

TINASHE MALVERN MADAMOMBE
versus
BINDURA MUNICIPAL COUNCIL
and
DANISO WAKATAMA
and
IVORY MATANHIRE
and
JAPHET KABANGA

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 27 May and 13 January 2010

Opposed Court Application

J Bamu. for the applicant
S Mushonga, for the respondents

GOWORA J: On 29 March 2008 the applicant was one of the councilors successfully elected to the Bindura Municipal Council. He does not appear to remember his ward but that is of no import for the resolution of the dispute before me. The second and third respondents were also elected as councilors for the same municipal council. The fourth respondent is the town clerk for the council. This council held its first meeting on 1 August 2008 and at that meeting the applicant was elected mayor for the Bindura Municipal Council. The third respondent was in turn elected as deputy mayor. On 13 October 2008, one of the councilors moved a motion to rescind resolution 1406/08 which confirmed the election of the applicant to the position of mayor. On 24 October 2008 the fourth called a meeting at which a motion was introduced for the rescission of the resolution in terms of which the applicant had been elected as mayor of the first respondent. The applicant queried the correctness of the procedure and when he received no support he declared the meeting closed and left the chamber. Three other councilors left with him Undeterred the other council members carried on with the motion with the result that the said resolution was rescinded and the appointments of the applicant and second respondent as mayor and deputy mayor respectively and were rescinded. The third respondent was then appointed mayor and the second respondent deputy mayor. It is as a result of that resolution that the applicant has launched these proceedings wherein he seeks a declaratur to the effect that the meeting of 28 October 2008 be declared null and void and

further that he is the duly elected mayor for the municipal council of Bindura. The application is opposed by all the four respondents and the opposing affidavit has been deposed to by the second respondent on behalf of all four. In short the respondents contend that the applicant was correctly and legally removed as mayor and that the incumbent is legally entitled to occupy the position.

In view of the contention by counsel for the respondents that legally a resolution could be issued for an elected mayor to be removed I requested that counsel on both sides of the divide file additional heads on the point. This has been done and I am grateful to counsel for their diligence. I turn then to determine the merits of the application. It is necessary in my view to examine the provisions of the Urban Councils Act [*Cap 29:15*] as it relates to the appointment and removal of mayors. That I believe is the only issue for determination for the resolution of this dispute.

The elections of office bearers for urban councils are provided for in Part VII of the Act, in particular s 103 of the same which provides as follows:

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 councilors; or
 - b. after an initial election of councilors referred to in section 17 (1) c); or

the councilors 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 -

- a) in the case of a municipal council, one councilor or other person to be mayor and thereafter another councilor to be a deputy mayor;
- b) in the case of a town council, one councilor to be chairperson and thereafter another councilor to be deputy chairperson.
- c) A person elected in terms of subs (1) shall forthwith enter upon his or her office and shall hold office until the election of his or her successor in office.
- d) A person elected in terms of subs (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 mayor is elected in terms of subs (4) to be mayor, he or she shall cease to hold office as deputy mayor with effect from that election:

- (ii) If a deputy chairperson is elected in terms of subs (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 with effect from the date the notice is received by the town clerk:
- (iv) If the seat of the councilor who is mayor, chairperson, deputy mayor or deputy chairperson becomes vacant by virtue of s 78 (2) (b), (c), (d),(f), or (g), he or she shall cease to hold office with effect from the date that seat becomes vacant.

Subsection (4) is to the following effect:

Where the office of mayor, chairperson, deputy mayor or deputy chairperson becomes vacant before a meeting referred to in subs (1), the councilors present at a meeting of the council held not later than thirty days after such vacancy shall elect a successor who shall serve for the unexpired term of office of his or her predecessor.

In interpreting a statutory provision the court must endeavour to arrive at the intention of the legislature from an examination of the provision being construed. Therefore it is a principle of statutory interpretation that the ordinary and literal meaning of a statutory provision be given effect unless to do so would lead to an absurdity. See *S v Nottingham Estates (Pvt) Ltd*¹. GUUBAY CJ made the following remarks at p 256 D-F:

“The primary rule of interpretation is, of course, to endeavour to ascertain the intention of the lawmaker from an examination of the provisions under consideration, placed in proper context. A court will commence its enquiry by giving the word its grammatical significance, unless it is clear that the literal sense when so applied, defeats the legislative intendment. In such event, a deviation from the ordinary meaning is justified, provided always that the word is sufficiently flexible to admit of another meaning by which such intention can be better effected. See *Ebrahim v Min of the Interior* 1977 (1) SA 665 (A) at 678A-C; *Birch v Klein Karro Agricultural Co-operative Ltd* 1993 (3) SA 403 (A) at 411E-G”

The same principle for statutory interpretation was stated by MCNALLY JA in *S v Kachipare*² thus:

“I take the view that one is entitled to look closely at the wording of the section in order to find an interpretation which achieves sense rather than nonsense, justice rather than injustice, in the application of the section in a situation almost certainly not contemplated by the legislature. This must be especially so in a statute which deals with procedure rather than substantive law.”

¹ 1995 (1) ZLR 253 (S)

² 1998 (2) ZLR 271 (S)

The remarks by MCNALLY JA are particularly significant in *casu* when regard is had to the provisions under scrutiny. What is at issue herein is the procedures that attach to the election of a mayor by councilors of an urban municipal council. The provisions are not concerned with substantive law but procedure. It is pretty obvious that the language in the provisions relating to the election of a mayor, his deputy, a chairperson and his deputy are clear and unambiguous. According to s 103 where an election has taken place after a meeting of the council, a mayor, his deputy, a chairperson or his deputy shall hold office until the appointment of a successor. A successor is only appointed if an election is held following a vacancy in the office of the mayor, his deputy, a chairperson or his deputy such vacancy having arisen either through resignation or by virtue of the operation of s 78 of the Act. In terms of s 78 the office becomes vacant if a councilor resigns, ceases to be qualified for election as councilor, is absent without leave of council from ordinary meetings of council during a consecutive period of two months, or from meetings of committees to which the councilor has been appointed for a consecutive period of two months, or is absent from ordinary council meetings for a period of six calendar months whether or not leave has been obtained, ceases to be a councilor in terms of s 22 of the Provincial Administration Act [*Cap 29:11*], or has been suspended in terms of s 114 for a period in excess of thirty days in which case his seat in council becomes vacant by operation of law. The Act does not provide for the vacation of the seat of a mayor, his deputy, a chairperson or his deputy except for the instances referred to above. An election to fill the seat is only held if a vacancy arises from the situations outlined above. Thus the position of mayor, being a creation of statute, and provided for in terms of the Act the election can only be changed in terms of the statute and the removal from office of a person from the position can only be effected under the provisions of the Act that created the position. Once a mayor ceases to hold office the respective council can then exercise its powers under the Act and elect a successor as provided for in s 103 (1) and (2).

In *casu*, the council did not follow the provisions of the Act in removing the mayor because there is no provision in the Act for such removal. Therefore no successor was elected. Thus the procedure followed in removing the mayor was un-procedural and illegal. The Act has not provided for the passing of a resolution to remove the mayor from office and any resolution purporting to have that effect, in the absence of a statutory provision providing for the same, is clearly illegal and un-procedural. There is thus no provision for council to pass a

resolution to remove the mayor who has been duly elected from office except under the provisions of s 103.

The respondents contend that the procedure followed was provided for in terms of s 89 of the Act. The section on which the respondents seek reliance does provide for the rescission or alteration of a resolution passed by council at a subsequent meeting to that wherein the resolution being sought to be rescinded was passed. The further contention by the respondents is that a resolution was passed in terms of which the applicant was appointed mayor and that therefore council had the power to rescind the earlier resolution appointing the applicant as mayor and rendering as a result the position vacant thus paving way for the election of a successor. As authority for this proposition the respondents have referred me to the case of *City of Gweru v Kombayi*³. I am at a loss as to why this particular authority was quoted as it does not make a pronouncement on the issue sought to be relied on by the respondents in advancement of their argument as it relates to resolutions by the council in ordinary meetings. It is not intended to apply to the election and vacation of office by an elected mayor which position is specifically provided for under s 103. Indeed the judgment speaks about the need to observe the provisions of the Urban Councils Act. It does not speak of one resolution rescinding another. The next authority I have been referred to is *Cape Town Municipality v Abdula*⁴. In this authority the judge hearing the matter did confirm that a responsible committee could legally pass a resolution which directly impacted on an interest of the respondents. As the Urban Councils Act empowers the council and any committees set up under its authority to make resolutions I do not find that this takes the respondents case any further than they had in their initial heads of argument.

The question that they had to address was whether or not a councillor elected as mayor could be lawfully removed from that position by way of a resolution passed by the councilors in meeting in the absence of the seat of mayor having fallen vacant as is required under s 103, which section does not provide for the passing of such a resolution. The provisions of s 103 (2) are peremptory and in the absence of a cogent argument as to why the council should not comply with the said provision I am unable to find that s 89 applies in the removal of a mayor from office. The resolution passed for the removal of the applicant is thus declared to be null and void and of no force and effect. It follows therefore that the election of the second

³ 1991 (1) ZLR 333 (S)

⁴ 1974 (4) S.A. 428

respondent to the post of mayor is itself illegal. The applicant is in the result entitled to an order in terms of the draft.

In the result I make an order in the following terms:

1. It is hereby declared that the resolution 1422/FC/08 rescinding the election of the applicant as mayor and I Matanhire as his deputy be and is hereby declared to be null and void and of no force and effect.
2. It is declared that the election of the second respondent as mayor of the first respondent on 24 October 2008 be and is hereby declared to be null and void and of no force and effect.
3. It is hereby declared that the applicant is the duly elected mayor for the first respondent.
4. The respondents be and are hereby ordered to pay the applicant's costs jointly and severally, the one paying, the others to be resolved.

Mbidzo, Muchadehama & Makoni, legal practitioners for the applicant
Mushonga, Mutsvairo & Associates, legal practitioners for the respondents.