REPORTABLE (3)

BRIAN LESLIE JAMES
v
(1) ZIMBABWE ELECTORAL COMMISSION (2) MINISTER OF LOCAL GOVERNMENT RURAL & URBAN DEVELOPMENT (3) MINISTER OF JUSTICE & LEGAL AFFAIRS (4) MINISTER OF CONSTITUTIONAL & PARLIAMENTARY AFFAIRS (5) ATTORNEY-GENERAL OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA, GWAUNZA JA, GARWE JA, GOWORA JA, PATEL JA, HLATSHWAYO JA & CHIWESHE AJA
HARARE, JUNE 28 & NOVEMBER 28, 2013

T Mpofu, for the applicant

T M Kanengoni, for the first respondent

M Chimombe, for the fifth respondent

No appearance for the second, third and fourth respondents

PATEL JA: After hearing argument from counsel, the court was unanimous in granting this application in the following terms:

> "1. It is declared that the applicant is not disqualified from standing as a candidate for election as a councillor in the forthcoming municipal elections.
>
> 2. There shall be no order as to costs."

We further indicated that our reasons would follow in due course and these are those reasons.

BACKGROUND

The applicant is a registered voter who was duly elected as a councillor and mayor of Mutare in 2008. He was suspended from his position as councillor in January 2012 by the second respondent, the Minister of Local Government, on allegations of misconduct under s 114 of the Urban Councils Act [*Cap 29:15*]. Following the second respondent's failure to determine those allegations within 45 days, the applicant challenged his continuing suspension before the High Court in Case No. HC 3875/12. That matter is awaiting set-down for hearing and is yet to be determined.

The applicant has been requested by his constituents to stand as an independent candidate in the council elections to be held on 31 July 2013. However, s 119(2)(i) of the Electoral Act [*Cap 2:13*] disqualifies a suspended councillor from being re-elected. The applicant avers that this provision infringes his fundamental right to stand for election to public office in terms of s 67(3)(b) of the Constitution. He further avers that the provision is unfair, unreasonable and arbitrary because it imputes guilt where it is not proven and operates without interrogating the circumstances of the suspension. It is also unjustifiable as it presupposes that the person suspended is not suitable for public office. Moreover, it is illogical and inutile and does not serve any public interest because a suspended councillor can still stand as a candidate for parliamentary or presidential elections. It has dire consequences since there is no remedy once the elections are held, even if the councillor is subsequently vindicated and absolved of guilt.

For all of these reasons, the applicant contends that the provision is unconstitutional insofar as it disqualifies suspended councillors from standing for re-election. The matter is not only of personal importance but also of national importance. The applicant accordingly seeks an order striking out the provision as being inconsistent with the Constitution. He also seeks an order directing the relevant nomination court to accept and not reject his nomination papers on the ground of his suspension.

The first respondent, the Zimbabwe Electoral Commission, has stated that it would abide the decision of the court as it has no factual basis to controvert the applicant's position. The second respondent, despite his obvious and direct interest in the matter, has not filed any notice of opposition. Nevertheless, the fifth respondent, the Attorney-General, has opposed the application and the relief sought. He avers that suspension under s 114 of the Urban Councils Act is designed to safeguard the integrity and well-being of the urban council concerned. A councillor who is suspended, so it is argued, must have committed some wrong. Consequently, to allow the re-election of a suspended councillor would circumvent and defeat the purpose and effect of suspension. Section 119(2)(i) of the Electoral Act is intended to protect the public interest, public confidence and public assets. Accordingly, the restriction against re-election imposed by that provision is not unreasonable but necessary in a democratic society.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 67 of the Constitution guarantees the political rights of all Zimbabwean citizens. Subsection (3) deals specifically with electoral rights as follows:

"Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right –

(a) to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and

(b) to stand for election to public office and, if elected, to hold such office."

The limitation of any fundamental right or freedom enshrined in the Constitution must conform with subs (2) of s 86 which provides that:

"The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right or freedom concerned;

(b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;

(e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and

(f) whether there are any less restrictive means of achieving the purpose of the limitation."

Section 114 of the Urban Councils Act regulates the suspension and dismissal of councillors as follows:

"(1) Subject to this section, if the Minister has reasonable grounds for suspecting that a councilor –

(a) has contravened any provision of the Prevention of Corruption Act [*Cap* 9:16]; or

(b) has contravened section *one hundred and seven* section *one hundred and eight* or section *one hundred and nine*; or

(c) has committed any offence involving dishonesty in connection with the funds or other property of the council; or

(d) has been responsible—

(i) through serious negligence, for the loss of any funds or property of the council; or

(ii) for gross mismanagement of the funds, property or affairs of the council;

whether or not the councillor's responsibility is shared with other councillors or with any employees of the council; or

(*e*) has not relinquished office after his seat became vacant in terms of this Act;

the Minister may, by written notice to the councillor and the council concerned, suspend the councillor from exercising all or any of his functions as a councillor in terms of this Act or any other enactment.

(2) Any allowance that is payable to councillors in terms of this Act shall continue to be paid to a councilor who has been suspended in terms of subsection (1) for so long as he remains a councillor, unless the Minister, by notice in writing to the council concerned, directs otherwise.

(3) As soon as is practicable after he has suspended a councillor in terms of subsection (1), and in any event within forty-five days, the Minister shall cause a thorough investigation to be conducted with all reasonable dispatch to determine whether or not the councillor has been guilty of any act, omission or conduct referred to in that subsection.

(4) If, following investigation, the Minister is satisfied that the grounds of suspicion on the basis of which he suspended a councillor in terms of subsection (1) have been established as fact, he may, by written notice to the council and the councillor concerned, dismiss the councillor, and the councillor's seat shall thereupon become vacant.

(5) A person who has been dismissed in terms of subsection (3) shall be disqualified from nomination or election as a councillor for a period of five years."

It seems necessary at this juncture to note in passing the procedure to be followed before and after the suspension of a councillor in terms of s 114. Subsection (1) requires that the suspension must be effected by written notice. It is trite that any administrative decision adversely affecting the rights of another must be accompanied by the reasons for that decision. The letter of suspension *in casu*, dated 19 January 2012, is vague in that it refers to an earlier cautionary letter but does not itself spell out the reasons for suspension. This omission renders questionable its procedural validity.

Additionally, subs (3) enjoins the Minister to cause a thorough investigation to be conducted in order to determine the guilt or otherwise of the councillor, within 45 days of his or her suspension. Thereafter, upon being satisfied of his or her guilt, the Minister must decide under subs (4) whether to dismiss the councillor for misconduct. The precise time limit for the making of such decision is not specified. However, having regard to the drastic nature of suspension and its highly prejudicial effects, it seems that the decision must be taken with reasonable expedition.

In the instant case, although all the relevant facts are not before us, it would appear at first glance that the second respondent has failed to comply with the procedural requirements of s 114.

Subsections (1) and (2) of s 119 of the Electoral Act prescribe the qualifications and disqualifications for election as a councillor. The relevant provisions stipulate that:

"(1) Any person who –

(a) is a citizen of Zimbabwe; and

(b) has attained the age of twenty-one years; and

(c) is enrolled on the voters roll for the council area concerned; and

(d) is not disqualified in terms of subsection (2);
shall be qualified to be elected as a councillor.

(2) A person shall be disqualified from being nominated as a candidate for or from election as a councilor if –

(a) – (h) …….. ; or

(i) he or she is suspended in terms of section 157 of the Rural District Councils Act [*Chapter 29:13*] or section 114 of the Urban Councils Act [*Chapter 29:15*], as the case may be, from exercising all his or her functions as a councillor or, having been dismissed in terms of either of those sections, he or she is disqualified under the section concerned from nomination or election as a councillor."

CONSTITUTIONALITY OF SECTION 119(2)(i) OF THE ELECTORAL ACT

As I have already stated, s 67(3)(b) of the Constitution entrenches the right of every citizen to stand for and hold public office. There is no doubt that s 119(2)(i) operates to derogate from that right in relation to a councillor who is either suspended or dismissed from office. The crux of the present matter is whether or not that derogation falls within the bounds of permissible limitation under s 86(2) of the Constitution. The fifth respondent contends that it is justifiable in the general public interest, while the applicant argues that the public interest only applies where a councillor is dismissed and not where he or she is merely suspended.

As has been held with respect to the Declaration of Rights in the former Constitution, any derogation from a fundamental right or freedom must be strictly and

narrowly construed. There must be a rational connection between the objective of the derogation and the implementing law. Moreover, the means employed should not impair the right in question more than is necessary to achieve the declared objective. See *Minister of Home Affairs & Others* v *Dabengwa & Another* 1982 (1) ZLR 236 (S) at 244B-C; *S* v *Hartmann & Another* 1983 (2) ZLR 186 (S) at 192H; *S* v *Ncube & Others* 1987 (2) ZLR 246 (S) at 264F.

Section 86(2) of the Constitution is essentially a restatement of the criteria for permissible derogation from constitutional rights as enunciated by the Supreme Court in *Nyambirai* v *National Social Security Authority & Another* 1995 (2) ZLR 1 (S). In the words of GUBBAY CJ at 13C-F:

> "In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:
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> (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
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> (ii) the measures designed to meet the legislative object are rationally connected to it; and
>
> (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

In my view, the reasons advanced by the fifth respondent as justifying the electoral disqualification of a suspended councillor do not stand the test of these established criteria or those set out in s 86(2) of the Constitution. First and foremost, the fifth respondent has failed to demonstrate any rational connection between the undeniably valid objective of protecting and preserving public assets and the need to

disqualify a suspended councillor from standing for re-election. The fact that a councillor is suspended on mere suspicion of misconduct cannot possibly justify the inference that he or she must have committed some unspecified wrongdoing or that he or she poses a threat to public assets. The very suggestion of any such inference is an affront to the time-honoured presumption of innocence. It can only apply, depending on the facts, where the suspended councillor is found guilty of misconduct after due process. The impugned provision penalises a councillor, even though no finding of guilt has been established, and even where he or she might subsequently be exonerated and absolved of any guilt. It undoubtedly goes considerably further than is necessary to achieve any legitimate public interest objective.

Secondly, the effect of the provision is irreversible, conceivably for the ensuing period of five (5) years. If the suspension of a councillor is nullified and set aside at any time after nomination day, he or she is nevertheless disqualified from standing for re-election until the next council election is held. The law cannot justifiably be allowed to disenfranchise a presumptively innocent citizen for five (5) years. This is particularly pertinent to the impugned provision inasmuch as it is open to the possible abuse of eliminating a political opponent from candidature by the simple expedient of suspension and, more pointedly, suspension founded on mere suspicion. This possibility of the provision being applied *mala fide* serves to further attenuate its rationality. As was aptly observed by the Indian Supreme Court in *Thappar* v *State of Madras* [1950] SCR 594 (SC) at 603:

> "So long as the possibility (of a limitation) being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void".

In conclusion, the constitutionality of s 119(2)(i) as it is presently framed cannot be sustained for the following reasons. The purpose of the provision is unquestionably noble and eminently defensible. It is to ensure that individuals who have a proven record of corruption or dishonesty in the management of public funds or public assets do not qualify for council office. On the other hand, there can be no doubt that the constitutional right to stand for and hold public office is a fundamental right of paramount political and civic importance. Any curtailment of that right must be very closely circumscribed so as to avoid the right being rendered nugatory. As I have already indicated, the impugned provision cannot be justified as being necessary in the general public interest. Nor can it be recognised as serving any other interest alluded to in s 86(2)(b) of the Constitution. Moreover, the nature and extent of the limitation imposed by the provision far exceed the means necessary to achieve its primary purpose. In short, the effect of the provision is to abridge a fundamental right in a manner that is not reasonably justifiable in a democratic society based on respect for civic liberties and freedom.

Obviously, the provision cannot be struck down in its entirety but only to the extent that it applies to persons who are suspended from council office in terms of s 157 of the Rural District Councils Act [*Cap 29:13*] or s 114 of the Urban Councils Act [*Cap 29:15*]. It remains unimpeachable insofar as it applies to those who have been dismissed in terms of either of those sections and are for that reason disqualified from

nomination or election as councilors. It is accordingly declared that s 119(2)(i) of the Electoral Act is unconstitutional *pro tanto*.

CHIDYAUSIKU CJ: I agree.

MALABA DCJ: I agree.

ZIYAMBI JA: I agree.

GWAUNZA JA: I agree.

GARWE JA: I agree.

GOWORA JA: I agree.

HLATSHWAYO JA: I agree.

CHIWESHE AJA: I agree.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners
Nyika Kanengoni & Partners, first respondent's legal practitioners
Civil Division of the Attorney-General's Office, fifth respondent's legal practitioners