CHITUNGWIZA RESIDENTS TRUST
versus
THE MINISTER OF LOCAL GOVERNMENT
AND PUBLIC WORKS
and
THE PROVINCIAL DEVELOPMENT COORDINATOR
HARARE METROPOLITAN PROVINCE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 14 October 2021 & 14 September 2022

Opposed Application

CHITAPI J: The background facts to this application are largely common cause. The applicant is a registered trust and is concerned with inter-alia governance issues of the Chitungwiza Municipal area. The first respondent is the Minister responsible for the administration of the Urban Councils Act [*Chapter 29:15*]. The second respondent is the Harare Metropolitan Province Provincial Administrator. He co-ordinates development issues within the Harare Metropolitan Province. The second respondent is appointed by the first respondent in his capacity of the Minister of Local Government and Public Works. For the avoidance of doubt it must be noted that Chitungwiza Municipal area falls under the area of jurisdiction of Harare Metropolitan Province.

The applicant seeks a review of a directive given by the first respondent to the applicant. The directive is dated 27 July 2020. It was addressed to all Mayors and Chairpersons of Urban Councils in Zimbabwe. I reproduce the directive which reads;

> **"MINISTRY OF LOCAL GOVERNMENT AND PUBLIC WORKS**
>
> REFERENCE: CX/137
>
> 27 July 2020
>
> To all Mayors and Chairperson of
>
> **Urban Councils**
>
> **ATTENDANCE AT COUNCIL AND COMMITTEE MEETINGS OF MINISTRY OFFICIALS**
>
> It has come to my attention that there is a growing non-compliance to the Constitution, the Statute Law and Government policy and circulars by Councils and that councillors are not always given all the options available to enable them to make proper decisions.

In view of his scenario, it has now become necessary to monitor meetings of Councils more effectively in the interests of transparency accountability and good governance.

In view of Section 96(10) of the Urban Councils Act, I hereby direct, in terms of Section 313 of the same Act that the Mayors or Chairpersons issue a standing invitation to the relevant Provincial Development Co-ordinator, District Development Co-ordinator or their designated officer, to attend all committee and full Council meetings with immediate effect. Thereafter, the Town Clerk/Secretary must ensure that the agenda for all meetings is dispatched to the Provincial Development Co-ordinator and District Development Co-ordinator to enable then to attend.

This directive is given in the national interest in ensuring that all tiers of government operate legally and in harmony with each other.

Hon J.G. Moyo [MP]

Minister of Local Government and Public Works

Copied The Honourable Ministers of State for Provincial Affairs and Devolution

The Permanent Secretary for Local Government & Public Works

The Acting Provincial Development Co-ordinators"

Applicant considers that the directive by the first respondent is unlawful and seeks its setting aside on review. For his part, the second respondent also issued a general directive dated 3 December 2022. The directive was addressed to the addresses who appear thereon. I reproduce the directive.

"HARARE METROPOLITAN PROVINCE

Ref:C/15

03 December 2020

The Acting Town Clerk City of Harare

The Acting Town Clerk Chitungwiza Municipality

The Town Secretary Ruwa Local Board

The Town Secretary Epworth Local Board

RE: EMPLOYEES UNDER INVESTIGATION AND THOSE OUT ON BAIL

Reference is made to the above subject;

Please be advised that employees who are currently out on bail should not be allowed back at work until investigations and the cases are concluded at the courts. We note with concern that employees currently out on bail are colluding with some council officials to be reinstated or elevated to senior positions within council in order to influence ongoing investigations as well as intimidate other staff members from testifying and cooperating with investigators. We are

seriously concerned that promotions are being awarded to the same employees as a reward for protecting their interests. I therefore urge all local authorities to please respect all ongoing investigations and desist from moving staff around as a way of hiding corrupt activities. Please be assured will not hesitate to enforce the law for your interference with investigations.

Kind Regards

Mr. T. Muguti

Provincial Development Coordinator

HARARE METROPOLITAN PROVINCE

Cc Minister of Local Government and Public Works

Minister of State for Provincial Affairs and Devolution

Secretary of Local Government and Public Works

Chairperson Zimbabwe Anti-Corruption Commission

Head- Police Anti-Corruption Unit

Head- Special Anti- Corruption Unit

File"

The applicant also seeks the setting aside on review of the directive by the second respondent as quoted which it considers to be unlawful. The applicants pray in the alternative that the court should issue a declaration to the effect that both directives in issue should be declared to be inconsistent with s 165 of the Constitution and that the directives should be struck down.

The background facts to the application are largely common cause. The applicant impugns the authority or legality of the issuance of the directive dated 27 July 2020 quoted herein by the first respondent. In the directive or letter the first respondent indicated that it had come to his attention that councils were not complying with the laws of the land, Government policy and circulars. The first respondent also noted that councillors were not properly advised of options available to them in making informed decisions in council matters. It was the view of the firs respondent that the situation needed that meetings of the councils be monitored "more effectively in the interests of transparency, accountability and good governance."

The Minister then indicated that he was making a direction in terms of s 96(10) of the Urban Councils Act as read with s 313 of the same enactment. The first respondent then directed that the Mayors and Chairpersons of Urban Councils should extend a standing invitation to provincial development coordinators, district development co-ordination or their

designated offices to attend all council and committee meetings of the Urban Councils "with immediate effect." The Town Clerks or secretaries as the case may were directed to ensure that the said invited personal were served with the agenda of such meetings in advance. Significantly, the first respondent ended the directive by stating that:

> "This directive is given in the national interest in ensuring that all tiers of government operate legally and in harmony with each other."

The applicant as already noted considers the letter and instructions to be a nullity for abrogating the law. It is necessary to recite the provisions of the law which the first respondent purportedly acted upon. Section 96(10) provides as follows:

> "96(10) subject to subsection (11), no person, other than the members of and the secretary to, a standing committee and the town clerk shall be present at a meeting of that standing committee:
>
> Provided that of –
>
> a) the attendance of employee of the council is required by the town or
> b) the Chairman of the standing committee has invited an employee or other person to attend a meeting in connection with the consideration of any matter;
>
> that employee or person may attend
>
> ii. if the mayor is not a member of a standing committee he or in his observe the deputy or acting mayor shall be entitled to attend and to participate in any discussion at a meeting of a standing committee but he shall not be entitled to vote on any matter before that standing committee."

The first respondent also indicated that he acted in terms of s 313 of the Urban Councils Act. It provides as follows:

> "313 Minister may give directions in matter of policy
>
> 1) Subject to subsection (2), the Minister may give a council such directions of a general characters as to the policy it is to observe in the exercise of its functions, as appears 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 subsection (1) he shall inforce the council concerned in writing of his proposal and the council shall within 30 days or such further period as the Minister may allow, submit to the Minister 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)."

The applicant averred that the provisions of s 96(10) of the Urban Councils Act was specific as to who is permitted to attend meetings of a standing committee. The applicant

further submitted that there is no discretion given in the said section for the invitation of persons other than those listed therein to attend a standing committee meeting.

The respondents argued that in terms of the provisions of s 265 of the Constitution generally there should be co-ordination between central government provincial and metropolitan and local authorities. They argued that directives by the respondents were well intended and made in the spirit of the paid provisions. However, s 265(3) that provides as follows:

> "265(3) An Act of Parliament must provide appropriate mechanisms and procedures to facilitate co-ordination between central government provincial and metropolitan councils and local authorities."

The Act of Parliament is the Urban Councils Act. It provides in s 96(10) aforesaid for the constitution of a standing committee of council and procedures to follow wherein for example the mayor may attend a committee meeting and take part in deliberations. However, the mayor has no vote when resolutions are passed.

The respondents also argued that the court should not interfere with the respondents' directions because the directives were transparent and not tainted with bias, collusion favouritism, bribery corruption or underhand dealings. They submitted that none of the grounds of review set out in s 27 of the High Court Act, [*Chapter 7:06*] had been established by the applicant. I disagree. Section 29 of the High Court Act, provides as follows:

> "29(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court, shall be-
>
> a) Absence of jurisdiction on the part of the court, tribunal or authority concerned;
> b) Interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned as the case may be
> c) Gross irregularity in the proceedings or decision."

The applicant set out 4 grounds of review as follows-

> "1. Absence of jurisdiction: By issuing the directive of 27 July 2020 as amplified by the minute of 3 December 2020, the Minister acted beyond the powers allocated to him under the Urban Councils Act. The directive is *ultra vires* the Urban Councils Act [Chapter 29:15]. The directive is very specific rather than general in its nature; and it relates to operations of councils rather than higher level policy matters.
>
> 2. Gross irregularity in the decision: The 1st Respondent did not sufficiently engage with local authorities as required under section 313(2) of the Urban Councils Act [*Chapter 29:15*]. Once he issued the directive, the Minister expected it to be complied with expeditiously and without considering any representations that might be made to him pursuant to section 313(2) of the Act.

3. Illegality in that the decision-making authority, the Minister of Local Government and Public Works, the 1st Respondent herein is guilty of an error in law. Section 101(6) of the Urban Councils Act [*Chapter 29:15*], which is unambiguous states that, 'no meeting of a committee may invite representatives of any authority or board concerned with local government functions to attend meetings of the committee as observes.' Furthermore, the 1st Respondent misconstrues sections 96(10) and 313 of the Urban Councils Act [*Chapter 29:15*]. As a result of the error of law, the 1st Respondent failed to appreciate the nature of the discretionary powers vested in him by section 313 to give directives of a policy nature; and the discretionary powers vested in Town Clerks or Chairpersons of any council standing committees by section 96(10) to invite any employee or any person that they may require to attend committee meetings.

Additionally, the 1st Respondent misconstrues section 265(1) of the Constitution of Zimbabwe that requires all tiers of government to cooperate with each other and coordinate their activities. By issuing a directive, as he has done, the 1st Respondent encroaches upon the 'geographical, functional or institutional integrity of another tier of government 'and acts in a manner that is completely at a tangent with the spirit and ethos of devolution that is contemplated in the Constitution.

4. Irrationality and unreasonableness: the 1st Respondent's decision directing local authorities to invite officials in his ministry to all committee meetings of councils is so outrageous in its defiance of logic that no reasonable authority having properly applied its mind to the circumstances at hand would arrive that decision. The Constitution of Zimbabwe requires that powers and responsibilities be devolved to lower tiers of government. Yet, the 1st Respondent seeks to centralise power and responsibilities."

In my view, the applicant's contention is that the directives by the first and second respondents are *ultra vires* the powers which they have in terms of the provisions Urban Councils Act. If so, then the respondents would not have jurisdiction to make them. The directives would be irregular and illegal. The issue of irrationality and unreasonableness would not arise because if the directives are unlawful then they are void for all purposes and the court treats them as not having been made or as not being there. The directives are considered as being void *ab initio*. Rationality, irrationality and unreasonableness only arises from a consideration of something which is extant and not from an invalid or void act. The *dicta* of Lord Denning in the case *Macfoy* v *United Africa Co-Ltd* (1961) 3 All ER 1169(PC) at P 11721 which has been cited in numerous cases in this and many other jurisdictions come to mind. The learned judge stated:

> "If an act is void then it is a nullity. It is not only bad, but incurably bad. There is no need to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on it and expect it to stay there. It will collapse."

See *Mutyasera* v *Gonyora & Ors* HH 180/14; *T M Supermarkets (Pvt) Ltd* v *Itayi, Nkomo and Ors* SC 26/18.

It was submitted on behalf of the first respondent as the Minister in charge of the administration of the Urban Councils Act that he has power to issue directives on policy matters. Counsel for the respondents cited section 124 of the Urban Councils. The Provisions of the section provide that the Minister may give to the "Local Government Board" such directives of a general character as to the policy which the board may exercise in its functions in the national interest. Counsel also juxtaposed and sought to draw a parallel between the provisions of section 124 and 313 which as already quoted provides for the power of the Minister to give directives of a general character to councils to observe in the exercise of council functions in the national interest. Counsel argued that the first respondents' directive had to be considered against the powers given in s 313. Counsel submitted that the underlying reason for the directives was noble and that not unreasonable nor malicious.

In my view counsel for the respondents and in fact the respondents as well judging from the opposing affidavit are mistaken on the interpretation of the law in the purported issuing of the directives which are impugned by the respondents. The real issue for determination is narrow. The general directives referred to in s 313 must not lead to a breach of the other provisions of the same enabling statute. The general rule of statutory interpretation in the context of arguments raised herein is that provisions of an Act of Parliament must be construed as being internally consistent with other provisions. Thus, the provisions of s 96(10) and 313 of the Urban Councils Act must not be construed to conflict with each other. Moreover, the provision of a general intent in an enactment should not be interpreted to conflict with a provision that expresses an express or specified intent.

The crisp question in my view is simply whether or not the first respondent may act in terms of the provisions of s 313 of the Urban Councils to vary or alter the composition of a standing committee of council as provided in s 96(10). If the first respondent cannot lawfully vary or alter the composition of the standing committees then the directive which he gave would not be founded upon the law and would be illegal invalid and void. Where an authority has acted illegally the action or conduct done would be reviewable and a declaration of the illegality declared by the court.

The provisions of s 96(10) of the Urban Council Act are worded in clear and unambiguous terms. The principle *expressio unius est exclusion alterius* is applicable in this case in interpretating s 96(10). Simply defined it means that to express one is to exclude others. The principle is used in statutory interpretation to ascertain the legislative intent. Thus where the enactment clearly expresses something then apart from what is expressed, everything else

is excluded. In the case of *Eagle Insurance Company Ltd* v *Grant 1*989(3) ZLR (SC) at 280F; KORSAH JA stated-

> "A rule which is invariably resorted to in the interpretation of statutes; the *expressio unius* rule- is that the mention of one or more things of a particular class may be regarded as silently excluding all other members of the class."

In the case of *Nkomo and Anor* v *Attorney General and Ors* 1993(2) ZLR 422(SC) at 434, GUBBAY CJ speaking to *expressio unius* rule stated-

> "…….This is no more than an application of the rule embodied in the maxim *expressio unius est exclusio alterius.* It draws attention to the fairly obvious linguistic point that in many contexts the mention of some matters warrants an inference that other cognate matters were intentionally excluded….."

In my judgment therefore, the fact that s 96(10) is specific on the persons who constitute the standing committee of a council implies that any other persons not listed therein are excluded. In short, only members of the standing committee, its secretary and town clerk are permitted to attend. Outside of the listed persons, the provision only allows for the Mayor to attend but not vote. The provision is also specific as to the exclusion of any other persons because it provides that "no other person other than…..", the listed persons "shall" be present at a meeting of the standing committee.

The provisions of s 313 must be construed as applicable to matters which do not involve the variation of the express provisions of s 96(10). By issuing a directive that the persons other than those expressed in s 96(10) should attend all committees and council meetings the first respondent misconstrued the powers which he enjoys under s 313 of the Urban Councils Act. It is the first respondents' duty to give effect to the provisions of s 96(10) of the Urban Councils Act. Section 313 does not give the first respondent power to alter or vary any express provision of the Act. In any event if the first respondent erroneously thought that he could lawfully issue the directive, there is no indication in that directive to show that the provisions of s 313 were followed in issuing the same. Section 313 provides that if the Minister considers that it is necessary to issue a direction, the Minister must engage council by providing council with the written proposal of the intended proposal. Council is given 30 days or such time as the Minister may specify to express its views on the proposals and financial implications. The directive was just issued without following the provisions aforesaid. The directive would still be invalid for this other reason.

It follows from my reasoning that the directive of 27 July 2020 by the first respondent is reviewable for illegality and is invalid and void *ab initio*. To the extent that the second respondents purported directive does not show the basis for his interference with the operations of the authorities addressed, it equally is invalid. Both directive must suffer the same fate. They must be set aside.

The applicant has also prayed for an order that the court should declare that the directives made by the first and second respondents are inconsistent with the constitution. There is no need for the declaration. The court has a discretion to make a declaratur or to refuse to do so. Having made a finding that the directives are invalid and inconsistent with the provisions of s 96(10) of the Urban Councils Act and further having found that in any event the first respondent did not follow the provisions of s 313 there is no necessity to make a declaration of constitutional invalidity of the directives. The directives do not pass validity in terms of the parent Act. The invocation of the constitution is not necessary to resolve the dispute. I therefore refuse to make the declaratur sought.

The last issue concerns costs. The applicant has in the draft order prayed for costs of the application against the first and second respondents. The applicant did not motivate the claim for costs either in the heads of argument or founding affidavit. The respondents have prayed for the dismissal of the application with costs. In the opposing affidavit and heads of arguments there is no motivation for costs. Where a party does not advance argument on a prayer for costs, the court will exercise its discretion on costs taking into account the nature of the application and the reasonableness or veracity of the opposition filed. In my view, this case involves issues of good governance on the part of the central and local government arms of one government. It is clear that the arguments arising boil down to a misinterpretation or misappreciation of the scope of the invocation of the powers of the Minister. There was no malice demonstrated on the part of the first and second respondents. Their actions arose from an error of law. The interests of justice will in my view be best served by not making an order of costs because the dispute is a public interest and policy one where essentially the court is called upon to interpret provisions of a legislation, the Urban Councils Act, on which parties are not agreed. There was strictly speaking no victor or loser in this application but related litigants who have a common goal to practise good governance not agreeing on the extent of powers which one has over the other in relation to the provisions of s 96(10) as read with s 313 of the Urban Councils Act.

Resultantly, the following order is made:

IT IS ORDERED THAT

1. The directives made by the first respondent dated 27 July 2020 as amplified by the subsequent one dated 6 October 2020 both under reference CX/137 be and is hereby set aside.
2. The directive of the second respondent dated 3 December 2020 be and is hereby set aside.
3. There be no order of costs.

Mupanga and Bhatasara, applicants' legal practitioners
Civil Division, first and second respondents' legal practitioners