FARAI MUSHORIWA
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 5 June 2013, 23 July 2013, 2 August 2013, and 30 April 2014.

Urgent chamber application

T. Mpofu, for the applicant.
C. Kwaramba, for the respondent.

BHUNU J: This is an urgent chamber application for a spoliation order coupled with an interdict. The Applicant seeks a final order as amended in the following terms:

1. That the termination by Respondent of the Applicant's water supplies on the basis of a disputed water bill and in the absence of a court order is unlawful self-help.
2. Respondent and all its employees be and are hereby interdicted from interfering whatsoever with, disrupting or terminating Applicant's water supply without a court order.
3. That the respondents shall pay the costs of suit on the higher scale of legal practitioner and client scale only if it opposes the application.

In the interim the Applicant seeks a provisional order directing the Respondent to reconnect water supplies at his premises. He also seeks an interim interdict barring the Respondent and its employees from interfering with his possession of the premises by interfering or terminating water supplies to the premises and costs at the higher scale

The bulk of the facts giving rise to the application are not in dispute. The applicant is a lawful tenant and occupant of flat number 12 at Northcliff block of flats in the City of Harare. The respondent is the City of Harare, a municipal authority duly constituted in terms of the Urban Councils Act [*Cap* 29:15].It is the sole supplier of domestic water in the city including the Applicant's block of flats.

Sometime in May 2013 the respondent sent the Applicant a bill of US$1 700-00 claiming payment for water services rendered. The Applicant flatly disputed owing the amount claimed or any other amount for that matter. He maintained that he had always paid his bills in full and on time. He has attached proof of payment to his application. He argued that the amount claimed pertains to a bulk meter not connected to his premises.

On 31 May 2013 the Respondent without any further ado unilaterally and arbitrarily disconnected water supplies to the Applicant's premises prompting him to file this urgent chamber application the following day for a spoliation order directing the Respondent to restore water services pending resolution of the dispute by the courts.

Having regard to the urgency of the case when seized with the matter I immediately ordered by consent of the parties restoration of the water services forthwith pending the determination of this application to avert a catastrophe as one cannot survive without water. The Respondent duly complied thereby ameliorating the urgency of the matter.

Despite the existence of a lawful consent court order barring the Respondent from disconnecting water services from the Applicant's premises until the finalisation of this application, the Respondent still went ahead and defiantly disconnected water services from the Applicant's premises with impunity without any Court order or legal justification. In spite of the Applicant's pleas pointing out that the Respondent was in contempt of Court it insolently refused to reconnect water supplies to his premises. It had again to take the intervention of this Court and threats of imprisonment for contempt of court for the City Council authorities to restore water to the Applicant's premises.

The Respondent raised a number of preliminary issues regarding the propriety of some issues placed by the applicant before this Court. Whatever complaints the Respondent might have had, have since been addressed by the amendments that I granted during the course of this hearing.

The undisputed facts before me clearly establish that prior to the dispossession the Applicant was in peaceful and undisturbed possession of the water connection in dispute. The only issue that arises is whether such dispossession was lawful.

There is no substance in the Respondent's claim that the Applicant was no longer in peaceful and undisturbed possession of the water connection because of its threats to disconnect water to the premises. That argument goes against public policy that no one should benefit from his own inequity. If its argument is sustained the Respondent stands to

benefit from its own wrongs or inequities should the threats turn out to be unjustified or baseless.

The doctrine against deriving benefit from one's own wrongs was amply articulated with characteristic lucidity in the famous American case of *Riggs* v *Palmer* (1899) 115 NY 506, NE 188. In that case the New York court had this to say:

> "All courts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found his own claim upon his own inequity or to acquire property by his own crime."

This Court came to the same conclusion in the case of *Wang & Ors.* v *Ranchod & Ors* 2005 (1) ZLR 415 where a wife who had shot and killed her husband wanted to be appointed executrix dative to his estate to the exclusion of his relatives.

I accordingly hold that the matter is properly before me and proceed to determine the application on the merits.

The dispute that has arisen between the parties has to do with their respective rights and obligations in respect of the provision of water to a citizen by a municipal authority such as the City of Harare. The parties are generally agreed that the Respondent has an obligation to provide water and the applicant in turn is obliged to pay for it. The point of departure is what happens in the event that there is a dispute regarding payment. In that case, is the respondent entitled to self-help and to unilaterally cut off water supplies to a citizen without recourse to law? Put differently is the respondent entitled to self help without recourse to the courts of law and be a law unto itself.

The Respondent's argument is that by virtue of s 8 of the City of Harare's water by-laws S.I 164 of 1913 as read with s 198 (3) and s 69 of the third Schedule to the Urban Councils Act it is clothed with unfettered discretion to disconnect water supplies to a citizen at will without recourse to the courts of law. The by-law provides as follows:

"8. The council may, by giving 24 hours' notice, in writing <u>without paying compensation</u> and without prejudicing its rights to obtain payment for water supply to the consumer, discontinue supplies to the consumer:

(a) If he shall have failed to pay any sum which <u>in the opinion of</u> the Council is due under the conditions or the water by-law.
(b) …"

The Applicant has countered that the by-law relied upon by the Respondent is *ultra vires* section 198 as read with s 69 (2) (e) of the third schedule to the parent Act and s 77 of the Constitution.

Section 198 (3) of the Urban Councils Act provides as follows:

> "198
>
> (3) Subject to this Act Council shall have power to do any act or thing which, in the opinion of the Council is necessary for administering or giving effect to any by- laws of the Council"

Section198 is however subject to s 69 (2) (e) of the third Schedule to the Act that specifically provides for the disconnection of water supplies to a consumer. That section deliberately omits the words 'in the opinion of'. It reads:

> "(2) Without derogation to the generality of subparagraph (1), by-laws relating to matters referred to in that subparagraph may contain provision for all or any of the following-
>
> (e) Cutting off the supply of water after not less than twenty-four hours' notice on account of failure to pay any charges which are due.

It is abundantly clear that s 69 (2) (e) of the third Schedule to the Act which takes precedence over s198 (3) deliberately omits the words "in the opinion of". The effect of that omission is to divest the Respondent of the unfettered discretion upon which it seeks to rely on in justifying its unlawful conduct. Thus the respondent retained the words 'in the opinion of' in its by-law in order to unlawfully confer on itself a discretion not granted to it by the enabling parent Act.

In other words, when it comes to disconnection of water on account of failure to pay, the City Council's opinion does not matter it can only disconnect water supplies on no less than 24 hours' notice upon proof that the consumer has failed to pay any charges which are due.

What this means is that the Respondent cannot lawfully disconnect water from a consumer unless it has established that the amount claimed is actually due. That then brings us to the question as to who is to determine whether or not the amount claimed is actually due.

The Respondent has sought to arrogate to itself the right to determine when the amount claimed is due by simply laying claim to payment without proof by due process or recourse to the courts of law. What it seeks to do is to oust the jurisdiction of the courts so that it can

operate as a loose cannon and a law unto itself. It seeks to extort money from the Applicant without the bother of establishing its claim through recognised judicial process. The disconnection of water supplies without recourse to the courts of law is meant to arm twist and beat the Applicant into submission without the bother of proving its claim in a court of law.

The right to water is a fundamental right enshrined in s 77 of the constitution of Zimbabwe which provides as follows:

> **"77. Right to food and water**
>
> Every person has the right to-
> (a) Safe clean and portable water; and
>
> (b) Sufficient food;
>
> And the State must take reasonable legislative and other measures within the limits of the resources available to it, to have a progressive realisation of this right"

Section 44 of the Constitution imposes a duty on the State and all its institutions and agencies to respect fundamental human rights and freedoms. It reads:-

> "The State and every person, including juristic persons and every institution and agency of the government at every level must respect, protect and fulfil the rights and freedoms set out in this chapter."

The Respondent being a public body and institution of local government, it follows that it cannot deny a citizen water without just cause. It is trite that it is the function of the judiciary to interpret and enforce the law when a citizen complains that his human rights have been violated. Section 162 of the Constitution clothes this Court with judicial authority and s 165 (1) (c) provides that,

> "The role of the courts is paramount in safeguarding human rights and freedoms and the rule of law."

In the words of Francis Bennion in his book *Statutory Interpretation 1984,* the courts are best suited to interpret and give effect to the law when he says at page 50:

> "A Court is an agency charged with the function of exercising the judicial power of the State. Only a court as thus defined has the power authoritatively to determine what the law is, and therefore what is the legal meaning of a relevant enactment."

Those sentiments accord with s 171 of the Constitution.

In terms of s 171 of the Constitution this Court as the High Court of Zimbabwe has full original jurisdiction over all civil and criminal matters throughout the country. It has unlimited jurisdiction save where its power has expressly been curtailed by Parliament for instance in labour matters see *Tuso* v *City of Harare* 2004 (1) ZLR 1 (H)

This court having been conferred with the necessary jurisdiction to hear and determine this matter by the supreme law of the land it cannot abdicate its function on account of an illegal municipal by-law crafted by municipal authorities contrary to the constitution and the enabling statute.

Above all, it is the function of the court to do justice according to law so that justice may be seen to be done and that the question of the law in dispute may be known.

Section 8 of by-law 164 of 1913 contradicts both the Constitution and the enabling statute in more respects than one. Firstly, it authorises the Respondent to arbitrarily deprive citizens of their fundamental right to water without compensation contrary to s 85 of the Constitution which entitles an aggrieved person to appropriate compensation whenever his fundamental human rights have been violated.

Secondly, in the event of a disputed bill it unlawfully confers the respondent with the sole jurisdiction to arbitrarily determine the dispute without recourse to the courts of law contrary to the provisions of s 69 of the third schedule to the Act as read with s 165 (1) (c) of the Constitution. By so doing the by-law allows the Respondent to be the sole arbiter in its own case contrary to the well-established common law maxim that no one should be a judge in his own case.

It is a basic principle of our legal policy that law should serve the public interest. As we have already seen, every person has a fundamental right to water. It is therefore, clearly not in the public interest that a city council can deny its citizens water at will without recourse to the law and the courts.

While the City Council has a right to collect its debts it cannot do so by resorting to unlawful means for every person including the City Council is subject to the law.

I take comfort in that the Supreme Court of South Africa in a related case of *City of Cape Town* v *Strumpher* (104/11) (2012) ZASCA 54 came to the same conclusion on facts that are on all fours with this case.

The respondent's conduct in terminating water supply in the face of a binding court order was contemptuous of the Court and unbecoming of the Respondent and its officials. The court expresses its displeasure by awarding costs at the punitive scale.

I must however comment counsel for the Respondent *Mr. Kwaramba*, for taking prompt and appropriate action to avert a nasty standoff between the Respondent and the Court in which someone was likely to emerge badly bruised as the courts derive their authority from the people of Zimbabwe in terms of s 162 of the Constitution and to that extent court orders must be honoured and respected. They can only be defied at one's peril because they have the full support of the State's entre enforcement machinery.

Those in the corridors of power must not abuse their authority by usurping the functions of the courts to the detriment of innocent members of society as happened in this case.

In the final analysis the application can only succeed. It is accordingly ordered that a provisional order be and is hereby granted in the following terms:

TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:–

1. That the termination by the Respondent of the Applicant's water supplies on the basis of a disputed water bill and in the absence of any order of Court is unlawful self-help.
2. That respondent and all its employees be and are hereby interdicted from interfering whatsoever with, disrupting or terminating Applicant's water supply without the authority of a Court Order.
3. That the Respondent shall pay costs of suit on the higher scale of legal practitioner and client only if it opposes this Application.

<u>INTERIM RELIEF GRANTED</u>

Pending determination of this matter, the Applicant is granted the following relief –

1. That Respondent be and is hereby ordered to immediately restore water supply to the Applicant's rented premises being 12 Northcliff Flats, Harare.
2. That pending finalisation of this matter, Respondent and its employees and assigns be and are hereby interdicted from interfering with applicant's possession of the premises by interfering with or terminating water supply.
3. That the Respondent shall pay costs of suit on a legal practitioner client scale.

Nyamayaro Makanza & Bakasa, applicant's legal practitioners.
Mbidzo Muchadehama & Makoni, respondents' legal practitioners.