REPORTABLE (71)

(1) MUTARE CITY COUNCIL (2) BLESSING KAPUYA CHAFESUKA
v
(1) LOVEMORE WARURAMA (2) MINISTER OF LOCAL GOVERNMENT PUBLIC WORKS AND NATIONAL HOUSING (3) LOCAL GOVERNMENT BOARD

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & KUDYA JA
HARARE: 6 JUNE 2023 & 23 JULY 2024

T.R Mafukidze, for the first appellant

T. Zhuwarara, for the first respondent

No appearance for the second and third respondents

KUDYA JA: On 3 May 2021, the appellants noted an appeal against the whole judgment of the High Court (the court *a quo*) dated 14 April 2021, in which the court *a quo* granted a declaratory order and consequential relief in favour of the first respondent (Warurama). The court *a quo* declared the directive issued by the second respondent (the Minister) to the first appellant (the municipality) to reverse the purported appointment of Warurama as its financial director to be null and void and of no legal effect. It consequently set aside the directive and confirmed Warurama as the financial director in place of the second appellant (Chafesuka) who had subsequently been appointed to that position.

The order reads as follows:

"1. The application for a *declaratur* is granted.

2. The first respondent (Minister)'s decision to rescind the applicant (Warurama)'s approval by the third respondent (The Local Government Board) and a directive to the second respondent (Municipality) to effect the directive abovementioned be and is hereby set aside.

3. Consequently, the applicant's approval and appointment to the second respondent as Finance Director shall stand at law.

4. First, second and third respondent shall pay costs of suit."

THE FACTS

The first appellant is the Mutare City Council (the Municipality), is a municipal authority situated in the Eastern Highlands of Zimbabwe. The second appellant is the substantive Finance Director of the first appellant. He assumed duty on 1 February 2019. He was the runner up for that position in interviews conducted by the first appellant. He was subsequently appointed after the withdrawal of the first respondent's appointment. The first respondent was the successful candidate who was nominated by the first appellant and approved by the third respondent (the Local Government Board) for appointment as the Finance Director in the municipality. The second respondent is the Minister responsible for the administration, *inter alia*, of the Urban Councils Act [*Chapter 29:15*] (the Act), which governs the management of municipal authorities. The third respondent is the Local Government Board (LGB), which is vested by the Act, with the power to approve the appointments of senior officials in municipal authorities.

In November 2017, the first respondent, who was employed by the Bindura Municipality (his employer) as a finance and administration director, was successfully interviewed for the post of finance director in the Municipality by the Municipality and the LGB. By letter dated 31 January 2018, the LGB approved his prospective appointment to the Municipality. The

letter also indicated that, "in the event that Mr Lovemore Warurama declines then the position should be given to Mr Chafesuka Blessing Kapuya" who had come second in the interviews. Thereafter, by letter dated 6 February 2018, the first appellant offered the position to the first respondent. He was required to accept the offer within 7 days and to assume duty on 1 March 2018 (the designated date). On 9 February 2018, the first respondent accepted the offer within the prescribed period of 7 days. He indicated that he might be unable to assume duty on the designated date in the event that he failed to procure a waiver of the obligatory three months exit notice from the Bindura Municipality.

On 19 February 2018, the Minister directed the Municipality to defer the first respondent's appointment pending the conclusion of an impending investigation for misconduct, which he was setting in motion. Acting on the ministerial directive, on 20 February 2018, the LGB also requested the Municipality to put the appointment of the first respondent in abeyance. The municipality communicated the directive to the first respondent, first by telephone on 22 February 2018 and thereafter by letter, on 5 March 2018. His written protests on 22 February 2018 and 15 May 2018 were ineffectual. The long and short of it was that he did not assume duty on the designated date. He apparently withdrew his resignation and remained in employment with his employer.

It was common cause that, at the time that the first respondent was interviewed, chosen, approved and offered the position, both the Municipality and LGB did not know that he was under a ministerial investigation, initiated in terms of s 311(2) of the Act, for financial mismanagement and corporate misgovernance. The investigation was prompted by an incriminating 2016 audit report arising from the 2014 Cabinet Salary Rationalization directive and

an altercation between the first respondent and the mayor of Bindura during a council session held on 18 January 2018.

The investigation took place between 19 February 2018 and 17 December 2018. It established that the first respondent had breached various municipal financial standing orders. It noted in para 6.3 that:

> "The conduct of the Finance Director in the offset agreement with Mujuru prejudiced council of several thousands of dollars and this is in contravention of s 45(c) of the Public Finance Management Act *[Chapter 22:19],* which states that an employee of the public entity must take effective and appropriate steps to prevent any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due."

It particularly recommended that:

> "7.9: The Finance Director [Mr L Warurama] and the Chamber Secretary [Mr NM]'s behaviour was uncalled for as they were disrupting meetings hence disciplinary action should be taken against them."
>
> 7:11 The movement of Mr L Warurama from Bindura to Mutare or any other local authority should be withheld to give him ample time to improve his public relations to the satisfaction of the Minister. This is specifically related to chamber interjections culminating to *(sic)* the chamber fight with the mayor."

The first respondent was thereafter prosecuted for allegedly assaulting the mayor of Bindura during a council session. He was acquitted of the assault charges at the Bindura Magistrates Court on 6 March 2019. On 25 January 2019, before his eventual acquittal of the assault charges on 6 March 2029, the Minister directed the municipality to rescind his appointment as the finance director of the municipality. The municipality complied with the Minister's directive and duly rescinded the appointment in one of its duly constituted council sessions.

It is also noteworthy that, in the court *a quo*, the first respondent made the factual admission that he withdrew his resignation from his employer on receipt of the letter dated 22 February 2018. It was also common cause that, in consequence of the recommendations of the ministerial investigating team, he was eventually charged with misconduct by his employer and duly dismissed from its employment on 8 June 2021.

Aggrieved by the rescission of the offer of employment by the Municipality, the first respondent first sought an order of specific performance before a labour officer. He, however, abandoned that application in favour of an application (the progenitor of the present appeal), in terms of s 14 of the High Court Act [*Chapter 7:06*], for a declarator and consequential relief in the court *a quo*. In the court *a quo*, the Minister was the first respondent, the first appellant was the second respondent, the third respondent was also the third respondent, the second appellant was later joined in as the fourth respondent.

THE CONTENTIONS IN THE COURT *A QUO*

In the court *a quo*, Warurama submitted that the Minister's directive to the municipality to rescind the approval of his appointment by the LGB was a nullity because it was irregular, irrational and unlawful. He premised his submission on the provisions of ss 115 to 130 of the Act. He further contended that, s 135(4) of the Act, upon which the Minister premised his conduct did not support such conduct. He further argued that the Minister is only permitted by that section to intervene where the LGB rejects the candidate recommended by council and the council thereafter fails to recommend another suitable candidate to it. He also argued that the directive was in violation of s 276(1) of the Constitution which vests municipalities with the untrammeled power to govern their own areas. He asserted that he had a direct and substantial

interest to protect his accrued right, which in his contention, emanated from the Constitution, the Act and the Labour Act. He also submitted that the repudiation of his contract of employment constituted an unfair dismissal which further violated his administrative justice right to be heard before the rescission was done.

Per contra, the first appellant submitted that it was obliged by s 313 alternatively s 314 (3) of the Act, to comply with the Minister's directive. It contended that the latter provision reposed the power to issue such a directive in the Minister. It also argued that a failure to obey the directive would have been in breach of public policy. It further argued on the authority of *Zesa* v *Maphosa* 1999 (2) ZLR 452 (S) and *Chanakira* v *Mapfumo & Anor* HH 155/10 that a contravention of a fundamental principle of the law or morality or justice offends against public policy. It also argued that it was required by the provisions of s 134 and 135 of the Act to comply with the request by the LGB to freeze the prospective appointment**.**

Regarding the purported appointment of Warurama to the position, the municipality made two further contentions. The first was that the purported acceptance did not constitute an unequivocal acceptance but a conditional counter-offer, which the municipality did not accept. The second was that the first respondent never became its employee as he not only withdrew his resignation from the Bindura Municipality but also failed to assert his purported accrued right of employment by assuming duty on the designated date. It also contended that the application had been overtaken by the subsequent appointment of Chafesuka following the rescission of Warurama's appointment. The municipality therefore contended that Warurama did not have any "existing, future or contingent right or obligation" to relate to. It also contended that he, for that

reason, did not have any direct and substantial interest to protect. It accordingly moved for the dismissal of the application for a declarator with costs.

The Minister and the LGB were content to merely file their opposing papers without participating any further in the proceedings *a quo.* They neither filed heads of argument nor attended the hearing in the court *a quo*. They had, however, averred in their opposing papers that the Minister was imbued with the power to direct the municipality to rescind the prospective appointment by s 314(1) of the Act. They also stated that the Minister was obliged to alert the municipality of the impending investigation because Warurama had not made the necessary disclosures to his interviewers that he was under investigations arising from his conduct at Bindura Municipality.

Chafesuka contended that he was an innocent appointee who was currently in post, and whose rights could not be prejudiced by Warurama's grievance. He submitted that, as Warurama essentially sought for the specific performance of reinstatement of his purported contract of employment, such an order would be a *brutum fulmen* bearing in mind that the position was no longer vacant. He relied on the case of *Hativagone & Anor* v *CAG Farms (Pvt) Ltd & Anor* SC 42/15 at pp 16-17 where this Court stated that:

> "The principle *lex non cogit ad impossibilia* states that specific performance should never be ordered if compliance with the order would be impossible. The respondent inexplicably assumed that the *merx, viz* the farm still existed, this despite the subdivisions. The subdivision of land is not a matter of form, it is one of substance. The remedy of specific performance was not available to the respondent."

THE FINDINGS OF THE COURT *A QUO*

The court *a quo* held that Warurama's intimation of a waiver of notice was neither a conditional acceptance nor a counter offer. It reasoned that he unequivocally accepted the offer without any ambiguity and had expressed his desire to join the municipality on the waiver of the obligatory notice period. It held that Warurama had established that he had concluded a contract of employment with the municipality. It also held that the contract accorded to him a direct and substantial interest to protect his existing, contingent or future right of employment with the municipality.

The court *a quo* further held that the ministerial directive could not lawfully rescind the contract of employment concluded with the first appellant on receipt of the first respondent's acceptance letter. It held that s 314(1) constituted a general policy provision which could not be construed to cover the appointments of senior officials.

The court *a quo* concluded that the rescission of the appointment of Warurama and the consequent appointment of Chafesuka in his stead were both null and void and of no force or effect.

Dissatisfied by the court *a quo's* determination, the first and second appellants approached this Court on the following four grounds of appeal.

THE GROUNDS OF APPEAL AND RELIEF SOUGHT

"Grounds of appeal:

1. The court *a quo* erred and misdirected itself in granting declaratory relief to the first respondent notwithstanding that he failed to establish the basis for such relief, in particular, that he had an existing or future right entitling him to a declaratory order.
2. The court *a quo* erred in granting declaratory relief in an application which essentially was a disguised application for review.
3. The court *a quo* erred in granting relief for a declaratory order which departs from the claim pleaded and proved by the first respondent, the claim proved being a claim for a review.
4. The court *a quo* grossly erred and misdirected itself in granting a declaratory order without considering the consequences of such an order given the competing rights and interests of the second appellant who is a *bona fide* employee substantively appointed to the position in issue."

RELIEF SOUGHT

WHEREFORE the appellants pray that: -

1. The appeal be allowed with costs.
2. The order of the court *a quo* be and is hereby set aside and substituted with the following:

"The application be and is hereby dismissed with costs on a higher scale."

THE CONTENTIONS BEFORE THIS COURT

The preliminary objections

On 1 June 2023, Mr *Zhuwarara* for the first respondent, acting in terms of r 51 of the Supreme Court Rules, 2018, gave written notice of his intention to raise four preliminary

objections. On 2 June 2023, Mr *Mafukidze* for the appellants, in turn, filed written opposition to all the preliminary objections.

At the commencement of the hearing of the appeal, Mr *Zhuwarara* abandoned the first three preliminary objections. He, however, persisted with the fourth one. He took the point that the appellants were bound by r 55(2) of the Rules of Court, not only to tender security for costs but also to furnish such security within one month of lodging the present appeal. He relied on the pronouncements of this Court in *Watermount Estates (Pvt) Ltd & Anor* v *The Registrar of the Supreme Court NO & Ors* SC 135/21 at pp 13-14 that:

> "Significantly, the 2018 rules, not only require that the appellant enters into good and sufficient security (r 55 (2)), they also require the appellant to do so within one month of filing the notice (r 55 (5)) and provide the sanction that if that is not done the appeal shall be deemed to have been abandoned (r 55 (6)).
>
> In my view r 55(2) should be read in conjunction with the other subrules. In that regard it becomes apparent that it requires from the appellant more than a statement of intent to furnish security for costs made in a Notice of Appeal. If the import of r 55(2) were to be as stated in *MDC & Another* v *Mudzumwe & Others* 2012 (2) ZLR 287 (S), that would render nugatory the provisions of r 55 (6). Indeed, if the applicants' interpretation of the rules were accepted, it would mean that no appeal could ever be deemed abandoned and dismissed as required by subrule (6). My view is that the proviso to r 55(2) places the *onus* of ensuring that the parties address their minds to the nature and adequacy of the security on the appellant who should ensure that he or she or it *enters* into good and sufficient security for the respondent's costs of appeal.
>
> It follows that the parties should either agree on the nature and sufficiency of the security within one month of the date of filing of the Notice of Appeal or, failing agreement, the appellant must, within the same period, make an application to the Registrar for determination of the security to be furnished. The obligation on an appellant imposed by r 55 (2) to enter into good and sufficient security for the respondent's costs of appeal demands of the appellant more than a pre-recorded statement in the Notice of Appeal."

Mr *Zhuwarara* moved the court to remove the appeal from the roll for the reason that it had been regarded as abandoned and deemed to have been dismissed by operation of sub-rule (6) of r 55 of the Rules of Court.

Mr *Mafukidze* made the contrary argument that the appellants were exempted from furnishing security for costs by the provisions of subrule (4) of r 55 of the Rules of Court. The sub-rule reads as follows:

> "(4) No security for costs in terms of subrule (2) need be furnished by the Government of Zimbabwe or by a municipal or city council or by a town management board."

In interactions with the Court, Mr *Mafukidze* conceded that the exemption from furnishing the requisite security for costs applied to the first appellant and not the second appellant. Counsel therefore agreed that the second appellant was not properly before the court. This was because, by operation of law, his appeal was regarded as abandoned and deemed dismissed by his failure to furnish good and sufficient costs in breach of r 55 (6) of the Supreme Court Rules, 2018. We consequently non-suited the second appellant from participating in the appeal proceedings with no order as to costs. As the two appellants were represented by the same counsel and their appeal intimately intertwined, the court removed the second appellant's matter from the roll with no order as to costs. The following order ensued.

> "The second appellant's matter be and is hereby removed from the roll for the reason that it is deemed dismissed by operation of law for failure to furnish good and sufficient security costs in terms of s 55 (6) of the Supreme Court Rules, 2018."

THE MERITS

On the merits, Mr *Mafukidze* submitted on the authority of *Geddes Ltd* v *Tawonezvi* 2002 (1) ZLR 479 (S), *Enhanced Communications Network[Econet] (Pvt) Ltd* v *Minister of*

Information, Posts & Telecommunications 1997 (1) ZLR 342 (H) at 344-345; *Marasha* v *Old Mutual Life Assurance Co* 2000 (2) ZLR 197 (H) at 198; *Masuku* v *Delta Beverages* 2012 (2) ZLR 112 (H) and *Mukanganise & Ors* v *Mwale & Ors* HB 131/21 at pp 7-8 that the court *a quo* erred by entertaining a review that was disguised as a declarator. He argued that in para 2.1 of his founding affidavit under the sub-heading "nature of the application" the first respondent sought the setting aside of the ministerial directive and his consequential appointment as the substantive financial director in place of Chafesuka.

Counsel for the appellant also argued that the purported declarator was in reality a disguised review application as further demonstrated by the reference in para 3.24 of the first respondent's founding affidavit to the purported irregularities pertaining to the Minister's administrative action. Mr *Mafukidze* contended that the grounds of *ultra vires*, irrationality, unfairness and breaches of administrative justice, adverted to in the latter paragraph, clearly constituted the substance of a review rather than a declarator. He submitted that by improperly lodging a review disguised as a declarator, the first respondent had effectively circumvented the mandatory requirements of the then operative Order 33 r 257 and r 259 of the High Court Rules, 1971. These respective rules required an application for review, whether brought under the common law, Administrative Justice Act [*Chapter 10:28*] or the High Court Act [*Chapter7:06*] to state clear and concise grounds for review on the face of the application and to be lodged within a period of 8 weeks. He further argued that a necessary corollary of that rule was that a failure by an applicant to adhere to the 8-week time line obliged him to preface the review application with an application for condonation.

Mr *Mafukidze* therefore submitted that the court *a quo* grossly misdirected itself in failing to, *mero motu,* strike off the roll the purported declarator in the face of these glaring procedural irregularities, which were in breach of r 257 and 259 of the High Court Rules, 1971. However, when the court engaged him on the propriety of raising the issue of a review disguised as a declarator for the first time on appeal, he conceded that as the issue had neither been pleaded nor argued in the court *a quo,* he was precluded from raising it for the first time on appeal. He accepted that he could not turn this Court into a court of first and last instance and thereby deny it the benefit of the reasoning of the court *a quo.* He also conceded that a purportedly void act could be challenged either by an application for review or by a declarator.

In the alternative, Mr *Mafukidze* contended that the first respondent was granted a declarator without establishing the requirements for such a declarator. He premised his contention on the three factors that he argued tended to show that the first respondent never became an employee of the first appellant. The first was that he never asserted his right to assume duty on 1 March 2018. The second was that he had withdrawn his resignation from the Bindura Municipality on receipt of the communication deferring his purported appointment. The third was that he remained in the employment of the Bindura Municipality for a period of 3 years, until his dismissal on 8 June 2021. Mr *Mafukidze* strongly argued that it was inconceivable that the first respondent could possibly have been an employee of two municipalities at the same time. He thus argued that the first respondent had not established his direct and substantial interest in the matter or any existing, conditional or future right of employment with the first appellant. Counsel therefore submitted that the court *a quo* had injudiciously exercised its discretion in granting the declarator sought by the first respondent.

Mr *Mafukidze* further contended that s 311(2) of the Act reposes in the Minister the power to appoint, in the public interest, an investigative team to inquire into the corporate governance and financial probity of a municipality. He also contended that subs (15) of the same section allowed the Minister to take any necessary corrective action arising from the investigation. He argued that, a consideration of these provisions in conjunction with the provisions of s 341(1) of the Act allowed the Minister to issue the suspension and rescission directives to the municipality. Further, that in terms of s 341(3) of the Act the municipality was obliged to expeditiously comply with these directives. He therefore submitted that the court *a quo* erred in declaring the municipality's conduct, premised as it was in obedience to the dictates of statute, to have been unlawful and of no force or effect.

Per contra, Mr *Zhuwarara*, supported the findings of the court *a quo*. He contended that the cases of *Geddes Ltd, supra*, at 485D and *Musara* v *Zimbabwe National Traditional Healers Association* 1992 (1) ZLR 9 (H) at 14C-D resolve the review disguised as a declarator argument in favour of the first respondent. Both these cases held that the correct method to impugn a void act or a nullity was by way of a declarator and not a review *simpliciter*. He submitted that these cases held *inter alia* that notwithstanding to references to words and phrases which are often associated with a review application, an application premised on the ground of nullity, suffices to be regarded as a proper application for a declarator. He argued that the first respondent impugned the ministerial directive on the ground that it was a nullity. He further argued that once the ministerial directive was found to have been void *ab initio*, any further decision that flowed from it would consequently be void. He therefore submitted that a declarator constituted a safe harbour for the first respondent. This was because the ministerial directive, having been conceived outside the provisions of s 314(1) of the Act was void *ab initio*. He also submitted that s 314(3) of the Act

could not be construed as permitting the municipality to terminate an employment contract by way of a resolution premised on an unlawful ministerial directive. He therefore submitted that both the actions of the Minister and the Municipality were unlawful, void *ab initio* and of no legal force or effect.

Mr *Zhuwarara* also contended that the court *a quo* judiciously exercised its discretion in granting the relief sought in terms of s 14 of the High Court Act. He argued that once the court *a quo* found that the first respondent had concluded a valid contract of employment, it followed that he had established a direct and substantial interest in the subject matter and proved the existence of a contingent or future right of employment worth of the court's protection.

THE ISSUES

The issues for determination are two.

1. Whether the court *a quo* erred in failing to *mero motu* determine that the application for a declarator was a disguised review application.
2. Whether the court *a quo* erred in granting declaratory relief to the first respondent.

THE APPLICATION OF THE LAW TO THE FACTS

Whether the court *a quo* erred in filing to mero motu determine that the application for a declarator was a disguised review application

In view of the concession made by Mr *Mafukidze*, this issue falls away. We are satisfied that the concession was proper. While a point of law can be raised at any time, the limits for doing so, which were pronounced by this court in *Austerlands (Pvt) Ltd* v *Trade & Investment Bank Ltd & Ors* 2006 (1) ZLR 372 (S) at 378D-E, *ZIMASCO (Pvt) Ltd* v *Marikano* SC 6/14 at p

10, and *El Elion Investments (Pvt) Ltd* v *Auction City (Pvt) Ltd* 2016 (1) ZLR 289 (S) at 293G-H, are apposite.

It was common cause that the issue was neither raised in the pleadings nor in argument *a quo*. The raising of the new point is prejudicial to the first respondent whose claim was argued and concluded *a quo* on a completely different basis. The facts were not common cause. The parties did not agree on whether the contract of employment was perfected by the first respondent's "conditional" acceptance of the first appellant's offer of employment. These three factors individually preclude the first appellant from raising the point for the first time on appeal.

We make two further points on the propriety of the concession. The first is that the court *a quo* would have grossly misdirected itself had it embarked on a frolic of its own and determined the question of whether the declarator was a disguised review when the point had neither been pleaded nor argued before it. See *Nzara & Ors* v *Kashumba N.O. & Ors* 2018 (1) ZLR 194 (S) at 200G- 202D and *A. Adam & Company (Pvt) Ltd & Ors* v *Good Living Real Estate (Pvt) Ltd & Ors* SC 18/21 at paras [25] and [26].

The second is that conduct which is purported to be *void ab initio* can be impugned through a declarator. In this regard see *Geddes's* case, *supra,* at 585B-D where this court stated that:

> "In this case, the respondent was not attacking Mrs Madyara's decision to suspend him from work, the disciplinary proceedings she presided over or the decision of the employer to dismiss him from employment. He was in fact treating these decisions and proceedings as a nullity. In other words, they were as good as not having happened and there was no route leading to them upon which they could be reviewed. The ground on which he was treating these decisions and proceedings as a nullity, was that Mrs Madyara had no legal authority or jurisdiction to make the decisions and institute disciplinary proceedings against him. In highlighting the want of jurisdiction on the part of Mrs Madyara to do what she did, the respondent did not need to review her actions."

By parity of reasoning, *in casu*, the first respondent was treating the ministerial directives as a nullity on the ground that the Minister lacked the statutory power and authority to issue the two directives.

The second and third grounds of appeal, which speak to the conceded first issue must therefore fail.

Whether the court *a quo* erred in granting declaratory relief to the first respondent.

The factors that entitle a litigant to the discretionary relief of a declarator were set out in *Johnsen* v *Agricultural Finance Corporation* 1995 (1) ZLR 65 (S) at 72 E-F where GUBBAY CJ held that:

> "The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a prerequisite to the exercise of jurisdiction. See *Ex p Chief Immigration Officer* 1993 (1) ZLR 122 (S) at 129F-G; 1994 (1) SA 370 (ZS) at 376G-H; *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 337 (S) and the cases cited."

This was further affirmed in *Allied Bank Ltd* v *Dengu & Anor* 2016 (2) ZLR 373 (S) at 376G-H, where MALABA CJ said:

> "The principle of *locus standi* is concerned with the relationship between the cause of action and the relief sought. Once a party establishes that there is a cause of action and that he is entitled to the relief sought, he or she has *locus standi.* The plaintiff or applicant only has to show that he or she has a direct and substantial interest in the right which is the subject matter of the cause of action."

The court *a quo* found that the first respondent had established that he was an interested person who had a direct and substantial interest in the contract of employment concluded

with the first appellant and in the outcome of the application. In other words, the court *a quo* was satisfied that the first respondent ably demonstrated the *causa* from which his legal interest was cognizable or discernible. It was further satisfied that he had an existing, contingent or future right to protect, that is, that there was a tangible benefit he sought to be resolved by the declarator. It also found that the Minister lacked the lawful authority to interfere with the perfected contract of employment. This is how the court *a quo* expressed itself at p 5 of its judgment:

> "On 25 January 2019, the second respondent wrote to the applicant informing him that the Council had rescinded the resolution to appoint him to employ him. The view that I take is that the second respondent declined to appoint the applicant on the basis of the ministerial directive. At this stage, it is important to note that an employment agreement had been concluded between the two parties.
>
> The respondents have relied on s 314(1) to justify the decision to rescind the contract of employment. I do not read this provision as conferring power to suspend the appointment of the applicant to the post in question. In fact, it gives the first respondent authority to give a Council direction of a general nature as to the policy it should observed *(sic)*, and to alter the Council's decisions in the interest of the inhabitants. Consequently, the power does not extend to issues of appointment of senior members of the Council. It is evident that the reference to resolution, decision or action of the Council must be read in context as relating to policy matters and not appointments. In this regard, in *Hlophe* v *Judicial Service Commission & Others* [2022] 3 ALL SA 87 (EJ), the court aptly acknowledged that the context is an invariable consideration in statutory or constitutional interpretation. Therefore, no basis exists for rescinding the applicant's contract of employment. I am inclined to grant the relief sought by the applicant."

It is necessary to reproduce the correspondence between the parties upon which the court *a quo* found the existence of a contract of employment. The offer letter dated 6 February 2018 reads as follows:

> "**RE: APPOINTMENT: FINANCE DIRECTOR: GRADE 15**
>
> Following the interview held in the Committee Room on the 10th November 2017 in the Committee Room, Civic Centre, Council has the pleasure in offering you the above post in the Finance Department effective 1st March 2018, on the following conditions and terms:
>
> (a) The salary (and fixed allowance were indicated).

(b) You will be required to serve a probationary period of three months, thereafter, subject to satisfactory service and conduct you will be appointed to the fixed establishment. You will be required to contribute to Local Authorities Pension Fund and Cellmed Health Medical Fund of which Council will contribute 75% of the contributions towards Medical Aid.

(c) You will be bound by the agreement of the Mutare Municipality Undertaking which forms part of the Conditions of Service attaching to your post.

In terms of the foregoing, please confirm in writing your acceptance of this position within 7 days of receiving this letter. For matters not covered in this letter please refer to the Human Resources Manager."

His acceptance letter dated 9 February 2018 reads thus:

"**RE: ACCEPTANCE OF OFFER**
This is my acceptance of the offer of employment as per your letter dated 6 February 2018. Whilst I am making efforts to request for a waiver of notice, this might not be granted as it is at the discretion of Council. I have however made the formal request which I am hoping will be given a positive response. Hoping to join your organization soonest."

The first respondent's appointment was eventually rescinded by the Municipality by letter 25 January 2019. The letter reads as follows:

"Kindly note that City of Mutare was served with a ministerial directive wherein the approval to appoint you as Finance Director was rescinded on the basis of findings of investigations launched against you at Bindura Municipality.

Council deliberated over the matter and resolved to abide by the said Ministerial Directive. Consequently, Council also rescinded its earlier resolution to appoint you to the post."

Mr *Mafukidze* argued that the court *a quo* erred in finding that an enforceable contract of employment was concluded between the two parties. He conceded that a contract is generally constituted by the communication of an acceptance to the offeror. We agree with Mr *Zhuwarara* that the suspension of the appointment, following as it did the ministerial directive, clearly constituted an acceptance by the Minister, the LGB and the Municipality that a contract of

employment had been concluded between the municipality and the first respondent. The first respondent's contention that the acceptance letter constituted a counter-offer was rightly dismissed by the court *a quo*. Had it been a counter-offer, the first appellant would have said so to the first respondent, the Minister and the LGB. The fact that the Municipality suspended the appointment and thereafter rescinded the appointment almost a year later shows that a contract of employment had indeed been concluded.

However, that is not the end of the matter. Mr *Mafukidze* argued by reference to the sentiments expressed by Simon Honeyball in his book *Great Debates in Employment Law* 2nd ed. (Bloomsbury Publishing Co. 2015) that a contract of employment is only perfected when the employee assumes duty. The learned author writes that:

> "Sometimes applicants start work immediately when they are offered a job and become employees straight away. But it is extremely common for an applicant to accept a position, continue to work for their present employer whilst working out a period of notice and begin work for their new employer weeks or even months late. The law views the employment relationship in these circumstances as starting, not when the employer's offer is accepted and the contract is formed, but on the date on which the employee begins work. There is thus no contemporaneity of contract and employment. The contract may pre-date employment by some time."

Mr *Mafukidze* therefore argued that in the absence of an assumption of duty by a prospective employee no employment relationship existed between the municipality and the first respondent which warranted the court *a quo* to grant declaratory relief to the first respondent.
He also impugned the finding of the court *a quo* that the ministerially driven suspension and rescission were unlawful for being in breach of s 314 (1) of the Act. The starting point in determining whether the suspension and subsequent rescission were *ultra vires* the Act, is to consider the provisions of s 311 (2) and (15) of the Act. These provide as follows:

"**311 Inquiries by the Minister and appointment of investigators.**

(1) In this section—

'authority" means a council or other local authority into whose affairs or concerns the Minister has appointed an investigator to inquire in terms of this section.'

(2) The Minister may, if he considers it necessary or desirable in the public interest, appoint one or more persons as investigators, together with such assistants and advisers as he may consider necessary, to inquire into any matter which—

(a) relates to the good government of a council area or local government area or arises out of the government of a council area or local government area; or

(b) relates to the failure of a council to undertake any function or provide any facilities for which it has the necessary power in terms of this Act, which power it has failed to exercise; or

(c) relates to arises out of the affairs of—

(i) a council; or

(ii) a local authority concerning any matter referred to in Part XVI;

and to report to him thereon."

And subs (15) says:

"(15) The Minister may, on receipt of a report arising from an inquiry instituted by him in terms of subs (2), take such steps as in his opinion are necessary or desirable to rectify any defect or omission revealed by the report."

The above cited provisions empower the Minister to set up an investigation team and to thereafter act on its findings and recommendations. Clearly, the Minister had the authority to appoint a team of investigators to look into the corporate governance, financial management and human relationships of the Bindura Municipality and thereafter take corrective action on any defects or omissions revealed by the investigation.

The power of the Minister to give policy directions to municipalities and to reverse, suspend and rescind council resolutions and decisions is prescribed in ss 313 and 314 of the Act, which stipulates that:

> "**313 Minister may give directions on matters of policy.**
> (1) Subject to subs (2), the Minister may give a council such directions of a general character as to the policy it is to observe in the exercise of its functions, as appear to the Minister to be requisite in the national interest.
>
> (2) Where the Minister considers that it might be desirable to give any direction in terms of subs (1), he shall inform the council concerned, in writing, of his proposal and the council shall, within thirty days or such further period as the Minister may allow, submit to the Minister, in writing, its views on the proposal and the possible implications on the finances and other resources of the council.
>
> (3) The council shall, with all due expedition, comply with any direction given to it in terms of subsection (1)."

It is apparent from the pleadings that the Minister did not give any policy directions to the Municipality.

Section 314 stipulates as follows:

> **"314 Minister may reverse, suspend, rescind resolutions, decisions, etc. of councils**
> (1) Where the Minister is of the view that any resolution, decision or action of a council is not in the interests of the inhabitants of the council area concerned or is not in the national or public interest, the Minister may direct the council to reverse, suspend or rescind such resolution or decision or to reverse or suspend such action.
>
> (2) Any direction of the Minister in terms of subs (1) to a council shall be in writing.
>
> (3) The council shall, with all due expedition, comply with any direction given to it in terms of subsection (1)."

The essential components of s 314 are these:- Firstly, the Minister may form the view that a resolution, decision or action of an urban council is not in the interests of its inhabitants or is not in the national or public interest. Secondly, he may then direct the council to reverse,

suspend or rescind such resolution or decision or to reverse or suspend such action. Thirdly, any direction of the Minister to a council must be in writing. Lastly, the council concerned must, with all due expedition, comply with any such direction.

Section 314 (1) imbues the Minister with a broad discretionary power or exclusive prerogative to act in what he perceives to be the interests of the inhabitants of a council area or in the national or public interest to direct a municipality to suspend, reverse or rescind its decision or resolution. It grants him an oversight role to address and redress conceived and perceived missteps of any local authority in the management of its affairs. The correspondence exchanged between the parties, *in casu,* shows that the Minister exercised the power reposed in him by s 314 (1) and directed the Municipality first to suspend its decision to appoint the first respondent as its finance director and thereafter to rescind that appointment. In both instances, the reason for issuing such a directive was provided. He issued both directives in writing, in compliance with the dictates of s 314 (2) of the Act. In each instance, the Municipality complied with the directive in line with the mandatory provisions of subs (3) of s 314 of the Act.

The actions of the Minister, based as they were on the provisions of s 314 (1) and (2) could not by any stretch of the imagination be considered and found to be in violation of the very same enabling provision. The Minister acted in a lawful manner. His directives could therefore not be void *ab initio.* Neither would the resolutions issued by the Municipality in compliance with s 314 (3) of the Act be regarded as a nullity.

It must be borne in mind, that the first respondent was attacking the validity of the directives and not the reasons for making them. The court *a quo* entangled itself by reading the provisions of s 313 into the provisions of s 314. It is s 313 which confers on the Minister the power

to give and manner in which he gives general policy directions to local authorities. The ministerial directives issued under s 314 relate to resolutions, decisions or acts which the Minister adjudges to be inimical to the interests of the municipality concerned. The provision does not limit the extent and scope of the Minister's power. We find no basis for excluding their reach from inchoate employment contracts, such as the one concluded with the first respondent. The contract can properly be regarded as an inchoate or incomplete contract, firstly by reason of his failure to assert his right to assume duty on the designated date and secondly by the withdrawal of his resignation letter from the Bindura Municipality where he remained in employment until his discharge for misconduct on 8 June 2021. Once he withdrew his resignation letter (and by his own admission long before he filed the application for a declarator), he ceased to be a prospective employee of the first appellant. He also concomitantly no longer had any existing, future or conditional right to employment to assert against the first appellant.

We therefore agree with Mr *Mafukidze* that the court *a quo* grossly misdirected itself in declaring the Municipality's lawful conduct, premised as it was on the earlier lawful conduct of the Minister, to have been *void ab initio*. We accordingly find merit in the first and fourth grounds of appeal.

COSTS

Notwithstanding, the dismissal of two of the four grounds of appeal, the first appellant has overally succeeded in its appeal. Costs must therefore follow the result.

DISPOSITION

It is accordingly ordered that:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

   "The application be and is hereby dismissed with costs."

GWAUNZA DCJ : I agree

MATHONSI JA : I agree

Bere Brothers, 1st appellant's legal practitioners.

Mafongoya & Matapura Law, 1st respondent's legal practitioners