DISTRIBUTABLE (109)

MARY MUKONYORA
v
(1) MUNICIPALITY OF CHITUNGWIZA (2) DAVID DUMA N.O. (3) RAYMOND WENYEVE

SUPREME COURT OF ZIMBABWE
GUVAVA JA, BHUNU JA & KUDYA AJA
HARARE, JUNE 20 2020 & 8 OCTOBER 2021

L. Madhuku, for the appellant

T. L Mapuranga, for the first and second respondents

No appearance for the third respondent

KUDYA AJA: This is an appeal against the whole judgment of the High Court, Harare, dated 11 December 2019.

The court *a quo* dismissed with costs on the scale of legal practitioner and client the urgent chamber application for an interim interdict that was filed by the appellant on 8 October 2019. In the application, she sought to stay the effect of the resolution of the 459th Ordinary Council Meeting of the first respondent of 27 September 2019.

Consequent to the resolution, she was removed from the office of acting chamber secretary and replaced by the third respondent on 1 October 2019. She also sought a declaration of invalidity against both her removal from office and the third respondent's appointment, on the return date.

FACTS

The appellant has been in the employ of the first respondent as a substantive Human Resources Manager, since 2012. She was appointed as the acting chamber secretary by the management of the first respondent "with effect from 9 May 2018, until further notice."

The appointment was terminated on 1 October 2019 by the first respondent and effected by the second respondent by letter of the same date on the strength of the resolution of the 459th ordinary full council meeting. The basis of her removal was that she did not possess a law degree. In terms of a circular issued by the Secretary for Local Government, Public Works and National Housing on 22 September 2017, a law degree was an absolute requirement for the post. The third respondent is a holder of the required degree.

It was common cause that her appointment to and subsequent removal from the post of acting chamber secretary was not done in accordance with the provisions of s 133-135 and s 140 (3) of the Urban Councils Act [*Chapter 29:15*].

THE FINDINGS *A QUO*

The four preliminary points raised by the respondents that related to material non-disclosure, lack of urgency, defective certificate of urgency and non-citation of the councilors who passed the resolution to remove her and appoint the third respondent were all dismissed by the court *a quo*.

On the merits, the court *a quo* dismissed the application with costs on the scale of legal practitioner and client on the ground that the appellant failed to satisfy, on a *prima facie* basis, the requirements for the grant of an interim interdict. It held that the appellant had failed to

establish a *prima facie* right, which could protect her stay in the post. It reasoned that her claim to office was incorrectly premised on the provisions of s 133-135 of the Urban Councils Act. These provisions, *inter alia* require the substantive holder of the post to undergo a competitive interviewing process conducted and approved by the Local Government Board before assuming office.

The court *a quo* further found her appointment to have been an exercise of discretion by the first respondent. It also found that she was aware at the time that her appointment was of a temporary nature. In addition, it found that as her appointment had also been in breach of the circular of 22 September 2017, her removal was lawful.

The court *a quo* further found that the appellant had failed to establish the irreparable harm she stood to suffer if she were denied the interim relief sought. Her lack of a law degree adversely affected her performance in the post, as the chamber secretary was the chief legal counsel to the first respondent. It also found that she had other satisfactory remedies at her disposal under the Labour Act [*Chapter 28:01*], such as a claim for reinstatement alternatively damages. Lastly, it held that the balance of convenience was tilted in favour of the first respondent in that it was entitled to receive legal advice from a qualified and not from an unqualified incumbent.

Aggrieved by these findings, the appellant filed the present appeal in which she raised the following grounds of appeal.

THE GROUNDS OF APPEAL

1. The learned judge in the court *a quo* improperly exercised his discretion and erred at law in finding that the appellant had no *prima facie* right in that she was not a holder of a law

degree in circumstances where a law degree is not a legal requirement for the position of Chamber Secretary created under the Urban Councils Act [*Chapter 29:15*].

2. The learned judge in the court *a quo* improperly exercised his discretion and erred in law in not finding that there was irreparable harm as the actions of 1st and 2nd respondents of removing the appellant from the position of Acting Chamber Secretary were not permitted by the Urban Councils Act [*Chapter 29:15*].

3. In considering the requirements of 'alternative remedy' and 'balance of convenience', the learned judge in the court *a quo* improperly exercised his discretion by taking into account what he termed 'a directive issued by the Minister' when such directive could not override the provisions of the Urban Councils Act [*Chapter 29:15*].

She sought the vacation of the order *a quo* with costs and its substitution by the interim relief sought.

The sole issue that arises from these grounds of appeal is whether the court *a quo* was correct in dismissing the urgent chamber application.

THE LAW

The relevant statutory provisions

The Urban Councils Act *[Chapter 29:15]*

The appointment of substantive office holders in local authorities, such as the first respondent, is governed by Part IX of the Urban Councils Act [*Chapter 29:15*] (the Act). Section 131 thereof defines a "senior official" as "a town clerk, a chamber secretary, a head or deputy head of department or such other employee of a council as may be prescribed". In terms of s 133 (1), the chamber secretary is the head of the administrative and secretarial services to council. The appointment process of a chamber secretary is prescribed in s 133 (2) as read with s 135 (1) (a) of the Act. The Council submits a list of suitable nominees to the Local Government Board, which in turn approves the nominees, conducts interviews and selects the suitable candidate for the post

for appointment by the council concerned. The Local Government Board is empowered by s 123 (1) (d) to prescribe the qualifications and appointment procedures for senior officials of local authorities.

In terms of s 140 (1) and (2) a senior official is discharged from office on "notice of not less than three months or summarily on grounds of misconduct, dishonesty, negligence or any other ground that would in law justify discharge without notice" and with the approval of the Local Government Board. Section 140 (3) prescribes the disciplinary procedure to be followed in respect of a senior official, other than the town clerk. It states that:

> "(3) If it appears to a town clerk that any other senior official of the council has been guilty of such conduct that it is desirable that that official should not be permitted to carry on his work, he—
>
> (*a*) may suspend the official from office and require him forthwith to leave his place of work; and
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> (*b*) shall forthwith notify the mayor or chairman of the council, as the case may be, in writing, of such suspension.

The other employees of council are appointed by council on the recommendations of the town clerk. The procedure for their discharge from office and discipline is similar to that of senior officials. The only difference being that the approval of the Local Government Board is not required for their discharge.

The Minister of Local Government, Public Works and National Housing is imbued with the power to make regulations for the better management of local authorities by s 234 (1) (h) of the Act. Lastly, s 313 (1) and (3) of the Act subjects council to the overarching mandatory policy control of the Minister.

THE INTERPRETATION ACT [*CHAPTER 1:01*]

The application of the Interpretation Act to the construction of any enactment must, in terms of s 2, be consistent with the intention, purpose or context of the enactment. An enactment is defined as any Act, statutory instrument, regulation or ordinance. It does not include a circular or letter or directive issued by any Government ministry that is not made under an enactment. Section 26 confers on a lawfully appointed acting holder of a statutory post the authority to exercise any power, jurisdiction, right or duty reposed in such a post while s 28 prescribes that an appropriate enactment shall confer on an appointing authority the discretionary correlative power, jurisdiction and right, to, *inter alia*, remove, suspend, reappoint, reinstate or replace an acting holder of such a post.

CASE LAW

In our law, an appellate court may interfere with the discretion of a lower court or tribunal in limited circumstances such as where there has been a clear misdirection or irrationality on the part of the court or tribunal. See *Innscor Africa (Pvt) Ltd v Letron Chimoto* SC 8/15 at p 2, *Barros & Anor v Chimpondah* 1999 (1) ZLR 58 (S) at 62G-63A and *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 669F-670.

The requirements for the exercise by a court of its discretionary powers to grant an interim interdict are settled. These are, a *prima facie* right, though open to doubt, irreparable harm actually committed or reasonably apprehended, the absence of an alternative satisfactory remedy, and the balance of convenience in favour of the *dominus litis*. See *Setlogelo v Setlogelo* 1914 AD 221 at 227 and *Judicial Service Commission v Zibani & Ors* 2017 (2) ZLR 114 (S) at 124F. In addition, an interim interdict cannot be granted against past invasions nor against lawful conduct.

This court pronounced itself on this point in *Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority* 2014 (2) ZLR 78 (S) at 84F-G thus:

> "An interdict is ordinarily granted to prevent continuing or future conduct which is harmful to a prima facie right, pending final determination of that right by a court of law. Its object is to avoid a situation in which, by the time the right is finally determined in favour of the applicant, it has been injured to the extent that the harm cannot be repaired by the grant of the right. It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a *prima facie* right. It is also axiomatic that the prima facie right is protected from unlawful conduct, which is about to infringe it. An interdict cannot be granted against past invasions of a right nor can there be an interdict against lawful conduct. *Airfield Investments (Pvt) Ltd v Minister of Lands & Others* 2004 (1) ZLR 511 (S); *Stauffer Chemicals v Mosanto Company* 1988 (1) SA 895; *Rudolph & Anor v Commissioner for Inland Revenue & Ors* 1994 (3) SA 771."

In *Kombayi & Ors v Minister of Local Government* HB 57/16 at p 8, it was amongst other things, held that a Provincial Administrator could not, in the absence of an enabling provision in the Urban Councils Act, act on behalf of the Minister.

ANALYSIS OF THE LAW AND THE FACTS

Mr *Madhuku,* for the appellant, contended that the court *a quo* erroneously relied upon the circular of 22 September 2017 to find the removal of the appellant from office to have been lawful. He argued that the Urban Councils Act did not make any provision for the Secretary of the parent ministry to issue policy directives to local authorities. Instead, the power to do so was vested in the Minister by s 313. He therefore submitted that the circular did not have any legal effect on the appointment to and removal of the appellant from office. He also argued that, on appointment, the appellant assumed the full powers, jurisdiction, rights and duties of a substantive chamber secretary in accordance with the provisions of s 26 of the Interpretation Act. He further argued that, as a senior official, she could only be removed from office for misconduct in terms of

s 140 (3) as read with s 26 of the Interpretation Act or by operation of law on the appointment of a substantive incumbent.

Regarding the adverse finding *a quo* that the constituent elements of an interim interdict had not been established, he contended that the appellant had established them. He contended that she had established a *prima facie* right to the protection of her stay in office by s 140 (3) of the Act. He therefore submitted that her summary removal and its consequences were unlawful, void *ab initio* and subject to arrest by an interim interdict. These contentions were predicated on para 21 of the founding affidavit of the appellant in which she said:

> "I am advised that the scheme of the Urban Councils Act *[Chapter 29:15]* is that senior officials of councils must be highly professional and independent in the execution of their duties. For this reason, the Act rigidly regulates their appointment and conditions of service. It has been emphasized to me by my legal practitioners that any aspect of appointment, discipline or removal contrary to the Act is void." (Underlining for emphasis.)

He further contended that her permanent removal from office constituted irreparable harm. Lastly, he argued that the only satisfactory remedy to her "reinstatement" was the interim interdict sought. He, however, did not motivate the balance of convenience factor.

Per contra, Mr *Mapuranga*, for the first and second respondents, contended that the appellant could not seek an interim interdict against a removal that was not only lawful but had also taken place. He also argued that the appellant failed to establish a *prima facie* right that could be protected by a temporary interdict. He further argued that the ultimate relief of reinstatement that the appellant sought could be satisfactorily achieved by claiming reinstatement or damages in the Labour Court.

We agree with Mr *Mapuranga* that the logical conclusion of the argument advanced by Mr *Madhuku* can only be that, as the appointment process used in respect of the appellant did not rigidly follow the provisions of s 133 and 135 of the Act, her assumption of office was void *ab initio* and of no force or effect. Accordingly, she could not claim the benefit of the removal process that is prescribed for senior officials in s 140 (1) (2) or (3) of the Act when she had not been properly appointed to that office.

We also agree with Mr *Madhuku* that The Urban Councils Act does not confer any authority on the Secretary to issue binding circulars or directives to local authorities. The power to do so is vested in the Minister by s 313 of the Act. See *Kombayi & Ors v Minister of Local Government, Public Works and National Housing, supra* at p 8. It is clear to us that the court *a quo* misdirected itself in assuming without deciding that the circular had been lawfully issued. It further misdirected itself in basing its finding on the absence of a *prima facie* case on the lawfulness of the circular. We are therefore at large to determine the issues afresh.

The starting point in determining whether the appellant was lawfully removed from office lies in the proper construction of s 26 of the Interpretation Act. It states that:

> "**26 Holders of offices**
> Where any enactment confers a power, jurisdiction or right, or imposes a duty, on the holder of an office as such, then the power, jurisdiction or right may be exercised and the duty shall be performed, from time to time, by the holder for the time being of the office or the person lawfully acting in the capacity of such holder." (Underlining for emphasis).

The section confers on an acting holder the same power, jurisdiction, right and duty vested in a substantive incumbent. The section critically accords the exercise of the power, jurisdiction and right and the performance of duty to an acting holder who is lawfully appointed

into office. The section does not expressly or impliedly deal with the appointment, disciplinary, discharge or removal of acting office holders. It merely recognizes that such office holders exercise the same authority and perform the same functions as the substantive holders of office. The reliance placed by the appellant on s 26 of the Interpretation Act was therefore misconceived.

A closer look at the appellant's letter of appointment shows that she was appointed as acting chamber secretary by management. It is common cause that she was not appointed in accordance with the mandatory requirements of s 133 (2) as read with s 135 (1) (a) of the Act. Her averment in para 21 of the founding affidavit, as reinforced by Mr *Madhuku* in oral argument that any aspect of appointment, discipline or removal contrary to the Act is void singularly upended the validity of her appointment. The appellant cannot approbate that her removal was unlawful for breaching s 140 (3) and reprobate that her appointment, in breach of s 133 (1) and 135 (1) of the same Act, was valid.

The common cause facts show that the appellant was not appointed as an acting chamber secretary in terms of the provisions of the Urban Councils Act. They also reveal that she was not removed from office under the provisions of s 140 (1), (2) or (3) of the same Act. The provisions of either s 26 or 28 of the Interpretation Act do not therefore apply to her.

We take the view that she was appointed in terms of the common law. It is apparent to us that the letter of appointment constituted a valid contract of employment between her and the first respondent. It was freely concluded between them. It was a contract of limited duration, which would terminate on "further notice." By taking up the post, she accepted this essential term of her contract. The "until further notice" of termination came on 1 October 2019. The appellant

failed to show that the termination of her contract of employment was unlawful. The first respondent had once terminated a similar previous appointment of the appellant in April 2017.

In view of the axiomatic pronouncement made by this Court in the *Mayor Logistics* case, the appellant cannot interdict, whether temporarily or permanently, lawful conduct. We therefore agree with Mr *Mapuranga* that the termination was perfected on 1 October 2019 with the removal of the appellant from office and the contemporaneous appointment of the third respondent thereto. By the time the appellant filed the application that gave birth to this appeal on 8 October 2019, the removal and appointment were a *fait accompli*. An interim interdict was an inappropriate remedy to stop what had already taken place. It was futile of her to close the stable door after the horse had bolted.

The conclusion by the court *a quo* that the termination of the contract was lawful, though for the wrong reasons, was therefore correct.

The effect of the above finding is that the appellant could not establish a *prima facie* right, even one open to doubt. The absence of a *prima facie* right negates consideration of the other constituent factors relevant for the granting of an interim interdict. It is therefore not necessary to determine whether the findings of the court *a quo* in respect of these factors were correct.

COSTS

The respondent sought costs on the ordinary scale. We see no basis for departing from the established principle that costs must follow the cause.

DISPOSITION

Accordingly, the appeal be and is hereby dismissed with costs.

GUVAVA JA : I agree

BHUNU JA : I agree

Lovemore Madhuku Lawyers, appellant's legal practitioners

Kantor & Immerman, 1st and 2nd respondent's legal practitioners