zimbabwe Electoral Commission and Anor* Judgment No. SC 11/08; *Moyo & Ors v Zvoma Ors* SC 28/10.

[14] An unsigned document cannot be elevated to the status of a council resolution. It stands for nothing. It is nothing. It cannot anchor a cause of action. Mr *Ncube* counsel for the applicant submitted, quoting from the opposing affidavit that it was not disputed that council resolved to

hire the applicant in the position of Accountant (Budgeting and Reporting). That is inconsequential. It is of no moment. The applicant is enjoined to make a case for the relief he seeks in the founding affidavit. He has not done so. He has not crossed that hurdle.

[15] In any event the respondent has not formerly offered the applicant employment in the position of Accountant (Budgeting and Reporting). He has not been offered a contract of employment in this position. There has never been any formal communication between the applicant and the respondent about this position he claims is his. Even in his founding affidavit he does not say he was offered employment in the position of Accountant (Budgeting and Reporting). There is no factual basis or basis at law upon which to declare that flighting of an advertisement unlawful. It is for these reasons that the case for a *declaratur* failed.

[16] The applicant in his draft order also sought a *mandamus* directing respondent's management to finalize his hire to the position of Accountant (Budgeting and Reporting). The object of a *mandamus* is to compel an administrative organ to perform some or other statutory duty. It is a judicial remedy available to enforce the performance of a specific statutory duty or remedy the effect of an unlawful action already taken. See *Oil Blending Enterprises (Pvt) Ltd v Minister of Labour* 2001 (2) ZLR 446 (H) at 450. The requirements to access this judicial remedy were spelt out in the case of *Setlogelo v Setlogelo* 1914 AD at 227. The Supreme Court of Zimbabwe noted with approval the requirements of *mandamus* in the case of *Tribatic (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S) at p56. The requirements for a *mandamus* are: a clear or definite right –this is matter of substantive law; an injury actually committed or reasonably apprehended- an infringement of the right established and resultant prejudice; the absence of a similar protection by any other ordinary remedy. See *Mahiya v Minister of Justice, Legal & Parliamentary Affairs* CCZ 14/20.

[17] With regard to the first requirement, according to Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* 5th Edition, at p 1457, whether the applicant has a right is a matter of substantive law. The authors state that one has to prove a clear and definite right in terms of substantive law, a right which can be protected, a right existing at common law or statutory law. See *Mahiya v Minister of Justice, Legal & Parliamentary Affairs* CCZ 14/20. In *casu* the applicant anchors his case on an unsigned document he calls a resolution of

council. It is not a resolution. He has no formal correspondence from council offering to hire him in this position of Accountant (Budgeting and Reporting).

[18] A *mandamus* may only be granted in circumstances where the public or administrative body has a clear duty to perform the action sought. In *casu* council has no duty to hire the applicant. He was employed by council and was accused of fraud and absence from work without lawful excuse or authority and was dismissed from employment. He appealed internally and hit a brick-wall. He has appealed to the Labour Court and the appeal is pending finalisation. Council cannot be compelled to re-hire such a person *albeit* in a different position nor can he be permitted to force his way back to council through the back-door. Due process is on course, he must just be content and prosecute his appeal to the Labour Court. The applicant has dismally failed to establish a clear and definite right. He has not made a case for a *mandamus*. It is for these reasons that the case for a *mandamus* failed.

#### Costs

[19] In the opposing papers the respondent sought costs on a legal practitioner and client scale as against the applicant. It was contended that the applicant has a pending case for a *declaratur* in this court under case number HC1518/23 (CAPP 327/23). It was averred that in HC 1581/23 the parties and the issues are the same as in this case. It was averred further that the duplicity of processes is undesirable as it may result in court issuing conflicting orders.

[20] I gave the issue of costs serious consideration and settled for costs on a party and party scale. This is a border-line case. The conduct of the applicant, though to some extent vexatious is such that he cannot be mulct with costs on a legal practitioner and client scale. The scale of attorney and client costs is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in an indubitably, vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium. See *Public Protector v South African Reserve Bank* [2019] ZACC 29. This is not such a case. His conduct cannot be described unworthy, reprehensible or blameworthy or actuated by malice. Costs on a legal practitioner and client scale are not merited in this matter.

[21] It is on this basis that I found that the application had no merit and proceeded to dismiss it with costs.

*Ncube Attorneys*, applicant's legal practitioners

*Dube Nkala and Company*, respondent's legal practitioners