**NKANYISO NDLOVU**

**Versus**

**CITY OF BULAWAYO**

**And**

**CHARLES MALABA**

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 11 FEBRUARY 2020 & 11 MARCH 2021

**Opposed Application**

*Z. C. Ncube* for the applicant
*P. Ncube* for the 1st respondent
*S. Nkomo* for the 2nd respondent

**MABHIKWA J:** The applicant and 6 others attended interviews in a recruitment process conducted from September 2017 to May 2018. This was for the post of Assistant Director of Health Services (Environmental Health). Both the applicant and the 2nd respondent were already employed by the 1st respondent at the time in different capacities. At the end of the whole process, the 2nd respondent was appointed or elevated to the post of substantive Assistant Director of Health Services with effect from May 2018.

Aggrieved by the 1st respondent's decision to appoint 2nd respondent, the applicant filed this application in the form of a declaratur alleging that the decision by the 1st respondent was unreasonable, unfair and unlawful.

The applicant went on a tirade with piece-meal criticism of 2nd respondent's academic qualifications and other credentials. He literally attempted to tear them to shreds and then came up with what he believes "worked against the 2nd respondent" in the interviews. His conclusion was that the 2nd respondent should not have been appointed to the post. Reading his application, particularly the criticism, one would for a moment forget that the applicant was himself an interviewee, not an interviewer.

A trend should never be inculcated, where would be, or former rival candidates in job interviews are allowed to tear each other's credentials to pieces to get the job. That is not the purpose of an interview. Much of the applicant's application is about that criticism. This court will not spend its time on the same. Suffices to say that what was done, and claimed by the applicant in this application could have been done by any other candidate blow by blow against him too. In fact there are temptations in 2nd respondent's opposing affidavit to do the same. It is noticeable from the opposing affidavit in paragraph7.1 to 7.7 that 2nd respondent has had to show that he has always been more experienced than the applicant from 1991 to 2018 when he was elevated to the current post. He even attempts to dress down the applicant in similar fashion when he states in paragraph 7.6 that;

> "I also wish to emphasise that when applicant joined 1st respondent in 2003 I basically trained him and when he was Senior Environmental Health Officer I was divisional Environmental Health Officer and he was reporting to me. I should also mention that the post of Divisional Environmental Health Officer is equivalent to that of Cleansing Superintendent, a post I held substantively but applicant is only acting." (Underlying is mine)

It is not the intention or spirit of interviews to have rival candidates making fun of each other's qualifications and literally insulting each other.

The applicant even attached as annexures, extracts of minutes wherein references were made to him having been recommended for appointment to the post in issue. Annexures "C", "E" and "F" are such annexures. Minutes by the Special General Purposes Committee are also attached. I take note however that these were internal documents in 1st respondent. There are some also that were against adopting the said recommendation as for instance in annexure "D".

In one instance, an extract explains completely the issue of qualifications and experience. In short, a person recommending or moreso an interviewee, cannot himself tie down an employer to a particular requirement (s) for an interview and then demand that he be appointed. In all earnest, and in simple common sense, such an employee would literally have employed himself and would be difficult to deal with.

An extract from a special council meeting (annexure "J" explains even more on the Town Clerk's recommendations. It is stated at paragraph 3 of that extract that;

> "The matter was … Councillors in their wisdom could appoint anyone who they felt was better qualified than others. He said that the objection that they had as management was now being withdrawn."

It is completely improper in my view for an interviewee to somehow get minutes of deliberations, internal recommendations objections etc and then push for his appointment.

**The law**

The Urban Councils Act (Chapter 29:15) section 141 deals with the appointment of employees. It reads;

> "141 Appointment and conditions of service of other employees
>
> 1) Employees of a Council, other than senior officials, shall be appointed by the Council"
>
> (a) On the recommendation of the town clerk in the case of a municipal.
>
> (b) On the recommendation of the Secretary in the case of a Town Council.

*In casu*, 1st respondent is a Municipal Council. The appointment of other officials is therefore governed by section 141 (1) (a). That is to say;

It is the Council that appoints and on the recommendation of the Town Clerk.

It must be noted that the Urban Councils Act, does not anywhere define the term "recommendation". It also does not spell out procedures. It does not spell out advertisements

and interviews' conduct. It does not provide for management, or special, or General Purposes Committees. 1st respondent, like all other public authorities, is free to devise procedures and parameters in accordance with the dictates of natural justice not in conflict with the empowering legislation.

The learned HUNGWE J (as he then was) in *Tengwe Estates (Pvt) Ltd* vs *Minister of Lands & Anor* 2002 (2) ZLR 137 @ 140 quoted Baxter on Administrative Law at pg 444 that;

> "Public Authorities are at liberty to devise to the procedures most appropriate for exercising their powers, as long as these procedures do not conflict with the provisions, express and implied of the empowering legislation. In many cases, legislation that expressly stipulates, certain formalities must be complied with and certain procedures be followed when the power is exercised.

Also in *Danikwa & Anor* vs *Director of Housing & Community Services & Anor* 2017 (1) ZLR 41 (S) MALABA JA (as he then was) at page 45E stated the following;

> "Even if a recommendation had been made that the appellant be promoted the Executive Committee would not have been bound by it. It would have been free to reject the recommendation. The executive Committee was not under a binding obligation to promote the appellant in the exercise of its duty." Emphasis is mine

In any event I agree with Mr P. Ncube for the 1st respondent that the meaning of the term "recommendation", its Oxford English grammatical meaning and its situational meaning which are almost the same, was defined in *Grown* vs *Detained Mental Patients Special Board* 1985 (1) ZLR 202 (HC), as simply a "report to advise."

It is never meant to direct or demand that a particular person be employed or promoted. That in essence is the meaning of the Urban Councils Act, [Chapter …..]. *In casu*, properly looked at, the General Purposes Committee and the Town Clerk recommend to Council on the best suited candidate after the interviews. Similarly, the Management Committee only recommends. Of the three, the Council appoints a person to the position interviewed for. The peremptory part is only that before making the appointment council must have had the Town Clerk's recommendation. The peremptoriness is not on the appointment itself. In other words, the Town Clerk's recommendation does not direct Council to appoint a particular person otherwise it ceases to be a recommendation. That section in the Act would have been worded very differently.

See also:

(a) *City of Gweru* vs *Josphat Munyari* SC-15-05 with very similar facts.
(b) *Marawa* vs *Min of Transport & Ors* 2000 (2) ZLR 225(S)
(c) *MDC* vs *The President of Zimbabwe & Ors* 2007 (1) ZLR 257 (H)
(d) *Megalithic Marketing (Pvt) Ltd* vs *City of Bulawayo & 2 Ors* HB_101-19

I am inclined to say therefore that Sikhangele Ndlovu (1st respondent's Chamber Secretary), could not have put it more aptly than she did at page 3 of her opposing affidavit – at page 41 of the record that;

"3.1 First and foremost, it must be emphasised and understood that the minutes of the bodies that applicant has attached to his application, that is the Management Committee and the General Purposes Committee are minutes of recommending bodies. As is clear from the word **"recommend"**, those bodies **merely recommend to the 1st respondent** and nothing else. Similarly, the Town Clerk, can make a recommendation to the 1st respondent and nothing else. **The decision maker however, always remains the 1st respondent.** Insisting that the recommendation of the recommender should be adopted at all costs, would be to relegate the 1st respondent to a rubber stamping body. It would therefore have no powers to make the decision. The recommender would have been elevated above the employer who is the 1st respondent in terms of the Urban Councils Act. No matter how one would look at the matter therefore, those actions by the bodies and or the Town Clerk will always remain recommendations.

3.2 Accordingly, 1st respondent has the sole prerogative to make the final decision. All that the 1st respondent must do, is to consider fully the recommendation that has been made by the Town Clerk and/or the General Purposes and/or the Management Committees. It must consider matters that have probative value and then make a decision. As long as 1st respondent has done that, the decision of the 1st respondent cannot be impugned. Indeed as long as 1st respondent has considered material that is relevant to the matter before it, the weight that the 1st respondent places on each aspect of the matter, is its sole prerogative. Its decision cannot be set aside merely because another person has decided otherwise on the same facts. Neither does it then become unfair or unreasonable for that reason. It is therefore improper for the applicant to characterise the decision of the 1st respondent as unfair, unreasonable and unlawful." (emphasis is mine)

There was the issue of qualifications and the Masters' Degree that applicant really hammered on. As shown above, it was explained in the papers and annexures on record that the "Masters' degree" was not a hard and fast requirement. From the papers it appears that the position applied for required, external candidates to possess a Masters' degree in Environmental Health Science/Public Health. Internal policy was that it was not a hard and fast requirement for the internal candidates to possess the Masters' degree. It is for those reasons that the Management Committee shortlisted a total of 7 candidates. Among the 7, only 1 was an external candidate obviously with a Masters' degree. The remaining six (6) were all internal candidates. Two (2), including applicant had a Masters' degree. Two (2), including 2nd respondent were studying their Masters' degree and the other two (2) had no Masters' degree and were not studying for same. This means that a total of four (4) of the 7 shortlisted candidates did not have a Masters' degree.

Regrettably, well knowing these facts and the council policy, the applicant in his application completely made it appear like it was only the 2nd respondent who was shortlisted and interviewed in clear "corruption" and "favouritism" with no Masters' degree.

This court need not repeat the need to come clean to any court. A party who conceals, circumstances, or distorts facts can only do disservice to himself. He takes away the court's confidence in him telling the truth elsewhere in his case.

In addition, there was the explanation of the facts, which applicant clearly knew that 2nd respondent on calculation from 1991 to 2003, was twenty two (22) years his senior at work with 1st respondent. He had also acted in various capacities including the post for which they were being interviewed. Applicant had not.

Then there was the allegation in applicant's answering affidavit that the 1st respondent's internal recruitment policies contravene a circular by the parent Ministry for local authorities. The circular is allegedly dated 22nd September 2017 and attached as annexure "L". I am inclined to agree with *Mr P. Ncube* for 1st respondent that coming as it does only in an answering affidavit, the allegation and annexure are improperly before the court. In any case, even if it were to be accepted that there was such a circular placed before the court properly, it would still remain a circular with no legal force or effect. It is not a statutory provision. It is not law. It remains null and void and the council's decision would still stand.

In any event also, I am in agreement that in terms of the High Court Act (Chapter 7:26) this court has a discretion in granting or not granting the relief, in that section 14 of the Act reads;

"The High Court may, in its discretion …."

The Act actually has double discretion in both "may" and "in its discretion". I am in agreement that applicant's application does not meet the requirements of section 14 and a declaratur in general. The 2nd respondent had raised in his response a point *in limine* on whether the applicant had properly filed a declaratur instead of a review. However, the point appears to have apparently been abandoned. At the hearing, all parties went straight into the merits, including counsel for the 2nd respondent though he still mentioned the point mildly in passing.

Finally, the order sought by the applicant was clearly incompetent. Applicant in effect sought to have from this court an order setting aside 2nd respondent's appointment by the 1st respondent. Of course there was an attempt in between arguments to amend the draft by the removal of paragraph 3 which sought to direct the 1st respondent to appoint the applicant to the position of Assistant Director Services (Environmental Health). In making such an order, the court would be usurping the powers granted to 1st respondent by section 141 (1) (a) of the Urban Councils Act, (Chapter 29:15). In fact, even in terms of section 3 and 4 of the Administrative Justice Act (Chapter 10:28) this court cannot make such an order. The court would be turning itself into an employer which it is not.

On the issue of costs, I agree with *Messrs P. Ncube* for the 1st respondent and *S. Nkomo* for 2nd respondent that this is a matter that applicant knew or at least should have known, it was doomed to fail. He brought it to court nonetheless and put the other parties unnecessarily out of pocket. I addition, he went on to make in the application, baseless allegations of corruption and favouritism on the part of 1st respondent with no attempt whatsoever to provide evidence to that effect.

In any event, and as already shown, the application itself has no merit.

Accordingly, the application is dismissed on the attorney and client scale.

*Messrs Ncube & Partners*, applicant's legal practitioners
*Coghlan & Welsh,* 1st respondent's legal practitioners
*Mathonsi Ncube Law Chambers,* 2nd respondent's legal practitioners