

LAW SOCIETY OF ZIMBABWE
versus
CITY OF HARARE
and
CITY OF MUTARE
and
MUNICIPALITY OF CHINHOYI

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 9 October 2018 & 31 July 2019

Opposed Application

E. T Matinenga, for the applicant
A Muchadehama, for the respondents

HUNGWE J: Introduction

This application concerns the levying of taxes and charges by the respondent urban councils in terms of the Urban Councils Act.¹ The applicant is a statutory body constituted in terms of the Legal Practitioners Act.² Applicant is aggrieved by the decision of the respondents to pass resolutions empowering them to promulgate By-laws enabling them or their employees to charge and collect licence fees from legal practitioners conducting business as such. A number of legal practitioners affected by such demands have objected to them by way of correspondence. The applicant asserts that its members are professionals whose licensing is regulated by a professional body, the applicant, pursuant to the Legal Practitioners Act. Since all members of the Society have paid their trade licences to their professional body, the applicant, they should not be required to make any payment to the respondents. The applicant's view is that trade licences for which

¹ [Chapter 29:15]

² [Chapter 27:07]

respondents demand payment are for traders only and legal practitioners are not traders. As professionals, they are licensed by a relevant authority which is the applicant.

The first respondent is the City of Harare established in terms of the City of Harare (Private) Act.³ The second respondent is the City of Mutare established in terms of the City of Mutare (Private) Act⁴. The third respondent is Municipality of Chinhoyi established in terms of the Urban Councils Act.⁵

The applicant's case

The applicants' case is set out in the founding affidavit sworn by the applicants' Executive Secretary. The applicant contends that the business of its members is governed by the Legal Practitioners Act ⁶ through the Council of the Law Society. The Council of the Law Society is responsible for the management of its affairs and in addition has the power to make By-laws for the conduct of its affairs including the issuing, to its qualifying members, and the withdrawal of practising certificates which entitle such members to set up businesses and offer legal services to the public generally.

Annually, legal practitioners are issued with practising certificates upon securing a clean bill of financial health from auditors who would have conducted an audit of their practice, business and trust accounts. The Secretary avers that such practicing certificate gives the members to whom they are issued the right to run the practice of legal practitioners at any place in Zimbabwe without further requirements or formalities.

The Secretary avers that from 2007 to date various local authorities including the three respondents, have continued to raise income by requiring legal practitioners to apply for and obtain licences upon payment of a fee. Prior to this period applicant's members had not paid any fees, taxes or charges to local authorities. It would appear to the applicant's Secretary that the basis upon which the local authorities have been demanding payment of licence fees appear to be s 219 of the Urban Councils Act which provides that

“a Council that is to say, a local government authority may, by resolution passed by a majority of the total membership of the Council,

³ [Chapter 25:04]

⁴ Note 1 above

⁵ [Chapter 29:15]

⁶ Note 2 above

- (a) fix tariff or charges for the supply of electricity, or water or refuse removal services or the conveyance of sewage or trade effluent and public sewers and its treatment at a sewage treatment works or any other service which a Council may provide in terms of this Act;
- (b) fix charges to be payable in respect of certificates, licences or permits issued, inspection carried out, services rendered or any act, matter or thing done by the Council in terms of this Act;
- (c) fix deposits to be paid in connection with any services provided by the Council in terms of this Act.”

Pursuant to this provision, the second and third respondents appear to have passed resolutions empowering them to promulgate By-laws enabling them or their employees to charge and collect licence fees from legal practitioners conducting business as such. Some of those legal practitioners who were approached with this demand have objected to the demands through written correspondence and raised their concerns with the applicant.

It is clear that the three respondents, so applicant submits, for purely economic reasons, have sought to raise licence fees from legal practitioners either without any lawful basis or relying on By-laws promulgated by the Minister of Local Government purportedly based on either s 219 or 229 of the Urban Council Act.

Applicants contend that such actions are unlawful and inconsistent with the provisions of Urban Councils Act which allows local authorities to raise charges only for services provided. Applicant submits that By-laws requiring the payment of license fees by legal practitioners are *ultra vires* the Urban Council Act, therefore unlawful, null and void.

First respondent appears to have accepted that it could not lawfully require licences or licence fees from legal practitioners. Whilst it has reserved the right to make such demands once the time to do so was ripe. Second and third respondents have insisted that they are entitled to demand licence fees from applicant’s membership. Second and third respondents rely on the By-laws passed by their respective councils. The second and third respondents acknowledge that their demands were resisted by a majority of the applicant’s members although few complied.

In order to prevent future harassment of its members, applicant seeks a declaration in the following terms:

IT IS HEREBY DECLARED THAT:

1. Any resolutions passed by and/or by-laws enacted at the behest of the respondents requiring applicant's members to apply and pay for trading licences in order to provide legal services to their clients are invalid, null and void and of no legal force or effect;
2. Any resolution and by-laws referred to in para 1 above wrongfully and unlawfully interfere with the independence of legal profession and are invalid, null and void and of no legal force and effect;
3. Any resolution and by-laws referred to in para 1 above are ultra vires s 219 of the Urban Councils Act, [*Chapter 29:15*]; and
4. The respondents shall pay the costs of this application on a scale of legal practitioner and client.

Respondents' case

The three respondents oppose the grant of the order on the sole ground that by law, local authorities are permitted to charge for business licences to any business that is operated within their jurisdictions.

First, it was argued for the respondents that s 156 of the Urban Councils Act vested them with control rights over the land which falls within their jurisdictions. By virtue of s 219 the respondents were entitled to fix charges to be payable in respect of certificates licences or permits issued, inspections carried out, services rendered or any act, matter or thing done by the council in terms of the Act.

It was submitted on first respondent's behalf that since it had not passed any resolution and/or by-laws requiring applicants members to apply and pay for trading licences in order to provide legal services to their clients no order can be made against it in this regard.

In respect of second and third respondents, it was submitted that since it had by-laws which require applicant's members to apply and pay for trading licences, it was legally entitled to require applicant's members to pay for trade licences. It was contended on behalf of second and third respondents that a municipal authority had powers to make such by-laws. Section 276 of the Constitution permitted a local authority to govern the local affairs of the people within an area for which it has been established and has all the powers necessary to do so. Following upon this, an Act of Parliament could confer function on local authority including a power to levy rates and taxes in order to raise sufficient revenue to carry out their objects and responsibilities.

The Urban Councils Act⁷ is the basis upon which the additional power to make by-laws for “regulating trading and carrying on of any occupation or calling in a local government area.”⁸

Respondents argue that since the practice of the legal profession is the carrying on of “any occupation or calling” and since a trade is defined as “an occupation or regular means of livelihood and is business one practices or the work in which one engages regularly,”⁹ it follows that the legal profession is subject to the regulation by the local authorities.

The respondents argued that the imposition of trading licences for any business or occupation falls within the scope of the legislative scheme set out s 227, 228, 235, 219 & 198 of the Urban Councils Act.

In respect of second respondent it was submitted that the non-joinder of the Minister of Local Government was fatal as he is a necessary party, as such the court had no discretion regarding the non-joinder. The Minister had a direct and substantial interest in the outcome of the matter since authorising the licencing of the traders or occupations within the local government area would prejudice the State. The Minister ought to be heard before any decision affecting his office could be made. The Minister could tender useful evidence justifying the limitation of the rights.

The respondents submit that by virtue of the control rights over land which fall within their jurisdiction, they are entitled to exercise such control over all land, roads and sanitary lanes or any part thereof within a council area to which the inhabitants of the municipality or town have or acquire a common right. As such, in terms of s 156 of the Urban Council Act, the local authority exercise control over such land. As part of that power, the local authorities have the right to raise tariffs or charges on businesses that operate within their area of jurisdiction.

The respondents go on to submit that s 219 as read with s 17 of the Second Schedule of the Urban Councils Act constitute a sufficient basis to charge trading licences through council resolutions. Mr *Muchadehama*, for the respondents, traces this power as flowing from the Constitution.¹⁰ He submits that the Urban Council Act¹¹ provides for matters for which council

⁷ Section 227 (2)

⁸ Section 235 (3) (f)

⁹ Blacks’ Law Dictionary Pronunciation 6th Edition Centennial Edition (1891 – 1991) page 1492

¹⁰ Section 276 of Constitution

¹¹ Section 227 of the Urban Councils Act

and local authorities can make by-laws. He accepts that such power only extends to matters listed in the Third Schedule and that the Third Schedule does not include the practice of law. He however submits that local authorities do have that power by virtue of the additional powers to make by-laws in s 227 (2) of the Act. That section reads:

“(2) In relation to a local government area administered by the council or any other area that is prescribed or in respect of which the Minister has by written notice to the council, directed that his sub-section should apply, a council may in addition, make by-laws in terms of this part in respect of any matters which it considers to be necessary or desirable for the control management and good government of that area, including, without derogation from the generality of the foregoing, the matters specified in sub-section (2) of section two hundred and thirty five as though any reference therein to the State were a reference to the council, and that in that case subsections (3) (6) and (7) of that section shall apply *mutatis mutandis*.”

I am unable to agree with *Mr Muchadehama*'s reasoning in respect of the implication of s 227 of the Urban Councils Act. I agree that the Constitution of Zimbabwe empowers local authorities and municipalities to exercise original legislative functions which include the power of taxation¹². However, the powers of local authorities are not as wide as counsel for the respondents would urge this court to believe. The Constitution clearly provides that a local authority has a right to govern, on its own initiative, the local affairs of the people within the area of which it has been established, subject to the Constitution and any Act of Parliament, has all the powers necessary to do so.¹³ The relevant section reads:

276 Functions of local authorities

- (1) Subject to this Constitution and any Act of Parliament, a local authority has the right to govern, on its own initiative, the local affairs of the people within the area for which it has been established, and has all the powers necessary for it to do so.
- (2) An Act of Parliament may confer functions on local authorities, including—
 - (a) a power to make by-laws, regulations or rules for the effective administration of the areas for which they have been established;
 - (b) a power to levy rates and taxes and generally to raise sufficient revenue for them to carry out their objects and responsibilities.

The wording of s 276(2) of the Constitution, in my view, is instructive. It prescribes the parameters within which an Act of achievement conferring functions on local authorities may exercise its legislative functions. That subsection confines the legislative function of these

¹² *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council and Others* CC 7/98,

¹³ Section 276 (1) of Constitution of Zimbabwe, 2013.

authorities only for the effective administration of the areas for which they have been established.¹⁴ As an indication of the thrust of the legislative powers, s 219 authorises a council to fix tariffs or charges for supply of electricity or water or refuse removal, or the conveyance of sewage or trade effluent in public sewers and “**any other services which a council may provide in terms of the Act.**”¹⁵ (My own emphasis). Section 228 confirms the geographical limitation of those powers by implication when it states that by-laws may be made in terms of ss 227, 228 and 229 of the Act for council area or any property or area outside the council area which is administered or controlled by the council or local government.¹⁶

Consistent with the requirement to make by-laws, regulations and rules, the Urban Councils Act, sets out in the Third Schedule, the specific items for which a local authority, acting in terms of s 227 of that Act, may make by-laws. The omission of the professions does not appear coincidental. These are governed by the applicable legislative enactments under which their professional bodies superintend the eligibility for membership, conduct and taxation.

It seems to me that the express exclusion of mining areas, for example, from areas for which local authorities may be established is consistent with legislative intent on the matter. Local authorities govern geographical areas for which they are established. A mining location is a geographical area, but it is unique in that the mining authorities pay huge royalties in order to exploit a finite resource. They establish residential compounds and associated infrastructure which they administer. In the final analysis, in the case of mining locations, there is largely a very limited role for a local authority in most mining locations. Being a geographical area, their exclusion may in this respect, be justified. A local authority may thus only provided specified service for which it may raise and charge tariffs. The physical geographical area is managed privately by the mining authority established under the Mines and Minerals Act.¹⁷

Although the practice of law is conducted in a given geographical location, I am unable to accept that the Legal Practitioners Act,¹⁸ The Health Professions Act,¹⁹ and other similarly placed associations of professionals were meant to be subject to the Urban Councils Act. Such matters as

¹⁴ Section 276 (2) (a) of Constitution.

¹⁵ Section 219 (1) (a) (iii) of [Chapter 29:15].

¹⁶ Section 228 (2) (a)-(d).

¹⁷ Section 309 of [Chapter 21:05].

¹⁸ [Chapter 27:07].

¹⁹ [Chapter 27:19].

eligibility to practice, to pay levies and taxes, where they are regulated by Statute, cannot again be subject of local authorities' legislative ambit. It would amount, in my view, to double taxation. In that situation the respondents would unfairly be double dipping by benefitting from the direct taxation imposed through by-laws and from allocations from the central government. Clearly, that could not have been intended by either the Constitution or the Urban Councils Act. What the letter permits the local authorities to do is to raise levies within the area for which they were established. The Constitution and the Act both emphasise the geographical limitation of the local authorities' legislative powers. Those taxes are necessarily linked to the roads, buildings, sanitary lanes, spaces in which the health and well-being of their subjects or citizens are confined. Those powers do not extend to the service that they do not provide. I do not imagine that there is a service that local authorities provide to the profession which would justify a levy payable by the profession to the local authorities. In any event an untenable situation would arise if the respondents' argument were to be upheld.

A legal professional practices in Zimbabwe and not is restricted to the geographical area within which his offices are physically situated. Both counsels submitted dictionary definitions in support of their respective arguments. I associated myself with *Mr Matinenga's* submission as to whether the legal profession is a trade or a profession. It is a profession and not a trade. The fact that a legal practitioner sells his services, in my view, does not reduce the profession to a trade. If *Mr Muchadehama's* argument is taken to its logical conclusion, it would mean that there would be no difference between a trade and a profession. It is absurd to suggest that.

The interpretation advanced by the respondents would be open to abuse since every local authority could require that a legal practitioner be registered and licenced in its geographical area before they could practice in a court located in that area, or provide service in their locality. In my view, what local authorities can lawfully do is to raise rates, taxes and other levies associated with the physical building in which a legal practitioner's offices are housed. They can levy a fee for health and safety inspections and license such structures as suitable for housing the profession. My reading of both the Constitutional provisions as well as the statutory provisions persuade me to hold that local authorities and municipalities are empowered to impose charges on service that they provide within their localities. Such services would include parking fees, market fees, health levies for the structures or similar units.

To levy charges on a service which parliament has already clearly provided for in appropriate statutes was not certainly intended by the legislature and would *prima facie* be *ultra vires* the Urban Councils Act and therefore unlawful. The levying of taxes ought not to be such as to cause prejudice to national economic policies, economic activities across local authorities' boundaries, or the national mobility of goods, services, capital or labour.

While local authorities have a constitutional mandate to raise revenue for the good administration of the areas under their jurisdiction, this ought to be done within the parameters of the provisions of s 298 of the Constitution. To require, through a by-law, citizens who already pay taxes to government where there is no express statutory provision for it, cannot have been intended. It amounts to double taxation and, *prima facie*, offends the values of the Constitution in respect of public financial management.²⁰

The respondents submit that the non-joinder of the Minister in charge of the administration of the Urban Councils Act is fatal to this application. As regards the non-joinder of parties, a distinction has been made between the non-joinder of a party whose joinder is only a matter of convenience or expediency. Invariably the approach has been that if the order cannot be effective without the absent party or parties, the suit is liable to be dismissed. When, however the question is such that it can be decided between the parties to the suit, the court cannot decline to do so merely because the third party might be interested in the matter. A constitutionally protected right is legally enforceable and gives rise to a legal interest which may require a joinder.²¹ Thus, whenever an order which may be made may infringe upon the constitutional rights of any persons, those persons should be joined or be given judicial notice of the proceedings.²²

In the present matter the applicant seeks a *declaratur* that the resolutions passed by and/or by-laws enacted at the behest of the respondents requiring applicant's members to apply and pay for trading licences in order to provide legal services to their clients are invalid, null and void and of no force or effect. Such resolutions or by-laws are *ultra vires* the Urban Councils Act, so the applicant avers in its draft order.

In *Amalgamated Engineering Union v Minister of Labour*, a two-pronged test was suggested. The first test was whether the third party would have locus standi to claim relief on the

²⁰ Section 198 (2) of Constitution.

²¹ *Amalgamated Engineering Union v minister of Labour* 1949 (3) SA 637 (A).

²² *Tour Operators Business Association of Zimbabwe v Motor Insurance Pool and Others* CCZ 5/15.

same subject matter. The second test was to examine the whether a situation could arise in which because the third party had not be joined, any order that the court might make would not be res judicata against that third party, entitling him to approach this court concerning the same subject-matter and probably obtain an order irreconcilable with the order made in the first instance.²³ Mr Muchadehama submitted that because of the non-joinder, the court has no discretion but to dismiss the present application. This submission would be correct if I were to find that the non-joinder concerned a party whose joinder was one of necessity. If such joinder is one of necessity then it follows that a non-joinder would be fatal. The test in *Amalgamated Engineers Union* is extremely useful in determining whether the third party is a necessary party but is of no application where the court considers the issue on the basis of convenience. As already stated, it is important to determine whether the joinder is one if convenience or necessity. It has been held that a direct and substantial interest exists where a party has an interest in the right which is subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.²⁴ By their own admission, the Minister's interest is limited to the collectable revenue accruing to the local authorities should this court grant the relief sought. Clearly, none of the Minister's rights stand prejudiced by the grant of the declaratur sought. It has been held that the fact that the Minister administers an Act that the court is called upon to interpret does not give the Minister the right to participate in the proceedings.²⁵ In *Davids v Van Straaten*²⁶ in an eviction action, the court held that the Minister of Housing has no "direct and substantial interest" in the *lis* in the sense that the Minister's rights may be affected by the judgment of the court and does not need to be joined as a party to the proceedings.

In the present matter, what is clear is that the applicant is not challenging the decision of the Minister to promulgate the by-laws but the power of local authorities to make resolutions on matters already governed by other competent legislative provisions regarding the practice of the profession, and whether the practice of law can be classified as a trade for which the local authorities can regulate in their respective areas of jurisdiction.

²³ Note 21 above at page 660-661.

²⁴ *Burger v Rand Water Board* 2007 (1) SA 30 (SCA) paras 7-9.

²⁵ *Morgan v Salisbury Municipality* 1935 AD 167-172.

²⁶ 2005 (4) SA 468 © @ 487B-C

Upon finding that there is no statutory provision for the levying or licensing of legal practitioners by a local authority because an Act of Parliament already provides for the regulation of such a profession, I do not think that it would be fatal to omit to join a Minister who is charged with the administration of that Act. The Act does not authorise the impugned conduct. This is contained in a proposed action by a local authority in the case of first respondent and the by-laws of second and third respondent. An important distinction exists where what is impugned is a statutory provision as opposed to a provision in a by-law. In my view, a Minister has no direct and substantial interest in the licensing of legal practitioners by local authorities which is the effect of the by-law. The respondents have. The Minister would have an interest if the order sought related to the entitlement of local authorities to an allocation from central government. That affects his ability to allocate resources to these entities and naturally he ought to be joined in such an action. What is challenged is the conduct, actual or apprehended, of the local authorities in raising levies upon adopting the issue through a resolution in the absence of an enabling provision under the statute.

Mr Muchadehama submitted that there was no basis for a declaratur being made against first respondent as it had not passed a resolution seeking to license applicant's members. However it is common cause that the first respondent clearly expressed an intention to pass a by-law empowering it to licence legal practitioners. That is sufficient basis upon which a court may grant a *declaratur*.²⁷ A party has every right to protect a future or contingent right from management by deciding declaratory relief.

In light of the above I am satisfied that the applicant is entitled to the relief sought.

It is granted as follows:

IT IS HEREBY DECLARED THAT:

1. Any resolutions passed by and/or by-laws enacted at the behest of the respondents requiring applicant's members to apply and pay for trading licences in order to provide legal services to their clients are invalid, null and void and of no legal force or effect;
2. Any resolution and by-laws referred to in para 1 above wrongfully and unlawfully interfere with the independence of legal profession and are invalid, null and void and of no legal force and effect;

²⁷ *Munn Publishing (Pvt) Ltd v ZBC 1994 (1) ZLR 337 (s) @ 338 E-F*

3. Any resolution and by-laws referred to in para 1 above are ultra vires s 219 of the Urban Councils Act, [*Chapter 29:15*]; and
4. The respondents shall pay the costs of this application.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Mbidzo, Muchadehama & Makoni, respondent's legal practitioners