

HAMUTENDI KOMBAYI
and
KENNETH MAREKIWA SITHOLE
and
WILLARD NDAGUTA
and
GIBSON JACKSON FUNDIRA
and
CHARLES CHIKOZHO
and
CATHERINE MHONDIWA
and
ERNEST GUDUZA
and
ALEXANDER NORMAN MHONDIWA
and
TAWANDA MAGIDI
and
FARAYI J MUZA
and
BORNFREE MAGARA
versus
MINISTER OF LOCAL GOVERNMENT, PUBLIC
WORKS AND NATIONAL HOUSING
and
THE PROVINCIAL ADMINISTRATOR FOR
THE MIDLANDS PROVINCE
and
DR LUCKSON CHIKUMBIRIKE NO.
and
MR G. N KHOSA NO.
and
NICHOLAS MOYO NO.

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 22 SEPTEMBER AND 01 OCTOBER 2015

Urgent Chamber Application

E. Mandipa with *T. Chitere* for the applicants
E. Mukucha with *T. Dodo* for the respondents

MOYO J: This is an urgent application wherein the applicants seek the following temporary relief:

“That pending the confirmation of the provisional order the applicants are granted the following interim relief:

- 1) That pending finalization of this matter, all disciplinary proceedings against applicants that are pending before a tribunal appointed by first respondent are hereby stayed.
- 2) That first and second respondents jointly and severally bear the costs of this application.”

The brief facts of the matter are that the eleven applicants are all duly elected councillors of Gweru City Council. The first applicant is also the mayor of Gweru City. They were then suspended by the first respondent on 12 August 2015. Each one of them was served with a letter of suspension. Their suspension in terms of the attached letter follows on an investigation carried out at Gweru City Council which revealed their involvement in gross mismanagement, gross misconduct, incompetence and dishonesty in connection with council funds and affairs. The letter of suspension goes on to state that in terms of section 114(1) (c) (d) (i) (ii) of the Urban Councils Act [Chapter 29:15], (herein after referred to as the Act) they are suspended from being Councillors with immediate effect.

The letter goes on to state that during the period of the suspension they shall not conduct any council business within or outside council premises and that they shall not be eligible for any remuneration in any form from council.

Consequent to the suspension, the first respondent then set up an independent tribunal in terms of section 278 of the Constitution of Zimbabwe to commence disciplinary proceedings against the eleven applicants. The third, fourth and fifth respondents are the members of the independent tribunal constituted by second respondent.

The applicants contend that section 278 (2) of the Constitution provides that 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.

The bone of contention therefore is whether the first respondent acting in terms of section 114 of the Urban Councils Act (*supra*) in suspending the Councillors, and constituting the Independent Tribunal did act within the ambit of the constitution.

Section 114 of the Urban Councils Act [Chapter 29:15] provides thus:

Suspension and Dismissal of Councillors

- 1) Subject to this section, if the Minister has reasonable grounds of suspecting that a councillor-
 - a) has contravened any provision of the Prevention of Corruption Act [Chapter 9:16], or
 - b) has contravened Section 107, section 108, or section 109, or
 - c) has committed any offence involving dishonesty in connection with the funds or other property of the council,
 - d) has been responsible,
 - (i) through serious negligence, for the loss of any funds or property of the council, or
 - (ii) gross mismanagement, of the funds, property or affairs of the council, whether or not the councillors responsibility is shared with the other councilors or the 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 councilor 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
- 2) --- (Not applicable to this case)
- 3) As soon as is practicable after he has suspended a councillor in terms of subsection (1), and in any event within 45 days, the Minister shall cause a thorough investigations to be conducted with all reasonable dispatch to determine whether or not the councillor has been guilty of an act, omission or conduct reformed to in that subsection.
- 4) If, following investigation, the Minister is satisfied that the grounds of suspension 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 councilor and the councilor concerned, dismiss the councillor and the councillor's seat shall there upon become vacant.”

In summary section 114 of the Urban Councils Act (*supra*) vests all the powers to suspend, and dismiss councillors in the Minister of Local Government who is the first respondent.

Section 278 of the Constitution on the other hand provides as follows:

Tenure of seats of members of Local Authorities

- 1) --- (Not relevant for purposes of this case ---)
- 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 incapability,
 - b) gross incompetency
 - 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 law.

A reading of Section 278 of the Constitution as stated herein gives an impression that the Constitution has taken away the powers that the Minister had in terms of Section 114 of the Urban Councils Act (*supra*) and vested same in an Independent Tribunal which should be established through an Act of parliament.

The Constitution

The constitution of a country is the supreme law of the land. Any law or act which is inconsistent with it has no force or effect. Laws and administrative acts must comply with the Constitution. The Constitution is binding on the executive branch of government in every sphere of administration. The Constitution therefore establishes a variety of agencies and administrative structures to control the exercise of public power. The grundnorm of administrative law is thus to be found in the principles of the Constitution.

Refer to Baxter Administration Law 1984, and C Hoexter Administration Law in South Africa 2nd Edition 2012.

The Zimbabwean Constitution Section 2 thereof provides as follows:

- 2(1) This constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
- 3) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the state and all executive, legislative, and judicial institutions and agencies of government at every level, and must be fulfilled by them.”

The Constitution thus speaks for itself, any act or practice which is inconsistent with the provisions of the constitution is invalid to the extent of the inconsistency. Again it stipulates that the obligations imposed by it are binding on everyone and must be fulfilled by all.

This includes first respondent as the Minister of Local Government. The constitution, section 278, thereof provides for the establishment of an Independent Tribunal to exercise the function of removing from office mayors, chairpersons and councillors. It does not vest any authority to remove councillors in the Minister anymore, neither does it grant the Minister the powers to establish or constitute the Independent Tribunal. The Constitution has provided for an Act of Parliament, which must provide for the establishment of an Independent Tribunal. There is no way therefore the Minister can without the legislature having promulgated a law that provides for the establishment of an Independent Tribunal, then, take it upon himself to do so. The Minister must derive authority to Act from the Constitution or an Act of Parliament that has been passed or amended pursuant to the provisions of the constitution. What should happen is that legislative intervention is urgently required, in the form of either a new law or an amendment to the Urban Councils Act, to provide for the establishment of an Independent Tribunal which will then deal with errant councillors and Mayors. Without the re-alignment of the Urban Councils Act so that it is consistent with the provisions of section 278 of the Constitution, the first respondent's hands are tied in my view.

I am vindicated in holding this view by the decision of the Supreme Court in the case of *Konson vs S* SC 472/14 wherein the appellant challenged the propriety of the passage of the death sentence on him before legislative intervention on the circumstances in which it can be passed in terms of section 48 (2) of the Constitution.

Section 48 (2) of the Constitution provides as follows:

“A law may permit the death penalty to be imposed on a person convicted of murder committed in aggravating circumstances,

(a) the law must permit the court a discretion whether or not to impose the penalty.”

The Supreme Court held in its interpretation of section 48 (2) of the Constitution that the appellant (who had been sentenced to death) was given a sentence that was not competent in terms of the law. In particular that he was sentenced to death at a time when Parliament had not enacted a law providing the circumstances in which a death sentence may be imposed in line with section 48 (2) of the Constitution of Zimbabwe.

Counsel for the respondent submitted that clause 10 of Part 4 of the 6th Schedule to the Constitution provides that all laws should be construed to be in conformity with the constitution.

The relevant clause reads as follows:

“Subject to this schedule all existing laws continue in force but must be construed in conformity with this constitution.”

My understanding of this clause is that the current constitution did not repeal all existing laws, they are still in force but that rather they should be construed in conformity with the constitution meaning that they should be applicable where they conform with the constitution and where they are inconsistent with the constitution obviously they should be amended and re-aligned to it. It is my considered view that the interpretation as submitted by counsel for the respondents would lead to an absurdity as this interpretation would fly in the face of the principle of legality in that Acts that are inconsistent with the constitution and are therefore *ultra vires* are nonetheless construed to be in conformity with the constitution. How can an inconsistency be construed to be in conformity? Such an interpretation would result in an absurdity and an illegality for the simple reason that the constitution would cease to be the supreme law and will now be subservient to the non-conforming acts. I therefore reject that view for these reasons.

I accordingly, for the reasons detailed herein, grant the provisional order as sought.

Messrs Chitere Chidawanyika and Partners, applicants’ legal practitioners
National Prosecuting Authority, respondents’ legal practitioners