

COMBINED HARARE RESIDENTS ASSOCIATION
versus
MINISTER FOR LOCAL GOVERNMENT, PUBLIC WORKS AND
NATIONAL HOUSING
and
HARARE CITY COUNCIL
and
MAYOR OF HARARE
and
ATTORNEY GENERAL

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 4 May 2016 and 9 October, 2019

Urgent Chamber Application for Interdict-Reasons for judgment

D Mwonzora with *N Chamisa*, for the applicant
T. Tabana with *T. Shumba* & *Miss Kasere*, for the 1st and 4th respondents
C Kwaramba, for 2nd and 3rd respondents

CHITAPI J: After considering the papers filed by the parties in this application and hearing counsel on 4 May, 2016, I dismissed it with costs and indicated that my reasons for dismissing it would follow. I now indicate my reasons as hereunder.

Background

The applicant is a *universitatis*. Although it did not attach a copy of its constitution to its application, it was accepted by all the parties that the applicant is a legal *persona*. It was not disputed that it had legal standing to file this application. Mr *Mwonzora* submitted that the applicant is an association of residents of Harare metropolitan areas formed for the purposes of protecting the interests of its members. Among its objectives, it acts as a pressure group which ensures that the second respondent performs its functions in the interests of Harare residents as mandated by the law. The applicant's existence is recognized by the second respondent. The applicant in short, is a stakeholder in the efficient running of the affairs of the second respondent. The applicant acting through a representative, constituted part of the panel of interviewers who interviewed contending applicants for the position of Town Clerk for City of

Harare and thus participated in the selection process which ended with the appointment by the second respondent of one. James Mushore as the successful applicant.

It is common cause that on 24 March, 2016, the first respondent purporting to act in terms of s 314 of the Urban Councils Act [*Chapter 29:15*] rescinded the second respondents' resolution appointing James Mushore as town clerk on the basis that the appointment was done in breach of ss 132 (1) and 132 (2) of the said Act. In particular, the first respondent contended that the second respondent was required to seek and obtain the approval of the Local Government Board to appoint the Town Clerk before making the appointment.

It is also common cause that the purported rescission of the appointment of James Mushore as Town Clerk by the first respondent as aforesaid is under challenge by the applicant under case No. HC 3231/16 in which the applicant has teamed up with Chitungwiza Residents Association as a co-applicant. The respondents in case No HC 3231/16 are the same parties cited herein as the first, second and third respondents. The relief sought in case No. HC 3231/16 which is filed as an ordinary court application is for this court to declare the purported rescission by the first respondent of the appointment of James Mushore as Town Clerk to be invalid for being in violation of s 276 (1) of the Constitution of Zimbabwe. The applicants in the same case seek a declaration striking down or declaring ss 132, 133, 134 and 135 of the Urban Councils Act, [*Chapter 29:15*] as being unconstitutional. Lastly, the applicants seek an order that pending confirmation of the declaration of the invalidity of the cited sections by the Constitutional Court, the sections should be deemed invalid and costs of suit. I should add for completeness and benefit of the reader that under s 175 (1) of the Constitution, the declaration of the constitutional invalidity of any law by any court other than the Constitutional Court, becomes effective upon confirmation of the same by the Constitutional Court. Under s 175 (2) of the Constitution, a court which has made an order of the constitutional invalidity of any law in terms of s 175 (1) may do one of two things. It may grant a temporary interdict or other relief to a concerned party pending confirmation or the setting aside of the declaration by the Constitutional Court or it may adjourn the final determination of the matter pending the decision of the Constitutional Court as aforesaid. In case No. HC 3231/16, the applicants seek temporary relief in the nature of an order that in the event that the impugned sections are declared to be unconstitutional by this court, such declaration takes effect pending the confirmation or setting aside of the declaration by the Constitutional Court. I refrain from

expressing an opinion on the legal soundness or otherwise of the interim relief sought as it will be the function of the court which will hear case No. HC 3231/16 on the merits to rule thereon.

The first respondent herein as he is in case No HC 3231/16 has since filed opposing papers. The second respondent herein and therein has not filed opposing papers in the aforesaid case No. HC 3231/16. The second respondent has instead filed a letter in which it states that it does not wish to file any opposing papers but will abide the court's decisions. Case No. HC 3231/16 is still pending set down and a determination by this court.

Case No. HC 3231/16 was filed before this court on 30 March, 2016. According to the certificate of service filed by the applicants on 27 April, 2016, the application was served upon the first respondent on the same date that it was filed. The first respondent's notice of opposition confirms that indeed the application was served upon the first respondent on 30 March, 2016. The notice of opposition and opposing affidavit of the first respondent were both signed on 15 April, 2016. The second respondent herein as it is cited in HC 3231/16 filed its letter indicating that it will abide the decision of the court on 19 April, 2016 as well. There was however no certificate of service filed of record in respect of service upon the second respondent when I perused the papers filed of record in HC 3231/16 during the hearing of this application before me.

Although case No. HC 3231/16 was not before me for purposes of determining it but as a reference case relevant to the determination of the matter before me, it was important that I acquaint myself with it. The matter before me is cross-referenced to case No. HC 3231/16 and the case is referred to by the applicant in the application before me as requiring to be protected through *inter-alia*, the issuance of an interdict barring the second respondent and the Mayor of Harare, the third respondent herein from implementing the first respondent's directive rescinding the resolution to appoint James Mushore as Town Clerk as the implementation of the directive would render case No. HC 3231/16 academic or a *brulmen fulmen*.

In my perusal of the papers filed in HC 3231/16, I noted that the court application gave the respondents 10 (ten- days from service of the application upon them to file opposing papers. Since the first respondent was served with the court application HC 3231/16 on 30 March, 2016, the *dies inducia* for him, to oppose the application fell through on 13 April, 2016 after which he was automatically barred. In determining the application before me therefore and to the extent that Case No. HC 3231/16 is relevant, its status is therefore that the first respondent

therein as he is herein cited is barred and is deemed not to have opposed Case No HC 3231/16 until his notice of opposition is properly admitted, this being achieved through the upliftment of automatic bar as provided for by the rules of this court.

The present urgent application was filed by the applicant's legal practitioner on 1 May, 2016 which was a Sunday. As duty Judge I was telephoned by the duty registrar and advised of the filing of an urgent application. I then attended at the court house and perused the court record of the filed application. After satisfying myself that, the application upon a *prima facie* reading of the same appeared to be urgent, I directed that the Registrar should set down the matter for hearing in my chambers at 9:30 am on 3 May, 2016. I further directed that the respondents be served with the application and the set down notice. I had noted that essentially the applicant was seeking an urgent interdict to stop the second and third respondent from convening a special meeting which had been scheduled for 4:30pm on 3 May 2016 to "discuss, vary, suspend or rescind" the second respondent's resolution to appoint James Mushore Town Clerk.

On 3 May, 2016, the parties through their legal practitioners appeared before me and by agreement requested that I postpone the hearing to 4 May, 2016 at 10.am. The respondents had not prepared opposing appears due to short notice of the hearing and the intervening public holiday on 2 May, 2016. The second respondent was also in mourning as one of its councillors had passed on, in consequence of which it had rescheduled the meeting sought to be interdicted to 10-.00am on 5 May, 2016. As the request for postponement had merit and was agreed to by all the parties, I granted the request and postponed the hearing to 4 May, 2016 at 10:00am.

The application

At the risk of repeating myself on what I have set out in the above background, I now deal with the application in substance starting with restating the terms of the provisional order which read as follows:

"TERMS OF FINAL ORDER

1. Pending the finalisation of the application under case number HC 3231/16, the respondents or anybody acting or claiming through them be and are hereby interdicted from interfering with the performance of the substantive Town Clerk of Harare, Mr James Mushore of his lawful duties as the Town Clerk of Harare.
2. Pending finalisation of the application under case number HC 3231/16, the 2nd and 3rd respondents be and are hereby interdicted from carrying out the directive given by the 1st respondent on the 2016 to suspend the resolution to appoint Mr James Mushore as the substantive Town Clerk of the City of Harare.

3. Pending finalisation of the application under HC 3231/16 the 2nd and 3rd respondents be and are hereby ordered not to convene a council meeting for purposes of discussing, revising, varying or rescinding its resolution to appoint Mr James Mushore as the substantive Town Clerk of Harare.
4. 1st to 3rd respondents pay costs of this application.

TERMS OF INTERIM ORDER SOUGHT AND GRANTED

Pending finalisation of this matter,

1. 1st respondent be and is hereby interdicted from threatening to suspend or from suspending all or any of the Councillors of the 2nd respondent.
2. 2nd and 3rd respondents be and are hereby interdicted from convening a meeting of the 2nd respondent for purposes of discussing, varying, suspending or rescinding its resolution to appoint Mr James Mushore as the substantive Town Clerk of Harare.
3. This order shall be served by the Sheriff of Zimbabwe or his lawful Deputy on the respondents' addresses of service as given in the founding affidavit in this matter."

Grounds of application

The applicant in setting out the basis for its application averred that it had filed an application before this court under case No HC 3231/16 in which it sought a declaration of the unlawfulness and invalidity of the 1st respondent's directive suspending the resolution of the second respondent to appoint James Mushore as Harare Town Clerk. It alleged that the first respondent had been putting pressure upon the second respondent to reverse its resolution upon threats of dissolving the entire council membership of the second respondent if it did not comply. The latest threats which the applicant perceived to be unlawful and unconstitutional were said to have been made by the first respondent in Bulawayo on 29 April, 2016.

The applicant averred further that the second respondent through the third respondent had, due to the unlawful threat made by the first respondent scheduled a special meeting to be held on 3 May, 2016 for purposes of suspending or reversing the appointment of James Mushore as substantive Town Clerk and replacing him with an acting Town Clerk. The applicant averred that such intended actions by the respondents would be "injurious" to its case No HC 3231/16 as the replacement of James Mushore by a person not properly appointed on merit would result in the residents of Harare suffering irreparable harm. Accordingly, the applicant sought to interdict the holding of the scheduled special meeting of the second respondent.

The certificate of urgency prepared by Welington Muzenda basically echoed the grounds of the application as I have summarised them above. In addition, Mr Muzenda stated that the actions of the first applicant (sic) were blatantly unconstitutional as they breached sections 264, 265, 274 (2) and 276 (1) of the Zimbabwe Constitution. The reference to the first applicant is obviously a typing error and should read the first respondent in this application.

Founding affidavit

The founding affidavit was deposed to by Simbarashe Moyo, the Chairperson of the applicant. He basically set out the background facts as I have more or less summarised them. He deposed to the fact that he represented the applicant as a panellist at the interviews which culminated in James Mushore being appointed Harare Town Clerk. The interest of the applicant as a stake holder in the management of the affairs of the second respondent lay in the desire to appoint the best candidate who could turn the fortunes of Harare selected as he Town Clerk in a process free from corruption, favouritism and other malpractices.

The applicant averred that following the interview at which James Mushore was the successful candidate, the second respondent appointed him guided by the provisions of sections 264, 265, 274 (2) and 276 (1) of the Constitution. James Mushore commenced duty on 1 April, 2016 following his acceptance of his appointment as Harare Town Clerk. The applicant looked forward to James Mushore to deliver value to its membership, the residents of Harare.

As the applicant awaited expectantly for James Mushore to deliver value as aforesaid, the first respondent purporting to act under section 314 of the Urban Council Act [*Chapter 29:15*] issued a directive to the second respondent suspending James Mushore's appointment as Town Clerk for Harare. The first respondent's directive irked the applicant and it challenged it under case No. HC 3232/16. I have already adverted to the purport or substance of Case No HC 3231/16.

The applicant avers that on 1st April, 2016, the second respondent deliberated on the first respondent's directive following insistence by the first respondent that the second respondent should carry out the directive. The nature of the alleged insistence by the first respondent was not pleaded. The applicant annexed a copy of its member's request dated 22 May 2016, calling for a special meeting. The request was directed to the Acting Mayor requesting that he convenes a special meeting, "to urgently consider resolving to put Mr James Andrew Mushore on leave with full pay and benefits until any of the matters before the court is resolved."

The applicant averred that the first respondent suspended the substantive Mayor of

Harare on 20 April 2016 for refusing to implement the first respondent's directive. The applicant annexed as annexure D a copy of the letter suspending the mayor, one Councillor B Manyenyeni from office in terms of s 114 (1) (d) (ii) of the Urban Councils Act on the grounds that the mayor had without lawful basis employed a person to the position of Harare Town Clerk without following the procedure of seeking the approval of the Local Government Board. The other reason for the suspension, was the Mayor's defiance of the first respondent's directive to abide the purported rescission of the second respondent's resolution to employ James Mushore as Town Clerk. The suspension according to the applicant was challenged by the Town Clerk in this court and the matter was pending determination

The applicant avers that the first respondent has not relented and has ordered the third respondent to convene a full council meeting of the second respondent and to secure a resolution of the second respondent to suspend or rescind the appointment of James Mushore as Town Clerk for Harare. The first respondent is alleged to have threatened to suspend all the councillors of the second respondent if they did not convene the meeting by Tuesday 3 May 2016. The second respondent is said to have buckled under the threat of the first respondent and scheduled a full council meeting of the second respondent for that date. The notice of the meeting was attached to the applicant's affidavit as Annexure E. Annexure E shows that the special meeting had previously been scheduled for 25 April 2016 but was not held for reasons not apparent on record.

It is the special meeting which forms the cornerstone of this application in that the applicant seeks to have the second and third respondents interdicted from convening it. In para 9 of its founding affidavit, the applicant objects to the meeting being held on several grounds, *inter alia* that:

- i) the issue sought to be dealt with is subjudice in case No. HC 3231/16 and is intended to defeat the relief sought by the applicant therein. Further, applicant avers that it would be contemptuous of the court for second respondent to deal with a matter which awaits determination by this court.
- ii) the rights which the applicants seek to protect under case No. HC 3231/16 would adversely be affected if the meeting was allowed to proceed.
- iii) to allow the meeting to proceed would be tantamount to allowing the first respondent to interfere with the management and governance of the affairs of

second respondent in violation of ss 264, 265, 274 (2) and 276 (1) of the constitution.

- iv) The second respondent had already resolved that the issue of the legality or otherwise of the Town Clerk's appointment was sub *judice* and that nothing had changed to warrant the second respondent to have a relook at the matter.
- v) The suspension of the appointment of the duly appointed Town Clerk would result in the Chamber Secretary who failed the interview for Town Clerk but is preferred by the first respondent being left to run the affairs of second respondent as acting Town Clerk to the prejudice of the residents of Harare as represented by applicant.

The first respondent through an affidavit deposed to by the Permanent Secretary in the Ministry headed by the first respondent opposed the application. The first respondent's grounds of opposition can be summarised as follows:

- i) that he considered the position of Town Clerk for Harare as still vacant because the purported appointment of James Mushore to that position had been done unprocedurally in contravention of the provisions of the Urban Council Act and consequentially invalid and a nullity at law.
- ii) that the purported interest of the applicant to bring this application as a representative of Harare residents had the effect of creating confusion because the Harare residents were the electorate who elected the councillors of the second respondent and that such councillors were the appropriate mouthpiece of the residents as opposed to the applicant.
- iii) That the directive of the first respondent rescinding the resolution of the second respondent as Town Clerk was valid at law because the second respondent had irregularly appointed the Town Clerk in contravention of s 132 of the Urban Councils Act and that the first respondent had acted under the provisions of the law still in force in suspending the resolution. The first respondent averred that he did not see any conflict between the Constitution and the section of the Urban Councils Act under which he acted to rescind the resolution.
- iv) that he was surprised at the manner that the applicant appeared to be in the know regarding the day to day operations of the second respondent including accessing documents which ordinarily would only be expected to be available to second respondent's councillors.

- v) that he awaited the court's decision on matters raised in case No. HC 3231/16.
- vi) That he did not order the second and third respondents to hold the proposed special meeting nor did he threaten any councillor with suspension over the irregular appointment of the Town Clerk. He did not know anything about the meeting.
- vii) that the applicant did not stand to suffer any harm as argued by the applicant but that the residents of Harare would on the contrary suffer harm if unlawfulness in the appointment of the Town Clerk was allowed to prevail following the unprocedural appointment of the Town Clerk.
- viii) that he saw no urgency in the application. However, the first respondent abandoned the issue of urgency at the hearing before me and it was not pursued.

The second and third respondents opposed the application.

In summary their grounds for opposition were

- i) that the purported meeting sought to be interdicted by the applicant had been called in terms of s 84 of the Urban Councils Act and not at the instance of or through any directive of the first respondent. I pause here to observe that in terms of s 84 (3) of the Urban Councils Act, the Mayor may at any call for a special meeting and at the request of not less than a 1/3 of the total membership of the council or six councillors whichever is less, with such meeting being held within 14 days of such request.
- ii) The special meeting proposed for 3 May 2016 had been rescheduled to 6 May 2016 because of the death of a councillor.
- iii) That the meeting was intended to deal with an ancillary issue of what should happen to the Town Clerk pending the challenge to his appointment which challenge was *lis pendens* in the High Court. The special meeting was not intended to deal with the issue of the appointment of a substantive Town Clerk.
- iv) that the special meeting did not seek to impugn case No. HC 3231/16 or to reverse or rescind the appointment of the Town Clerk and neither was it intended to deal with the legality of the first respondent's directive. The real issue for discussion was to agree a position which would ensure that while the issues surrounding the appointment of the Town Clerk awaited

resolution by the court, council business should continue without controversy or hindrance.

- v) That the placement of James Mushore on leave would not effect the rights sought to be protected by the applicant in case no. HC 3231/16. Further, that placing the Town Clerk on leave would not derail the application to rescind the directive of the first respondent. Once the court cleared the pending cases surrounding the appointment of the town clerk, the Town Clerk would resume his duties depending on the outcome thereof.
- vi) That the special meeting was intended to place special interim measures in place whilst the resolution of the court challenges awaited resolution.
- vii) That in any event the appointed town clerk as an employee could seek remedies provided for under the Labour Act, [*Chapter 28:01*] if he felt aggrieved by whatever decision the applicant took at its special meeting if it affected him.

In coming to a determination in this matter I considered the law on the requirements which an applicant should establish in order to obtain the relief of an interim interdict as sought by the applicant in this application. In *Zesa Staff Pension Fund v Mushambadzi SC 57/2002*, the learned ZIYAMBI JA with the concurrence of the learned SANDURA JA and GWAUNZA JA set out the requirements for the grant of a final and interim interdicts as follows:

“It is trite that the requirements for a final interdict are:

1. a clear right which must be established on a balance of probabilities.
2. unreparable injury actually committed or reasonably apprehended; and
3. the absence of a similar protection by any other remedy.

See *Setlogelo v Setlegelo* 1914 AD 221 at 227; *Flame Lily Investment Company (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd and Anor* 1980 ZLR 378; *Sanachem (Pty) Ltd v Farmers Agricare (Pty) Ltd* 1995 (2) SA 781 A at 789B.

With regard to a temporary interdict, the following must be established;

1. a right which, though prima facie established, is open to some doubt.
2. a well-grounded apprehension of irreparable injury.
3. the absence of any other remedy.
4. the balance of convenience favours the applicant.

See *Eriksen Motors (Welkom) Ltd v Protea Motors and Anor* 1973 (3) SA 685 (A) at 691; *Flame Lily Investment Company Private Limited v Zimbabwe Salvage (Private) Limited and Anor (supra)*; *Durma (Pvt) Ltd v Siziba* 1996 (2) ZLR 636 (S) at 641”

I shall be guided accordingly by the Supreme Courts’ extrapolation. It follows upon a consideration of the requirements for an interim interdict that with regards the *prima facie* right which may be open to some doubt, such right should be real and not imagined. However, on where such right derives from is not important. It may derive from statute, common law or contract. This is not material. It should be a right and not a mere interest.

In the application before me, I am persuaded that the applicant has established a *prima facie* right which may be open to doubt. It participated as a panelist in interviewing candidates for the post of town clerk and in the selection process. It has a right to ensure that the result of the interview is given effect to. The applicant has also filed litigation against the first respondent seeking to invalidate the first respondents’ directive to reverse the appointment of the second respondent’s appointed town clerk. Had the applicant not been part of the interviewing panel for the job of town clerk for Harare as aforesaid, I would have been persuaded to hold that it did not prove a *prima facie* right but merely an interest in the matter. Furthermore the applicant’s pending litigation should not be rendered an academic exercise or a *brulmen fulmen*. I was satisfied that the applicant established a *prima facie* right to seek an interim interdict in the circumstances.

With regards the second requirement on the existence of a well-grounded apprehension of irreparable harm, irreparable harm in my view is established on a balance of probabilities where the applicant is able to show that the harm it will suffer will not be capable of repair if the ultimate relief is granted. Looked at another way, irreparable harm would have been established where the applicant can establish that if the interim interdict is not granted, it will be impossible if not considerably difficult to restore the status quo.

I was not satisfied on the facts founding this application that applicant would suffer irreparable harm if the interim relief was not granted. The purpose of the proposed meeting was not to rescind the resolution of the second respondent to appoint James Mushore as Town Clerk for Harare. The applicant did not deny the second respondent’s stated purpose of the meeting which was to discuss interim measures to put in place pending the resolution of the disputes at court including placing the town clerk who was at the centre of the court disputes on leave. Assuming that the second respondent was going to resolve that the town clerk

proceeds on leave, this would certainly not prejudice case no HC 3231/16. The position would have been otherwise if the meeting was intended to rescind the appointment of the town clerk or to adopt the first respondent's directive. The issue which the second respondent proposed to table for discussion and pass a resolution upon would not defeat the final order sought by the applicant in this application either. This is so because the institution or concept of an employee being on leave is part and parcel of an employment relationship. Leave and termination of employment though arising out of an employment contract as the common base are not synonymous. The *status quo* with regards the Town Clerk was that he had been appointed and had assumed duty. If he was to proceed on leave, he would still after the leave period return to work to carry out his duties. Therefore it cannot be said the status quo could not be restored, let alone with any difficulty.

As to whether there is no alternative remedy, I hold that this requirement was not satisfied. In the first instance this requirement in some way derives from the requirement to show irreparable harm. Once a finding is made that the harm sought to be guarded against is not irreparable, a determination on whether or not there is or no alternative remedy becomes academic. Assuming however that it would still be necessary to make a determination on whether or not there would be an alternative remedy available to the applicant, I would rule that it would be necessary to determine what the Town Clerk's attitude would be to being asked to proceed on leave. Strictly speaking the issue of whether or not the proposed resolution to send the town clerk on leave would injure the applicant irreparably is a matter of conjecture.

I was therefore not satisfied that the applicant had established a *prima facie* case for the grant of the interdict it sought and dismissed the application. I also considered that it would not be proper at law to interdict a meeting lawfully called in terms of the Urban Councils Act. At best, had the applicant been properly advised, it could have waited for the meeting to take place and if need be, seek an order that resolutions reached should not be implemented. A court as a general rule cannot interdict or stop the convening of a validly called meeting. It is the resolutions or decisions which come out of the meeting which can be interrogated as to their validity.

Civil Division of the Attorney-General's Office 1st & 4th respondent's legal practitioners
Mbidzo Muchadehama & Makoni, 2nd & 3rd respondents' legal practitioners