CLINTON MASANGA
and
LINDIWE MUKOKA
and
TABETH MARWIZI
and
ACKSON MUSASA
and
CATHRINE SITHOLE
and
EVERMORE MUBAYI
and
SELINA MAREVANGEPO
and
GETRUDE MARWISA
and
LAWRENCE IMBAYARWO
versus
MUTASA RURAL DISTRICT COUNCIL

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 18 and 28 July 2022

OPPOSED APPLICATION

D. Tandiri, for the Applicants
J Zviuya, for the Respondent.

MUZENDA J: The nine (9) residents of Tsvingwe High Density Suburb, Penhalonga, Mutasa Rural District Council approached court seeking the following relief as it appears in the draft order annexed to the application.

"IT IS ORDERED THAT:

1. *The Respondent's failure to ensure supply adequate, constant clean and potable water be and is hereby declared to be a violation of Applicants' right to clean safe and potable water as provided for under section 77 (a) of the Constitution of Zimbabwe, 2013.*
2. *The respondent be and is ordered to supply adequate, constant, clean and potable water to the Applicants' premises within thirty (30) days*
3. *The Respondent shall bear the Applicant's costs of this suit"*

The application is opposed by the Rural District Council, the local authority

Background

All the nine applicants reside on diverse properties situate at Tsvingwe, Penhalonga and get water from the respondent. As stated by applicants in their affidavits before September 2021 all used to get constant water supply from respondent on a daily basis. However erratic supply of water emerged in September 2021 plunging residents into looking for alternatives both clean and unclean water. Respondent without prior warning to residents rationed water supply to the residents and, supplied it at night twice per week. Applicants are crying stating that the water does not meet their primary and domestic requirements and they have resorted to unsafe, untreated sources exposing themselves to diseases and cyanide and other chemicals brought by artisanal miners panning in streams and rivers. They are in need of clean hygienic water during this Covid -19 pandemic. The whole society from clinics, hospitals, schools and households are in dire need of clean constant water supply.

The respondent was approached by applicants about the matter and to the applicants there is no response from the local authority. Applicants feel the respondent is in violation of the provisions of the Constitution, hence they decided to come to court for a *mandamus* and *declarator*.

The respondent raises four preliminary points. According to the respondent applicants have no authority and *locus standi* to institute the current proceedings. To the respondents, applicants failed to prove that they are residents of Tsvingwe High, Density suburb who have subsisting leases with the respondent.

Secondly respondent added that applicants committed a fatal misjoinder of the City of Mutare the sole supplier of water to the Respondent.

Thirdly respondent contend that applicants did not exhaust available domestic remedies like them requesting a meeting with the respondent. Lastly the respondent objects to the nature of relief being sought by the applicants. To the respondent the relief being sought is vague and imprecise. To the respondent applicants should be specific as to the provisions of the Constitution violated by the respondent. In addition, it is the averment of the respondent that applicants failed

to plead requirements for a *mandamus* and respondents pray that all the four points *in limine* be upheld and that the application be dismissed with costs.

On the merits, respondents contend that respondent is not the primary provider of water services in the District but that City of Mutare solely determines the volume and quantities it chooses to sell to the respondent. Of late City of Mutare has introduced stringent water rationing which in turn has incapacitated respondent to in turn provide water to its clients. In addition, respondent supplies its customers and ratepayers with other services which eats into budget and hence is unable to sink boreholes or supply bowsers to residents on a daily basis. Respondent complain of strained budget and call upon the applicants to increase their storage capacity to store as much water as possible when respondent supplies it for the two days period. Once City of Mutare relaxes the rationing of water respondent undertakes to increase supply of the water. Respondents added that due to global economic crisis attaining, it has no other alternative to source water from. To the respondent their application has no merit and it equally prays for the dismissal of the application with costs on legal practitioner-client scale.

The applicants also raised a point *in limine* attacking respondent's opposing affidavit arguing that the deponent is not authorized to state facts on behalf of the Rural District Council. To the applicants a failure by respondents to attach a Council resolution authorizing Mr George Tonderai Bandure, its Chief Executive Officer, paralyses the opposition and prays that the court must treat the application as unopposed. Applicants cited case law authorities[1] in support of its preliminary point.

In response to applicants' preliminary point, respondent contended that the failure to attach a council resolution by the respondent is not fatal to render the opposition a nullity. Respondent cited case law[2] authorities to motivate its argument. Respondent prayed for the dismissal of the point *in lemine*.

I will start with preliminary parts raised by both sides and in order to adequately look at respondent's point *in limine* it is incumbent upon the court to decide whether applicants' point in

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[1] *Madzinare & Ors* v *Zvaridza & Ors* 2005 (2) ZLR 514 (s*) Tin Gold – Arcturus Mine (Private) Limited* v *Zvanyadza Pari and Environmental Management Agency* HH 62/21 *Dendeuka* v *Paper Place* (Pvt) Ltd HH 195/11. Highlighting the importance of authorization of a person deposing an affidavit in court proceedings.

[2] *Tianze Tobacco Co (Pvt) Ltd* V *Muntuyedwa* HH 626/15 *The Trustees of the united Mutare Residents & Ratepayer*s *Trust* v *City of Mutare & Another* HMT 3/19

limine is dispositive of the opposing papers in order to determine whether a proper notice of opposition has been filed by the respondent.

Whether or not the deponent to the opposing affidavit was authorized to act for on behalf of the respondent?

It is apparently not in dispute that the deponent, Mr George Tonderai Bandure, is the Chief Executive Officer of Mutasa Rural District Council. I did not see any pleadings from the applicants disputing this aspect. Applicants sued a local authority whose work is daily managed by a Chief Executive Officer and all applicants pay levies to the respondent on regular basis. If Mr Bandure lacks legal capacity or is not authorized by the respondent to represent the latter then that would strengthen applicants' application than prejudicing them. In as much as a council resolution was necessary to meet all tenets of law, in the same vein, failure by respondent ta attach such does not automatically obliterate opposing papers filed by the respondent and adequately responded to by the applicants in their replying affidavits. I conclude that respondent's opposing papers are properly before the court and will dismiss the preliminary point raised by the applicants. I will now proceed to deal with respondent's preliminary points.

Whether or not the applicants have locus standi to institute these proceedings?

Respondent impugns applicants' paper for failure to place evidence before the court to prove that all the nine applicants reside in Tsvingwe surburb. To the respondent applicants were supposed to attach current lease agreements with respondent. Applicants in response went on to attach receipts of payments issued by the respondent. They had also averred in their founding affidavits that they occupy particular stand numbers in Tsvingwe Surburb, Penhalonga. In respondent's papers I did not hear respondent disowning any of the stands where applicants reside. The receipts produced and attached by applicants to their affidavits to me prove that they are indeed *bona fide* Tsvingwe residents and respondent provides water to them. They thus have *locus standi in judicio* to sue the respondent', that preliminary point is meritless and it is dismissed.

Whether the applicants commit a fatal non-joinder of City of Mutare?

The respondent submitted that applicants are aware that water is supplied mainly by City of Mutare and the latter solely determines the volume of water to be given to the respondent. The contract between respondent and City of Mutare is privy to those two local authorities. Applicants pay for services to the respondent and it is the respondent who bills applicants not City of Mutare. There is no direct supply line of water by City of Mutare to the applicants. Applicants are not privy to the terms and conditions of water supply to the respondent by the City of Mutare. In any case I am persuaded by the applicants averments that City of Mutare does not have a direct and substantial interest in the outcome of this application. In any case Rule 32 (ii) of High Court Rules, Statutory Instrument 202 of 2021 stipulates that "*no cause or matter shall be defeated by reason of the misjoinder or non-joinder*" this preliminary point is dismissed.

Whether applicants did not exhaust domestic remedies?

Respondent is of a strong view that instead of approaching courts applicants ought to have opened dialogue to resolve the matter. The record shows that applicants' legal practitioners penned a letter to the respondent, however I did not see any response to show that respondent was amenable to negotiations. I wonder then as to the form of dialogue or domestic remedies perceived by the respondent. It is the duty of the respondent in its corporate governance obligations to account to the rate payers as a service provider to explain challenges so as to inform the stakeholders. If such transparency lacks, respondent cannot be heard of exhausting domestic remedies. The point *in limine* is dismissed.

Whether the nature of the relief sought is vague and imprecise.?

Respondent contends that applicants' draft order sounds like a declaration of fundamental rights as per s 85 of Zimbabwean Constitution yet the application itself does not say so. It is also the view of the respondent that applicants have failed to meet the basic requirements of a *mandamus* and the pleadings of applicants lack that prerequisite and hence fatal to the application.

On this preliminary point applicants submit that to the *contra* the relief sought is clear, precise and concise. To the applicants they wish to get relief as espoused by s 77(a) of the Constitution. All they seek is an order compelling the respondent to supply adequate, constant,

clean and potable water to their premises. Applicants added that the court is at large to grant the order as prayed or vary it as empowered by r 59(27)(b) of High Court Rules. This point *in limine* by the respondent is equally convoluted as submitted by the applicants. I fail to see the basis of this preliminary point. Sometimes parties raise preliminary points for the sake of doing so. This is one of these occasions where a party deliberately creates confusion by simply alleging a point which does not assist such a party. In future such a course of action should be visited by an order of costs. As a result, I see no basis for this preliminary point and I will dismiss it.

On the merits

There is a Liberian Proverb which states that "*If the townspeople are happy, look for the chief*". Indeed, water is life and where the residents are in need of water they feel they have a case well suitable for deliberation by these courts. In this particular application the townspeople are not happy so they have come to court for a compelling order. What does the law say?

The law

Section 77 of the Constitution of Zimbabwe, No.20 Act of 2013 provides as follows:

"*Every person has the right to –*

(a) Safe, clean and potable water, and

(b) ……

and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of this right"

Section 71 of the Rural District Councils Act [Chapter 29:13] as read together with s 28 of the First Schedule to the Act reposes a local authority to "provide and maintain for domestic irrigation, industrial or mining purposes a sufficient supply of water for any inhabitants of the council area".

Case law authorities

Respondent in its heads cited the matter of *Hilton Chironga and Rashid Mahiya* v *Minister of Justice, Legal and Parliamentary Affairs, Minister of Home Affairs, Minister of Defence and*

The Government of the Republic of Zimbabwe[3] where the Constitutional Court cited with approval the case of *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* [4]where the Supreme Court clearly spelt out the requirements of a *mandamus* as follows:

> "(*1) A clear or defined right – this is a matter of substantive law.*
>
> *(2) An injury actually committed or reasonably apprehended: an infringement of the right established and resultant prejudice.*
>
> *(3) The absence of a similar protection by any other ordinary remedy.*
>
> *The alternative remedy must (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; and (d) grant similar protection.*
>
> *The above explanation highlights that the requirements for a mandamus and mandatory interdict are the same as those for a prohibitory interdict*".

The justiciability of s 77 of the Constitution was dealt with in the matter of *City of Harare* v *Mushoriwa* [5] where it was held:

> *"The first point to note about s 77 of the Constitution is that it is a fundamental right enshrined in Part 2 of the Declaration of Rights. As such it is directly enforceable in terms of s 85 of the Constitution if it has been, is being or is likely to be infringed.*
>
> *My reading of s 77 of the Constitution is that the possible violation of its provision is only implicated where the State or a local authority fails to provide any or adequate water supply to any given community or locality. It might also arise, as appears to have been recently admitted by the Appellant itself, having afforded adequate water supply to most inhabitants it is then discovered that such supply is in fact contaminated and therefore only potable at great risk*."[6]

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[3] CCZ 14/20
[4] 1996 (2) ZLR 52(s) at p56
[5] SC 54/18 cited by the applicants
[6] See also *City of cape Town* v *Strumper* 2012(4) SA 207 (SCA) where the Supreme Court concluded that "*the right to water was underpinned by the Constitutional and Statutory provisions*" Also the case of *Mazibuko* and others v *City of Johannesburg* and others 2010 (4) SA 1(CC) where it was held that "*Water is life. Without it nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it we will die. It is not surprising then that any Constitution entrenches the right of access to water*"

In *Cil Blending Enterprises (Pvt) Limited* v *Minister of Labour*[7] the learned Judge sought further to clarify a *mandamus* in conjunction with the justiciability of a Constitutional remedy and held as follows:

> "*A mandamus or mandatory interdict is a judicial remedy recognized under our law. It is applied against public authorities. It is an order which requires a public authority to comply with a statutory duty imposed upon it or one which requires a public authority to perform some act which remedies a state of affairs brought by its own administrative action. It is, therefore, a judicial remedy available to enforce the performance of a specific statutory duty or to the effects of an unlawful action already taken. In this application I am concerned with the former to order or not to order the respondent to perform a specific statutory duty placed upon him. The remedy will be granted where the public authority is under a clear duty to perform the act ordered*."

In the matter of *Khauyeza* v *Mandizha and another*[8] the learned Judge clearly dealt with the step by step test to establish whether someone's rights have been infringed and if so whether he should receive protection or a remedy. These steps were captured thus.

1. Firstly, a court must enquire whether a right does exist. Does domestic or international law prescribe such a right? This is normally a matter of fact. *Viz*, is there a law in existence which prescribes a particular right?
2. If the right does not exist, the matter ends there. However, if the right does exist, the second step is to enquire whether there was an interference with the right. This is also a matter of factual evidence, *viz*, what actions were committed by an authority, and did they impact on a person's enjoyment of his existing rights? In other words, was the applicant prevented from enjoying the right that the law has prescribed for his benefit?
3. Should there be no interference with the right, then that will be the end of the matter. However, if an applicant was prevented from enjoying duly prescribed rights then an enquiry must be made whether the interference was prescribed by law. Any interference with a right which is not sanctioned by law must of necessity result in a remedy accorded to the applicant against interference. In assessing whether the interference was prescribed

[7] 2001(2) ZLR 446 (H) per CHINHENGO J
[8] 2018 (1) ZLR 601 (H) per CHAREWA J on p 608A-609B

by law, regard must be heard to the accessibility of the law sanctioning such interference and its foreseeability as well as the quality of law i.e. whether it is compatible with Constitutional and/ or treaty obligations.

4. Where the interference was prescribed by law, then the applicant, is entitled to a remedy. On the other hand, where the interference was sanctioned by law, the next step is to enquire whether the interference pursues a legitimate aim. That the interference is sanctioned by law is not enough justification unless the objective of the interference is legitimate or the interference is within legitimate expectations i.e. was there sufficient basis in the domestic law?
5. If the objective of the interference is not legitimate, an applicant must be accorded relief. However, even where the objective of the interference was legitimate, it must be necessary in a democratic society for it to pass muster. The word "necessary" has been interpreted NOT to be synonymous with "indispensable" or to be as flexible as "describable" "useful" or "reasonable" but to denote whether there is a pressing social need. The question a court must address is therefore whether there are relevant and sufficient reasons for the interference, and, if so, whether the interference was proportional as between the interests of the individual and his institution or society at large? Where the interference was in the general interest it must be manifestly without reasonable foundation.
6. Ultimately, the authorities should be accorded a margin of appreciation to protect other person's rights and be able to manage or carry out their executive function. At the end of the day, there must be a fair balance or reasonable relation of proportion to avoid an individual excessive burden which would amount to too wide a margin accorded to the authorities.

The sum total of the test is that, as a general rule, an individual must have peaceful and unfettered enjoyment of his lawful rights. Any deprivation of such enjoyment must be both lawful and on good faith, otherwise, the individual is entitled to a remedy or compensation.

Application of the law to the facts

Applicants properly in my view approached the court to assert their fundamental rights in terms of s 85(1)(a) and (d) of the Constitution. Respondent does not spiritedly dispute the

justiciability of s 77(a) of the Constitution which bestows on the respondent the inalienable duty to provide applicants, and all Tsvingwe residents at large with clean, safe and potable water. The respondent tried to technically hide the proverbial finger by seeking to disqualify applicants from exposing its shortcomings in as far as provision of water is concerned. Even if a non-resident of Tsvingwe had raised such a complaint against respondent and outlines the basis of such action, a court would have looked at the grounds to justify intervention on behalf of the voiceless who are affected by the breach of s 77(a) of the Constitution. *In casu*, I have already made a finding that all applicants have a *locus standi* to approach the court for a relief.

Respondent admits in principle that it has a Constitutional obligation to supply clean and uninterrupted potable water to its residents but diverts the attention of all by saying the interruption and unsystematic supply of water is caused by Mutare City Council which introduced water rationing. Respondent also seeks sympathy of the court by citing dearth of financial resources and a cacophony of commitments to other services which it provides to its consumers. Undoubtedly so, these are mitigatory grounds relied upon by the respondent, but I did not hear counsel for the respondent submitting that these factors justify the respondent from meeting the requirements of s 77(a) of the Constitution, in other words I did not hear the applicants saying that these budgetary and financial constraints absolve it from abiding with s 77(a) of the Constitution.

It is common cause from the facts outlined by the applicants that their rights to clean water has been infringed and such a right exists in terms of s 77(a) of the Constitution in tandem with various regional and international instruments and that position needs no reemphasis. The respondent has evidently interfered with the right and it so admitted in its papers that it supplies water at night twice or so per 2 weeks and that applicants must acquire more and bigger storages to store water. The next factor to consider then is for the court to look and inquire whether the interference was prescribed by law. *In casu*, the respondent did not consult the appellants nor inform them about the water rationing, respondent did not publish a by law to legalise its action. As clearly spelt out in the matter of Khanyeza.[9]

> *"Any interference with a right which is not sanctioned by law must of necessity result in a remedy accorded to the applicant against such interference. In assessing whether interference was prescribed by law, regard must be had to the accessibility of the law sanctioning such interference*

[9] Supra, at p. 608 C-D per CHAREWA J

and its foreseeability as well as the quality of the law, i.e., whether it is compatible with Constitutional and or treaty obligations."[10]

In this application, respondent did not refer the court to any legislation to justify its conduct and the court infers that the lack of referral to any law is an admission that the respondent's interference with applicants' rights is not sanctioned by any law. Hence where the interference was not prescribed by law then the applicants are entitled to a remedy. Finally, the authority, the respondent should be accorded a margin of appreciation to protect other person's rights and be able to manage or carry out their executive function. As such there must be a fair balance or reasonable relation of proportionality to avoid an individual excessive burden which would amount to too wide a margin accorded to the authorities. The sum total of the test is that, as a general rule an individual must have peaceful and unfettered enjoyment of his lawful right. Any deprivation of such enjoyment must be both lawful and on good faith otherwise the individual is entitled to a remedy or compensation.[11]

Respondent, as already stated herein, did not cite any legislation requiring or obliging applicants to comply with in order to justify interference or limitations on the enjoyment of water rights of the applicants. The Constitution also is unambiguous about an individual's right to life, but "life" is constituted by various salient complementary components like clean uncontaminated water, shelter, food and entertainment, at the core of all this water is correctly equated to life without it there is no "living" and water also ensures prevention of other waterborne diseases which are many to mention and more particularly during the advent of the disastrous and catastrophic Covid-19 cleaner hygienic policies can only be met by provision of clean and potable water at all intervals then people like the applicants can vow to conquer Covid-19. I am satisfied that that duty to supply such clean and potable water is vested on the shoulders of the respondent as a local authority on behalf of the central government to meet all its obligations to supply such vital substance to its residents at all times.

I wish to add that the respondent does not abdicate on its obligations but cry on overdependence on Mutare City Council. In my view, the execution of the court order is secondary,

[10] Kopp v Switzerland ECHR 13/1997/797/1000 at paragraph 55
[11] See Khanyeza, *supra*, at p. 609 A-C

the primary fundamental issues is for this court to declare that respondent meets its constitutional and statutory obligations as anticipated and provided by both municipal/ domestic as well as international conventions in meeting the fundamental rights of the applicants. It is not a tall order in my view and the respondent is financially capable to sustain such an obligation from the revenue it collects from the consumers if that revenue collection is exclusively and properly used towards clean water. The application succeeds but I will try to balance the period within which respondent must put its house in order.

Disposition

IT IS ORDERED THAT

1. ***The respondent's failure to ensure supply of adequate constant clean and potable water be and is hereby declared to be a violation of all 9 applicants' rights to clean, safe and potable water as provided for under s 77(a) of the Constitution of Zimbabwe 2013.***
2. ***The respondent be and is hereby ordered to supply adequate, constant, clean and potable water to the applicants' premises within sixty (60) days.***
3. ***The respondent to pay costs of this application.***

Tandiri Law Chambers, applicants' Legal Practitioners
Bere Brothers, respondent's Legal Practitioners