BRUCE ISRAEL MASAMVU

Versus

CITY OF BULAWAYO

And

CITY COUNCIL OF BULAWAYO

And

MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS N.O

And

TENDY THREE INVESTMENTS (PRIVATE) LIMITED

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 28 MAY AND 5 DECEMBER 2024

Opposed Application

N. Mazibuko with Advocate Dube, for the applicant
T. Mpofu with P. Ncube, for 1st & 2nd respondents
K. Ngwenya, for 4th respondent

MOYO J: Applicant is a resident in the city of Bulawayo urban district. He owns a motor vehicle and uses the designated parkings in the city. Around 18 February 2022 1st, 2nd and 4th respondents entered into a parking management system in the Central Business District. Applicant was charged fees for parking his vehicle at various parking bays in terms of the introduced parking system. Applicant sought relief in HC 1460/22 pertaining to a parking dispute with the authorities. He sought to interdict Bulawayo City Council from clamping and towing away his motor vehicle. There was an objection to the application to the effect that applicant had cited a non-existent entity, Bulawayo City Council. Applicant now seeks to invalidate Statutory Instrument 63/15 which refers to the Bulawayo City Council on the basis that there is no such entity at law. Also, applicant seeks to interdict 1st and 2nd respondents from acting in terms of an invalid law.

1st, 2nd and 4th respondents' preliminary objections

A. **MOOTNESS**

1st and 2nd respondents argue that applicant seeks to invalidate a non-existent Statutory Instrument as it has been overtaken by events since the SI is no longer in existence following the promulgation of a correctly worded SI/Amendment. That the SI is no longer in existence and that the court only deals with concrete and live controversies. That it does not sit to deal with hypothetical issues. That the dispute is now moot. That the business of the court is to undo an injustice. They cite for this preposition the case of *Khuphe & Another* vs *Parliament of Zimbabwe* CCZ-20-19 in the case where the Constitutional Court held that once events move ahead of you, a court of law can no longer come to your rescue.

Respondents further argue that a court cannot invalidated a statute that is no longer before it.

(2) That Respondents further argued that even if it were to be argued and accepted for a moment that the SI is still valid, that it could not be invalidated on the basis of a wrong title.

That in terms of sections 227 and 228 of the Urban Councils Act Chapter 29:15. A party who is unhappy about the form of a by-law should approach the law reviser and that this court is therefore not the appropriate platform.

(3) That the applicant missed the bar by not objecting to the process that led to the promulgation of the SI, that applicant's remedy was an objection within the provisions of the Urban Councils Act *(supra*) by raising his hand at the City Hall and objecting to the title given to the by-law as opposed to approaching this court. Respondent further submitted that there is no longer any substance before this court to determine.

4th respondent's counsel concurred on the arguments raised by 1st and 2nd respondents' counsel of mootness. He also argued further and peculiar to 4th respondent that 4th respondent was wrongly joined to these proceedings and that in terms of section 223 Urban Councils Act (supra). 4th respondent should be removed from these proceedings in terms of Rule 32 (12) (a) of High Court Rules 2021.

Applicant's counsel argued that it is common cause that applicant was clamped for unpaid parking funds. That 1st and 2nd respondent's counsel's submissions demonstrate a live controversy. That the draft order mentions other statutory instruments in particular SI 181/20 and that therefore there is still an issue. That applicant's draft order is not restricted to SI 63/15

but to all other by-laws. That applicant seeks any enactment referenced to be declared null and void and any by-law so approved be set aside.

That the by-laws under SI 63/15 were in favour of an entity that no longer exists at law and no laws can be made in its favour.

(B) **LAW REVISER ARGUMENT**

Applicant shoots down the argument on the law reviser by stating that, the law reviser avenue is for minor connections and that applicant is at large to approach this court.

MOOTNESS

That the fact that these regulations have been revised does not render the matter moot and that there is still a live controversy. Applicant quoted the case of *ZIMSEC* vs *Victor Makomeke* SC-10-20, as authority for the proposition that the mere fact that between the parties there is no live dispute, where there are public policing considerations, the dispute is not rendered moot.

In response to the objection by the 4th respondent wherein 4th respondent, argues that it should not have been cited and should be removed from these proceedings, applicant argues that respondent is an authorized party in terms of the Urban Councils Act *(supra)* and is therefore properly cited. In response, 1st and 2nd respondent's counsel argued that the clear position is that applicant brought this application as an owner of a motor vehicle and he enforces his rights as a parker of a motor vehicle. He thus seeks invalidity of a law that no longer exists in that respect. That an applicant refers to the Hawkers Regulations making reference to them, but he has already told the court what brought him before it, he came as a parker of a motor vehicle and not as a hawker, further that the draft order deals with unnamed regulations and the court cannot be called upon to invalidate unnamed regulations. That the *ZIMSEC* vs *Victor Makomeke* case does not apply here as *ZIMSEC* in that dispute was yet to deal with other exams. That the regulations being challenged were promulgated by the City of Bulawayo an entity with full authority to make them and whatever the regulations are called, does not matter. That applicant accepts that it is the City of Bulawayo which made the Regulations but he has issues with what the Regulations are called so he should have approached the Law Reviser.

CONSIDERATION OF THE PRELIMINARY POINTS

1. Whether or not the declaration of the invalidity of SI 63/15, as sought by applicant is now moot. It is common cause that the SI being complained of by applicant is no longer in existence. Can applicant seek invalidation of a non-existent by-law? Can this court invalidate a non-existent law?

WHETHER THIS CASE IS NOW MOOT?

I refer to the case of *Thokozani Khuphe and Another* v *Parliament of Zimbabwe and 2 Others* CCZ 20/19 where in dealing with a similar argument on mootness the Constitutional Court stated thus, at page 7 of the cyclostyled judgment:-

"WHETHER OR NOT THIS MATTER IS MOOT

A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the court's jurisdiction ceases and the case becomes moot.

> "The question of mootness is an important issue that the court must take into account when faced with a dispute between the parties. It is incumbent upon the court to determine whether an application before it, still presents a live dispute between the parties. The position of the law is that a court hearing a matter will not readily accept an invitation to adjudicate on issues which are of "such a nature that the decision will have no practical effect or result."
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> It was held further that:-
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> "The court cannot order occupation of a seat in a Parliament that has been dissolved in terms of the law at the end of its 5 year term. A determination of the question of the existence or otherwise of the alleged constitutional obligation on the 1st respondent would be done in the abstract as its outcome would have no practical effect on the relief sought by applicants. The determination of the matter would be an academic exercise."
>
> A decision in favor of the 1st applicant would not be carried into effect.

The refusal of courts to decide cases which have become moot because of cessation of a dispute between parties derives from the common law notion that the function of a court is

limited to determining rights and obligations that are actually controverted in the particular case before court.

The court further held that the mere fact that the matter is moot does not constitute an absolute bar to a court to hear a matter.

The court further stated that;

> "courts in this jurisdiction do pay homage to the demands of the adversarial system of resolution of disputes. The adversarial system contemplates a situation in which both parties before a court have an interest in the outcome of the case. The system envisages a situation where the determination of the matter in dispute would have practical and tangible consequences for the contending parties. It would not be in the interest of justice for a court to determine a moot case where its decision has no practical effect on the parties"

In the *Khuphe* case the constitutional court refused to exercise its discretion to resolve the moot question between the parties.

From the facts before me applicant has issues with the naming of S1 63/2015 given the background of his case where he was clamped and ordinarily parks in the Central Business of District of the City of Bulawayo wherein his rights are affected as a vehicle owner. It is common cause that Statutory Instrument 63/15 is no longer in existence.

Applicant seeks an order that any Statutory Instrument written Bulawayo City Council be declared null and void. This court cannot declare null and void that which is unknown and has not been proven to be in existence secondly, applicant mentions Statutory Instrument 181/20 as another example.

At paragraph 25 of the founding affidavit applicant explains that his interest is that he owns a vehicle and parks it within the jurisdiction of 1st and 2nd respondents of which Statutory Instrument 63/15 may be applied or used against him,.

He submits that he should only be subjected to regulations made by 2nd respondent.

I hold the view that using the rational in the *Khuphe* case, Statutory Instrument 63/15 no longer being in existence, there is no live dispute between applicant and 1st and 2nd respondents.

What brought Applicant to this court is the background as narrated in his founding affidavit. His complaint zeros in on vehicle clamping and parking issues. He has not stated that he also has an interest as a hawker or that he has personally clashed with 1st and 2nd Respondent over hawking issues.

He simply says as a Bulawayo resident he may come into conflict with the 1st and 2nd respondent over other unnamed Statutory Instruments bearing the names Bulawayo City Council.

Especially considering the adversarial nature of our court systems as stated in the *Khuphe* case, I hold the view that Applicant's case is confined to his contended issue over Statutory Instrument 63/15 and it not being in existence any more this court cannot be detained by it as there is no longer a live dispute to determine even for a future cause.

In the *ZIMSEC* case (supra) cited by the applicant in argument against mootness, the court stated thus:

> "There is no doubt that any decision that this court makes will inevitably have some practical effect on many other students who will at some stage in the future sit to write exams conducted by the appellant, The matter as being entirely academic for all time. In the event that the appellant should for some good reason decide to exercise its administrative will to nullify the results of any given exam and require that it be taken afresh, the students that may be affected thereby as well as the Appellant itself will be governed and guided by the decision of this court. Thus, the extent of its practical effect would undoubtedly be of a long term and all-embracing nature. Moreover, the importance of complexity of the issues raised in this appeal are manifestly self-evident. Additionally, regarded from the different perspective alluded to in *Roe's* case *(supra*), there can be no doubt that the refusal by this court to decide those issues will inevitably create a situation, "capable of repetition, yet evading re view"

In other words in the *ZIMSEC* case the court characterized its intervention as being necessary for future guidance to the exams body and to future students. It also noted that complex matters had been raised.

This is not the case in the dispute before me, which clearly is not existent in the absence of Statutory Instrument 63/15.

The 4th Respondent's point *in limine* on his joinder, cannot be sustained as clearly 4th Respondent is an interested party as an enforcer of the regulations being the subject matter of this dispute.

I accordingly find that the issue is now academic and this court cannot deal with it as it is of no practical benefit to the parties. Having found that the dispute is moot, I do not consider it necessary to deal with the remedy of the law reviser as I consider that even the issue pertaining to the law reviser is now irrelevant given the mootness of the dispute. I accordingly decline to hear the moot question between the parties. The point *in limine* is thus upheld.

The application is accordingly struck off the roll with costs.

Calderwood, Bryce Hendrie and partners, applicant's legal practitioners
Coghlan and Welsh, 1st and 2nd respondents' legal practitioners
T. J Mabhikwa, 4th respondent's legal practitioners