WILSON SIAMPOLOMBA
versus
MINISTER FOR LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING
and
ATTORNEY-GENERAL OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 19, 25, 30 & 31 March and 1 April 2021

OPPOSED APPLICATION

R.C Muvuti for the applicant
J. Bhudha, for the respondents

CHIRAWU-MUGOMBA: The crucial legal issue raised in this matter is this. Can a Councillor of a rural district council who has been suspended from office in terms of s278 of the Constitution as read with s157 of the Rural District Councils Act [Chapter *29:13*] as amended by s2 of the Local Government Laws Amendment Act of 2016 **and** the time frame for acting by the responsible Minister lapses be suspended again on the same allegations? As the record will show, the legal practitioners lost an opportunity to advance argument on this crucial jurisprudential aspect.

The applicant is the Chairperson of the Binga Rural District Council and a Councillor for Ward 15. On the 9th of December 2019, the 1st respondent authored a letter to the applicant placing him on suspension. A summary of the allegations against the applicant is that he claimed transport allowances on two different dates and yet he used a council vehicle; he unilaterally stopped a council meeting; he misused the Council logo through use of letterheads and that he used the guest house of the council for non-council business thus causing financial prejudice. The letter gave applicant a period of 7 days to respond. The applicant responded to the letter on the 23rd of December 2019 but was not afforded a 'response'.

On the 5th of March 2020, a letter was addressed to the applicant by the 1st respondent calling on him to present himself before a tribunal convened to hear the matter. The applicant

received the letter on the 7th of March 2020. The hearing was scheduled for the 13th of March 2020. On the 11th of March 2020, applicant's legal practitioners wrote a letter to the Tribunal advising it that the legal practitioner who was handling the matter was unavailable and a request for re-scheduling to the 20th of March 2020 was made. No response was received to that letter.

On the 18th of March 2020, the applicant was served with a letter dated the 31st of January from the 1st respondent stating that the suspension as per the letter dated the 9th of December 2019 had been lifted. The letter qualified the lifting of the suspension in that applicant was advised that he had not been exonerated from the allegations levelled against him. By way of a letter dated the 17th of March 2020, the 1st respondent authored another letter to the applicant placing him on suspension on allegations similar to those in the letter dated the 9th of December 2019. Another independent tribunal was set up in respect to the second suspension.

Much of the applicant's founding affidavit contains averments of law which is not only unhelpful but is frowned upon – see *Chinzou* v *Masomera N.O,* 2015(2) ZLR 274. There should be a difference between a founding affidavit and heads of argument. The applicant's founding affidavit reads like the latter. In charting through the maze of the founding affidavit, the legal issues raised by the applicant are as follows. The hearing before the tribunal was supposed to have been conducted within 45 days. Failure to conduct the hearing meant that the suspension lapsed by operation of law. The 1st applicant cannot therefore purport to suspend the applicant for a second time on the same allegations. The second suspension is a legal nullity. Even if the second suspension is recognised at law, the 45 day period has lapsed by operation of law. Applicant's rights to a fair hearing have been infringed.

The applicant therefore seeks a declaratory order as follows:-

1. That a declaratory order be and is hereby granted.
2. That the suspension of the applicant by the 1st respondent is declared to have lapsed by operation of law on the 27th of February 2020.
3. That the re-suspension of the applicant after the first suspension had lapsed by operation of law on the 27th of February 2020, is declared null and void.
4. That the 1st respondent is to pay the costs on a legal practitioner and client scale.

Although the notice of opposition states that the 'respondents' were opposing the application, it was only the affidavit of the 1st respondent that was attached. He contended as follows. The 1st suspension lapsed due to circumstances beyond his control due to failure to get nominations of tribunal members from the relevant statutory bodies. The 2nd suspension was stopped due to lockdown measures imposed in the country that prohibited travel. The restrictions having been lifted, the applicant must allow the law to take its course. If the suspension is nullified, it will result in confidence in the community being dented. The applicant contributed to the delay having sought a postponement and this was before the COVID -19 induced lockdown. In his heads of argument, the applicant identified the following three issues. (1) Whether the first suspension would still be operational after the lapse of the mandatory forty-five days (2) the rule of law in the interpretation of statutes and (3) whether there is scope for re-suspension in the manner contemplated by the 1st respondent. The failure by the 1st respondent meant that the first suspension lapsed by operation of law and there is no scope for a re-suspension– *Manyenyeni* v *Minister of Local Government, Public Works and National Housing and another,* HH-274-16. The second suspension was arbitrary and falls outside the confines and authority of s278 of the Constitution. In his heads of argument, the 1st respondent made the following submissions. The issues for determination are (1) whether or not the application is properly before the court and (2) whether or not the second suspension was lawful. The applicant had failed to establish that he is entitled to a *declaratur*. The application ought to have been one for review and yet it was disguised as one for a declaratory order. As a result, much of the 1st respondent's heads of argument concentrated on the issue of a review. At the hearing, the legal practitioners could not make any meaningful submissions as they had both missed the crucial legal issue as enunciated in paragraph one. Contrary to the view held by the 1st respondent that the correct procedure is one for review, the legal issues raised cannot be resolved by way of a review.

The Constitution makes provision for the disciplinary proceedings against Councillors as follows:-

> **278 Tenure of seats of members of local authorities**
> (1) The seat of a mayor, chairperson or councillor of a local authority becomes vacant in the circumstances set out in section 129, as if he or she were a Member of Parliament, any reference to the Speaker or President of the Senate in section 129(1)(*k*) being construed as a reference to the Minister responsible for local government.

(2) An Act of Parliament must provide for the establishment of an independent tribunal to exercise the function of removing from office mayors, chairpersons and councillors, but any such removal must only be on the grounds of—
(*a*) inability to perform the functions of their office due to mental or physical incapacity;
(*b*) gross incompetence;
(*c*) gross misconduct;
(*d*) conviction of an offence involving dishonesty, corruption or abuse of office; or
(*e*) wilful violation of the law, including a local authority by-law.
(3) A mayor, chairperson or councillor of a local authority does not vacate his or her seat except in accordance with this section.

The Parliament of Zimbabwe followed up by enacting the Local Government Laws Amendment Act of 2016. The provision relevant to this matter is the following

Amendments to Rural District Councils Act *[CHAPTER 29:13]*

1 New sections substituted for section 157 of Cap. 29:13
Section 157 of the Rural District Councils Act *[Chapter 29:13*] (hereinafter in this Part called the "principal
Act") is repealed and substituted by the following sections —

"**157 Suspension and removal of councillors from office**

(1) In accordance with section 278 of the Constitution, the chairperson or councillor of a council shall only be removed from office on the grounds of—

(a) inability to perform the functions of his or her office due to mental or physical incapacity ; or
(b) gross incompetence; or
(c) gross misconduct; or
(d) conviction of ail offence involving dishonesty; corruption or abuse of office; or
(e) wilful violation of the law, including a local authority bylaw.

(2) Subject to this section, if the Minister has reasonable grounds for suspecting that a chairperson or councillor—

(a) is unable to perform the functions of his or her office due to mental or physical incapacity; or
(b) is guilty of any misconduct referenced in subsection (l)(b),
(c) , (d) or (e);

The Minister shall, by written notice to the chairperson or councillor and the council concerned—

(c) suspend the chairperson or councillor from exercising all or any of his or her functions in terms of this Act; and
(d) specify the reasons for the suspension and the nature of the allegations against the chairperson or councillor; and
(e) afford an opportunity to the chairperson or councillor to respond to the allegation within seven days of receiving the notice.

(3) …….

(4) Not earlier than fourteen days after the Minister has suspended a chairperson or councillor in terms of subsection (2), and in any event within

> forty-five days, the Minister shall, if no response is made to a notice in terms of subsection (2)(e), or if that response is not satisfactory to the Minister, cause a thorough investigation to be conducted, where necessary, with all reasonable dispatch to determine whether sufficient evidence exists for the issue of the removal of the chairperson or councillor on any of the grounds specified in subsection (1) to be referred to an independent tribunal.

The decision therefore by the 1st respondent as per the letter dated the 9th of December 2019 to suspend the applicant cannot be impugned. He was well within his rights to do so. It is the second suspension on the same allegations that becomes the crucial issue.

As submitted by the applicant in his heads of argument, the rationale for s278 of the Constitution was well captured by DUBE J in the *Manyenyeni* decision as follows:-

> The provisions of s 278 of the Constitution are clear on this point. The intention of the legislature in introducing this requirement must have been a concern over the lack of observance of the rules of natural justice conspicuous under s 114 (4) of the Urban Councils. A councillor under suspension is simply advised after an investigation that he has been dismissed without his side of the story having been heard. He is dismissed without a hearing. The *audi altrem partem rule* of natural justice is not observed and the decision to dismiss is made by one person. To bridge this shortcoming, the Constitution introduces an independent tribunal to guarantee a transparent process.

Although this was in relation to an urban councillor, this applies with equal force to a rural district Councillor.

Contrary to the assertion by the applicant that his right to be heard was infringed, S157 (2) (e) of the Rural District Councils Act protects that right. It affords an opportunity to a Councillor who is placed under suspension a right to reply to allegations raised against them within a period of seven days within which to respond. The applicant exercised this right and responded to the letter of suspension. In terms of s157 (2) (e) as read with s157 (4) there are various scenarios that may happen. Once a letter of suspension is dispatched and received, the Councillor may select to respond or not to respond. That is why s157 (4) makes it clear that *"if no response is made to a notice in terms of subsection (2) (e), or if that response is not satisfactory to the Minister"* the Minister will proceed as specified. In *casu*, the Minister received a response and his decision to still appoint a Tribunal must be read in the context of not having received a satisfactory response. The complaint by the applicant that he did not receive a response to his 'response' holds no water. Section 157(4) does not envisage further exchange of correspondence especially in view of the time frame of 45 days.

The Minister's duty is clearly spelt out that, s/he must " *cause a thorough investigation to be conducted, where necessary, with all reasonable dispatch to determine whether sufficient evidence exists for the issue of the removal of the chairperson or councillor on any of the grounds specified in subsection (1) to be referred to an independent tribunal."* The fact that the 1st respondent proceeded to appoint a tribunal must be read to mean that he had caused a thorough investigation to be conducted and had determined that there was sufficient evidence for the removal of the applicant. Ultimately, the final decision is that of the independent tribunal and the Councillor concerned can still take the decision on review.

The applicant never learnt of his fate with the tribunal because the 1st respondent lifted the suspension by way of a letter dated the 31st of January 2020 which the applicant claims was served on him on the 18th of March 2020. The 1st responded did not deny or dispute in his founding affidavit the assertion by the applicant that the indication of the date of the letter of lifting the letter of suspension as 31 January 2020 was a ploy to fit into the 45 day period. It is trite that, that which is not denied is admitted.

The Rural District Councils Act is silent on the reckoning of time. Section 336 of the Constitution makes provision for reckoning of time but this is specifically to provisions in the Constitution that relate to time frames. In this matter we are dealing with reckoning of time as provided for by an act of Parliament. Section 157(4) does not speak of the date of delivery of the letter of suspension but the date of the letter to reckon the 14 and 45 days period. It is only upon receipt of the notice that the seven day period to respond is reckoned. The time should be reckoned as per the provisions of the Interpretation Act [Chapter [*1:01]*

I fully associate with the words of UCHENA J (as he then was) in *Sikanyika* v *Garadi,* HH- 65-08 when he stated as follows:-

> Mr *Nyau's* submission that the reckoning of time should exclude Saturdays and Sundays, if accepted would bring service on 29 April 2008, within the 10 day period as the tenth day would have fallen on 29 April 2008. This issue was determined by this court in the case of *Edson Nyamapfeni v The Constituency Registrar Mberengwa East and Others* HH 27/08, where I, at page 5 of the cyclostyled judgment, while interpreting s 33 of the Interpretation Act (Chapter 1;01) and s 46 (19) (c) of the Electoral Act said;
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> > "The clear meaning of s 33 (1) to (4) is as follows. Subsection one spells out that s 33 defines any reference to time in any enactment in Zimbabwe. Subsection two excludes the day on which the event triggering the reckoning of time occurred, meaning the reckoning of time starts from the next day. Subsection three includes the last day of the stated period in the reckoning of time. Subsection four extends the period if the last day falls on a Saturday, a

> Sunday or a public holiday, to the next day which is not a Saturday, a Sunday or a public holiday. The inclusion of subsection four providing for extension to the following day if the period expires on a Saturday, a Sunday or a public holiday means Saturdays, Sundays and public holidays are included in the reckoning of time. This interpretation is confirmed in the case of *Makuwaza v National Railways of Zimbabwe* 1997 (2) ZLR 453 (S) @ 456 E-F where Mc NALLY JA said:
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> > "It was conceded on the understanding that the period from 10 May to 26 May was less than fourteen days if one excludes Saturdays, Sundays and public holidays.
> > That may be so, but on what basis does one exclude those days? The Interpretation Act [*Chapter1:01*] does not allow it. The Labour Relations (Settlement of Disputes) Regulations (SI 30 of 1993) do not authorize it. It is only permitted in matters before the High Court and Supreme Court because the rules of those courts specifically say so (rr4A and 1 respectively)."

The reckoning of days from the 9th of December 2019 means that the 45 day period expired on the 23rd of January 2020. The applicant is therefore correct in his assertion that the 1st respondent failed to act within the expected time frame and hence by operation of the law, the suspension fell away. It fell away not because of the 1st respondent's letter of the 31st of January 2020 but by the expiry of the time frame within which to act.

The 1st respondent attempted to blame the delay on difficulties to secure members for the tribunal. In my view that is neither here nor there. The 45 day period is a statutory provision that one cannot even apply for condonation to depart from. The 1st respondent proceeded to suspend the applicant for a second time on the same allegations. That is the crux of the matter, i.e. whether or not he could issue another suspension based on the same allegations after having failed to complete the act as envisaged in s157(4). I use the phrase, 'to complete' because the 1st respondent began the process as he is legally entitled to but failed to complete it within the stipulated time frame.

In his letter lifting the suspension which as I have indicated holds no water, the 1st respondent reserved unto himself the right to bring back the charges against the applicant. Part of the letter reads, *"Please note that the lifting of the suspension does not exonerate you from allegations of gross misconduct and abuse of office levelled against you".* In my view what is critical is the interpretation to be placed on disciplinary proceedings that have been commenced but not completed on time. Do the allegations go away simply because the time frame has lapsed especially given the fact that the merits of the allegations were not dealt with? I considered the effect in criminal proceedings of a withdrawal of charges before plea the result being that the charges can be brought back because the withdrawal does not go into the merits of the allegations.

There are therefore two competing interests – the first one being that if the court holds that the second suspension is null and void, it means that the merits of the allegations if any remain unknown. Councillors are public officials who must be held accountable. On the other hand, the absurdity is apparent that the Minister may suspend, not follow through with the process, the 45 days lapses and s/he suspends a Councillor on the same allegations. There will be in such a scenario no end in sight since the Minister may suspend a Councillor as many times as s/he wishes.

In my view, the answer lies in the mischief that the legislature sought to cure in enacting the Local Government Laws Amendment of 2016. Sections 157(3) and (4) of the Rural District Councils act before its amendment read as follows:-

157 Suspension and removal of councillors from office

(3) As soon as is practicable after he has suspended a councillor in terms of subsection (1), and in any event within forty-five days, the Minister shall cause a thorough investigation to be conducted with all reasonable dispatch to determine whether or not the councillor has been guilty of any act, omission or conduct referred to in that subsection.

(4) If, following investigation, the Minister is satisfied that the grounds of suspicion on the basis of which he suspended a councillor in terms of subsection (I) have been established as fact, he may, by written notice to the council and the councillor concerned, dismiss the councillor, and the councillor's seat shall thereupon become vacant.

The Minister as observed in the *Manyenyeni* case had excessive powers of causing an investigation, make a determination of guilty or not guilty and dismiss the Councillor. The mischief sought to be cured was this power. In my view, the new s157 (4) ought to be interpreted purposively. MUTEMA J in *Van Wyck* v *Tarcon (Pvt) Ltd*, HH-474-15 stated as follows:-

"Devenish G in *Interpretation of Statutes* (Juta 1992) @ 33 – 39 commenting on the *Purposive Rule of Interpretation* says:

"The purposive approach requires that interpretation should not depend exclusively on the literal meaning of words according to the semantic and grammatical analysis … The interpreter must endeavor to infer the design or purpose which lies behind the legislation. In order to do this, the interpreter should make use of an unqualified contextual approach, which allows an unconditional examination of all internal and external sources … words should only be given, ordinary grammatical meaning if such meaning is compatible with their complete context."

Section 157(4) as read with s157(7) gives the Minister ample time to commence a disciplinary process, wait for a response which may or may not come, cause a thorough

investigation to be done and refer the matter to the tribunal. It is important to note that referral of a matter to the tribunal is not the only end result of the investigation. The Minister may as well not refer matter depending on the outcome of the investigation. In my view, if the Minister fails to complete the process as envisaged, s/he may not have a second bite at the cherry in relation to the same allegations. To allow the 1st respondent as in this case to do so will result in a return of that excessive power that the legislature sought to remove. Granted, it is always the tribunal that has the final say but at will, the Minister may suspend a Councillor.

Section 157(3) places a Councillor in danger of losing their allowances during the period of suspension. Although the suspension should be without loss of allowances, this is qualified as follows:-

> (3) Any allowance that is payable to chairpersons or councillors in terms of this Act shall continue to be paid to a chairperson or councillor who has been suspended in terms of subsection (2) for so long as he or she is suspended, unless the misconduct in question involves —
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> (a) dishonesty in connection with the funds or other property of the council; or
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> (b) gross negligence resulting in the loss of any funds or property of the council; or
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> (c) gross mismanagement of the funds, property or affairs of the council;
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> whether or not the chairperson's or councillor's responsibility for such dishonesty, negligence or misconduct is shared with other councillors or with any employees of the council.

The allegations against the applicant mean that he could have been placed on suspension with loss of allowances based on just one of them. The letter of the 9th of December is silent on whether or not the suspension was with loss of benefits. The letter dated the 31st of January 2020 to the applicant from the 1st respondent is also silent on whether or not allowances were withheld. It just stated that all benefits withheld if any would be paid. The legislature could not have intended that the Minister wields such power having taken steps to curb it.

In view of the findings, it follows that the 'second' suspension of the applicant by the 1st respondent by way of a letter dated the 17th of March 2020 on the same allegations as in the letter dated the 9th of December 2019 by is a nullity.

The requirements of a *declaratur* have been the subject of a plethora of cases- *Munn Publishing (Pvt) Ltd* v *Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S). In my view, the applicant has fulfilled the requirements for the granting of such relief.

On costs, it is my view that the applicant and respondents' legal practitioners did not do justice in the manner that the case was presented especially on heads of argument. The most appropriate order is one in which there should be no order as to costs.

DISPOSITION

It is ordered that:-

1. The suspension of the applicant by the 1st respondent through a letter dated the 9th of December 2019 is declared to have lapsed by operation of law.
2. The letter of suspension issued against the applicant by the 1st respondent dated the 17th of March 2020 is declared null and void and the referral of the matter to a tribunal in terms of s157(4) of the Rural District Councils Act [Chapter *29:13*] is declared null and void.
3. The 1st respondent shall not suspend the applicant again based on the same allegations as contained in the letter dated the 9th of December 2019.
4. There shall be no order as to costs.

Mafume Law Chambers, applicant's legal practitioners
Civil Division of the Attorney-General's Office, respondents' legal practitioners