ESAU GWATIPEDZA DUBE
versus
THE MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS & NATIONAL HOUSING N.O.
and
D. MUZAWAZI NO
and
C. MASAWI NO
and
R. CHINGWE NO
and
ZVISHAVANE TOWN COUNCIL

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 9 & 29 November 2017

Opposed application

Mr *L. Mudisi*, with him, Ms *S. Chivivi*, for the applicant
Mr *T. Undenge*, for the first respondent
Ms *G.T. Nyabawa*, for the fifth respondent
No appearance for the second, third & fourth respondents

MAFUSIRE J:

[1] This is a review application. The applicant challenges his removal from office as councillor and chairman of the fifth respondent council ["the council"].

[2] The application is opposed. The applicant took an objection *in limine*. The opposing affidavit by council was by the town secretary. The applicant's objection, raised in the answering affidavit, was that the town secretary had no *locus standi* to represent council; that there was no resolution by council authorising him to act on its behalf, and that, in any event, the town secretary was an interested party who had given evidence before the tribunal, and that he is a person who has been at the centre of the

feud with the applicant. It was said that it is against public policy for the town secretary to depose to an affidavit in the circumstances.

[3] It seems to me that to most lawyers, objections *in limine* are a fashionable industry and a mandatory ritual. The applicant's objection was frivolous. It was spurious. It was just meant to waste time. Among other things, there was a council resolution attached to the notice of opposition by council authorising the town secretary to represent it in any legal proceedings. At any rate, in terms of the Rules of this Court, an affidavit is made by one who can swear positively to the facts. Being one at the centre of the so-called feud, I could think of no better person than the town secretary himself to give the other side of the story, the applicant having given his?

[4] It was preposterous for the applicant to allege breach of public policy because there wasn't any. I dismissed the point *in limine* and ordered argument on the merits.

[5] The facts were these. On 5 June 2017, an independent tribunal ["the tribunal"], set up by the first respondent ["the minister"], in terms of s 114A of the Urban Councils Act, *Cap 29:15*, comprising respondents 2, 3 and 4, found the applicant guilty of two, out of four, acts of misconduct. By virtue of the "conviction", and in terms of Rule 4[3][a] of the Rules of Independent Tribunals set out in the Fourth Schedule to the Urban Councils Act, the applicant was deemed removed from office from that date.

[6] The applicant did not agree with the verdict. So on 9 June 2017, among other things, he filed this application.

[7] In terms of s 114A [14] of the Urban Councils Act, the applicant had the choice, either to appeal the decision of the tribunal to this court, or to bring it on review. He chose review. The procedures and considerations are different. As a general rule, the power of a court on review are narrower than on appeal.

[8] In terms of s 27 of the High Court Act, *Cap 7:06*, the grounds on which this court can review any proceedings or decision include gross irregularity in the proceedings or decision.

[9] The applicant's ground for review is that the decision of the tribunal was, in the words of his counsel, "… grossly irregular, illogical and outrageous in its defiance of logic and accepted moral standards, that no reasonable person in the composition of [the] Tribunal's position who would have applied his or her mind to the questions to be decided upon, could have arrived at such a conclusion."

[10] The applicant's ground for review aforesaid is a well weather-beaten path. The words were coined by an English judge, LORD DIPLOCK, in the English case *CCSU v Minister for the Civil Service* [1984] 3 All ER 935, at 950j – 951d, and quoted with approval by DUMBUTSHENA CJ in *Patriotic Front – ZAPU* v *Minister of Justice, Legal and Parliamentary Affairs* 1985 [1] ZLR 305 [SC], at 326E – G [also reported in 1986 [1] SA 532 [ZS].

[11] A decision that is irregular in the manner described by the applicant is grossly unreasonable in the *Wednesbury* sense. The *Wednesbury* principle derives from the English case, *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223 [CA]; [1947] 2 All ER 680.

[12] In the case of *City of Harare* v *Parsons* 1985 [2] ZLR 293 [SC], McNALLY JA observed, at p 298D, that the *Wednesbury* principle as set out in the *Wednesbury Corporation* case above, was laid down in the context of a judicial review. Therein LORD GREENE said, at p 228:

> "When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of cases. …**it must always be remembered that the court is not a court of appeal**." [*emphasis by the learned judge of appeal*]

[13] A decision that is so grossly unreasonable as to be outrageous in its defiance of logic, or of acceptable moral standards constitutes a palpable inequity: see *Zimbabwe Electricity Supply Authority v Maposa* 1999 [2] ZLR 452 [S], at 466F. This is a very high standard indeed. As such, the review court will not lightly substitute its own

decision for that of the tribunal, unless the evidence demonstrates cogent irrationality or intolerable and palpable inequity in the decision sought to be impeached.

[14] With that test in mind, I place the applicant's ground for review herein under the microscope. First, I examine the material that was placed before the minister's three-member tribunal on which its decision was based. Next, I scrutinise the tribunal's decision. Thirdly, as I consider the arguments placed before me, I invite the *diligens paterfamilias* – that proverbial, faultless, legendary reasonable man – to examine the same material as was placed before the tribunal, to see if he would have made the same or similar decision under the circumstances, or whether he would have decided differently. If the *diligens paterfamilias* would have made the same decision as the tribunal, then the applicant loses. If however, he would have decided differently, finding fault with the tribunal's decision, then the applicant wins. So I approach the case in these stages.

a] *Material before the tribunal*

[15] The material before the tribunal, in a nutshell, and without being exhaustive, was, firstly, the charges of misconduct preferred against the applicant and the prosecution's arguments in support of them. There were four counts. I paraphrase them as follows:

- delaying the approval of the council's budget by refusing to sign the performance contract for the town secretary, resulting in council operating without a budget for eight months, in contravention of the Urban Councils Act [*Chapter 29:15*], s 288[1] thereof, and the Public Finance Management Act [*Chapter 22:19*], s 47 thereof;

- extending the suspension of the town secretary beyond the limit prescribed by the national code of conduct, and bringing a law suit against him without the approval of the council;

- engaging a lawyer, other than the council lawyer, to process the lawsuit aforesaid, without council approval; and

- [failure] to respect the separation of powers [doctrine], and involving himself in the executive functions [of council] by, for example, crafting misconduct charges against the town treasurer, in contravention of the Urban Councils Act, s 140[3] thereof.

[16] Secondly, before the tribunal was the applicant's defence outline. Through counsel, he denied all the charges and rendered a globular explanation in respect to all of them. In essence, and in my own paraphrase, his defence was that the charges as a whole were a symptom of the decayed relationship between himself and the town secretary. He said his cat and mouse fights with the town secretary stemmed from the latter's numerous acts of insubordination, chief of which was his refusal to investigate the director of finance for a litany of offences, this, despite a resolution by council to that effect. He said he had the power to suspend the town secretary. His actions had been taken in the public interest to fight endemic corruption within council.

[17] Thirdly, before the tribunal were the *viva voce* testimonies of the several witnesses called by both the prosecution and the defence.

[18] Lastly, there were numerous documents that were produced as exhibits, mainly correspondence and council minutes.

b] *The tribunal's decision*

[19] The tribunal convicted the applicant of count 1; part of count 2, and of count 3. It acquitted him of part of count 2, and of count 4.

i] <u>Count 1</u>: <u>Refusal to sign town secretary's performance contract</u>

[20] In convicting him in count 1, the tribunal went about it as follows:

- It found the applicant's reasons for refusing to sign the town secretary's performance contract as multiple, but inconsistent and unjustified. It noted that it was common cause that the submission of the council's budget to the parent ministry had been delayed for eight months. It blamed the applicant for the

delay. It said the performance contract had been one of the documents required to be submitted together with the budget.

- The tribunal found the applicant's conduct as being irrational. He had previously signed the same performance contract, which however, had been on a wrong template, only to recant when he had been asked to sign the same contract, which was now on the correct template.

- The tribunal found that it was the applicant's feud with the town secretary that was blinding him to his greater responsibilities as council chairman, to the detriment of council.

- The tribunal found the applicant's refusal to sign the performance contract as going against strong submissions by several fellow councillors who had exhorted him to sign. It went against a formal council resolution directing him to sign.

[21] Before me, the applicant's attack on the tribunal's decision to convict him of count 1 was based on the following grounds, in my own words:

- He was justified in refusing to sign the town secretary's performance contract. The town secretary's work performance was substandard. Among other things, he was refusing or failing to implement council resolutions to suspend the director of finance for assault and incompetence. He was also failing or refusing to implement a government directive to rationalise council employees' salaries. As council chairman, his function was not merely to rubber stamp decisions made elsewhere. That would be tantamount to rewarding incompetence and insubordination. His mission in council was to stamp out corruption.

- The town secretary, a subordinate, was the architect of the charges preferred against him. It was unprocedural for the minister to charge him, and for the

tribunal to convict him, on the basis of complaints by a subordinate, without paying regard to the reasons for his refusal to sign the performance contract.

- Nothing serious should be read into the delay of eight months before the budget was approved. There were twenty six other local authorities whose budget approval had also been delayed.

[22] Before me, the arguments by the minister and council in respect of count 1, as I understood them, and in my own words, were basically the following;

- The applicant was innocent of the principle of collegial harmony. His one-man style of management made him unfit to remain as council chairman. He was not an executive chairman. He had no business involving himself in the day to day management of council business.

- A signed performance contract for the town secretary was a prerequisite for the submission of council's budget. The term 'performance contract' was a misnomer. The document was not a measure or assessment of the performance of the town secretary for any preceding period. Rather, it was essentially a futuristic projection of the estimated costs of all the functions and business of council in the following year.

- Having previously signed the same contract, albeit on the wrong template, there was no logical basis for the applicant's continued refusal to sign the corrected template. It was the applicant's perceived feud with the town secretary that was clouding his proper sense of responsibility.

The diligens paterfamilias: Count 1

[23] At the outset the *diligens paterfamilias* would note that the case before me was poorly presented and poorly argued. To begin with, except for those for the minister, the documents filed of record, particularly the affidavits, were long-winded, repetitive and argumentative. The applicant's affidavit and heads of argument seemed like mere photocopies. The print was feeble. The town secretary's affidavit, on behalf of

council, was shabby. On the very first page material was shabbily erased with some liquid eraser and replaced with ink. Throughout the whole document sentence construction was poor.

[24] The performance contract was central to count 1. But none of the parties had seen it fit to produce it. Only at the hearing, when I had enquired about it, did Mr *Mudisi*, for the applicant, tender it, albeit with the consent of the other parties. It turned out to be a detailed, 47-page document. Naturally, it required time to go through.

[25] Whether or not a performance contract for a town secretary or town clerk is by law, or policy, or practice, or otherwise, a prerequisite to the submission of the budget for a local authority, should have been an aspect uppermost in the minds of all parties as they argued this matter. It was not. The minister's charge in count 1 ambiguously referred to s 288[1] of the Urban Councils Act, *Cap 29:15*, and s 47 of the Public Finance Management Act, *Cap 22:19*, as if to suggest that the performance contract is one of the documents to be presented. These provisions say nothing of the sort.

[26] At the hearing before me, none of the parties could satisfactory provide an answer on the point, all of them being content to overburden me with uninformed opinions. Mr *Mudisi* latched on to my enquiry and started to argue vociferously that at no point was the applicant made aware of any law, rule, practice or policy that requires a performance contract for the town secretary to be submitted together with the council's budget, and that as such, the tribunal was irrational to find the applicant guilty of an act of misconduct on this count.

[27] I was not impressed. The applicant did not take up the point before the tribunal. He had not taken it up before me. In fact, before both the tribunal and in this court, all the parties had proceeded on the clear understanding that the performance contract was a prerequisite.

[28] Taking a cue from my enquiry, Ms *Nyabawa*, for the council, asked for a postponement to enable her to put together the relevant information. All the parties eventually agreed, but Mr *Mudisi* rather reluctantly. I postponed the matter for

judgment to 29 November 2017 on the understanding that all the parties were free to file whatever documents they might feel answered my query, and that I would consider any such documents if they reached me within a reasonable period before I concluded my judgment.

[29] All the parties obliged. They filed supplementary documents on the point. I commend them.

[30] The applicant's documents were filed in two sets, and at different times. The first set comprises a supplementary affidavit by himself, to which is attached, among other things, the council's budget for the period in question. He also attaches a supporting affidavit by one councillor and three other affidavits by three individuals whose designation or capacity is not disclosed. Finally he attaches supplementary heads of argument by his legal practitioners.

[31] The applicant's second set of documents comprises an affidavit by the Mayor of the City of Bulawayo, and another affidavit by some named individual, but again whose designation or capacity is not disclosed. The applicant argues that council's budget had eventually been approved anyway without the town secretary's performance contract.

[32] The applicant's supplementary documents comprise large swathes of cognitive argument but are short on the factual compendium. The central point made in them is that the applicant was unaware, either from any legal provision, communication or policy, that the town secretary's performance contract was a prerequisite to the submission of council's budget.

[33] The applicant's documents also try to explain what a performance contract for a town secretary is; how it is not debated in council, it being an undertaking by the town secretary to fulfil certain obligations within a stipulated period; how a council chairman or mayor reviews the town secretary's performance in the preceding year, and how the council chairman or mayor is under no obligation to sign the town

secretary's performance where he has failed to meet set targets. The point is also made that the performance contract has no bearing on budget approvals.

[34] The documents filed on behalf of the minister and council are in the form of numerous correspondence from the parent ministry and from town clerks or secretaries for fifteen local authorities from virtually the length and breadth of Zimbabwe. These are Bulawayo; Beitbridge; Plumtree; Chiredzi; Shurugwi; Masvingo; Kwekwe; Gweru; Kadoma; Chegutu; Redcliff; Chinhoyi; Karoi; Kariba and Epworth.

[35] The unequivocal statement in these documents is that a performance contract for a local authority's town clerk or secretary is a prerequisite to the submission of budgets and that this position had periodically been communicated.

[36] I do not think that these documents introduce any kind of dispute of fact as would warrant either the leading of *viva voce* evidence or the adoption of the robust approach to straighten out the factual matrix. To begin with, and in my view, this aspect about the town secretary's performance contract is not at all essential to the determination of the case. It was not even part of the applicant's case, either before the tribunal, or before me. His case has always been that he was justified in refusing to sign the performance contract. Until I sought clarification, all the parties proceeded on the premise that the performance contract was a prerequisite.

[37] But at any rate, I find that the performance contract is clearly a prerequisite to the submission of council budgets. I also find that at all relevant times prior to the present dispute, local authorities had been duly informed by the parent ministry that such a performance contract is an integral part of the documents required for approval of budgets in line with the newly introduced Integrated Result Based Management [IRBM] system. In paragraph 5 of his supplementary affidavit, the applicant states:

> "The Town Secretary approached me and he indicated that there was a new system whereby the former's performance would be measured by the dictates of the performance contract which I was responsible for signing."

[38] A performance contract is ostensibly a contract between the chairman of council, obviously in his representative capacity, and the town secretary. One of the documents before the tribunal was the budget approval letter by the parent ministry dated 1 September 2016. But that approval was conditional upon certain tasks being fulfilled by council. The very first of these was the signing of the performance contract by the applicant, "… regardless of his 'relationship' with …" the town secretary.

[39] It is my considered view that the *diligens paterfamilias* would not find fault with the decision of the tribunal on count 1. I endorse in their entirety its reasons as paraphrased by myself in Paragraph [20] above. I also accept the arguments by the minister and council paraphrased in Paragraph [22] above. I find the applicant's arguments summarised in Paragraph [21] above unmeritorious. I therefore dismiss them.

[40] The material placed before the tribunal, among other things, portrayed a vivid picture of an applicant who was headstrong and completely innocent of the principle of collegial harmony in the conduct of council business. In count 1 for example, his refusal to sign the performance contract went against the express exhortations by several of his fellow councillors. It went against a specific council resolution, namely resolution no 20/2016 on 11 March 2016, exhibit 3.

[41] It was the same pattern in regards to several other issues. For example, in August 2016, council, in the face of the applicant's intransigence in refusing to sign some set of minutes of a previous sitting, resolved to travel to Harare to complain to the minister, exhibit 1. On another occasion council, clearly fed up with the applicant's bigotry, passed a resolution to dismiss him as chairman, exhibit 30.

[42] It was the same with regards the issue of the suspension of the director of finance, one of the flash points in the working relationship between the applicant and the town secretary. Against the express wishes of a significant number of fellow councillors, the applicant literally bulldozed his way for a resolution that the director of finance be suspended, exhibit 4.

[43] Before both the tribunal and myself, the applicant argued forcefully that the minutes that recorded the council's resolution directing him to append his signature on the town secretary's performance contract, exhibit 53, were doctored. His reason for saying this was that the minute taker had, during his testimony before the tribunal, produced an unsigned and somewhat truncated version of the same minutes, exhibit 3. The applicant disliked the minute taker's explanation that he had simply uplifted from his computer a soft copy of the same minutes after deleting what he considered to be irrelevant stuff, for example, a section on apologies.

[44] I find the minute taker's explanation quite plausible and the applicant's arguments rather puerile. I associate myself with the crisp and erudite manner in which the tribunal dismissed the applicant's argument on this point. It said:

> "What clearly comes out of exhibit 3 or exhibit 53 is that the council discussed the issue of the non-signing of the performance contract by the Chairman. The Councillors were actually pleading with the Respondent to sign the said contract. …… The contents of the deliberations about the performance contract on exhibit 3 and 53 are the same which makes the two exhibits the same. The explanation by Mr. Vimoni, the council minute taker that exhibit 3 was an extract of exhibit 53 and that when he was requested for the minutes he had as per their practice omitted those areas not forming the relevant subject in issue is reasonable though unwise. He should not have chosen what to omit and what to leave as that was not his business. We have held however that these documents are similar due to the similarity of the wording on paragraph 4:2. Clearly, what he left out in exhibit 3 is not linked to the performance contract. He left out paragraph 2 which deals with Apologies for absence and paragraph 3 which deals with Local leaders capacitating Local Politicians in Zimbabwe. ……. To hold any contrary view to that conclusion will be absurd as that resolution 20/2016 is in tandem with all the deliberations that took place on the 11th March 2016 whereby councillor after councillor requested the respondent to sign those aforesaid documents. Respondent and his defence witnesses did not proffer any evidence that there is another resolution in existence that is not worded as resolution 20/2016. Indeed there is no other resolution of that date in existence except as contained in exhibit 53."

[45] A *diligens paterfamilias* would find that the chairman of a local authority worth his salt would be well informed about his obligations; about parent ministry requirements on budget presentations; about the need to work collectively with other councillors and about the intrinsic nature of a performance contract. As Mr *Undenge*, for the minister, and Ms *Nyabawa*, for council, were at pains to argue, the document is strictly not a measure of assessment of the town secretary's performance. It is

basically a prognosis by a council of the tasks in the forthcoming year and of the attendant estimated costs. It is an integral part of a council's overall annual budget.

[46] The applicant has no case in respect of count 1.

ii] Count 2: [A] Extension of town secretary's suspension beyond the legal limit, and
[B] Bringing lawsuit against the town secretary without council approval

[47] As appears above, count 2 had two legs. The one related to the extension of the town secretary's suspension beyond the legal limit. The other related to the bringing of a lawsuit against the town secretary without council approval.

[A] Extension of town secretary's suspension beyond the legal limit

[48] In acquitting him of the first leg of count 2, the tribunal's reasoning was that the power to suspend a town secretary is reposed in the chairman in terms of s 139[3][*a*] of the Urban Council's Act. In terms of sub-section [5][*a*], such a suspension terminates if lifted, or if council eventually decides not to discharge him, or if six months have elapsed, whichever occurs sooner.

[49] The tribunal noted, and agreed with the applicant, that the national code of conduct, namely Labour [National Employment Code of Conduct] Regulations 2006, S.I. 15/2006, was not the applicable law on the point. It also noted that the prosecution had previously properly conceded the point but had subsequently tried to retract.

[50] Before me, the first leg of count 2 was, naturally, of no moment because the applicant was acquitted. But I have raised it in order to holistically understand the tribunal's thought process in the proceedings before it.

The diligens paterfamilias: Count 2, first leg

[51] The acquittal of the applicant on the first leg of count 2 shows a tribunal that was alive to the issues before it, both factual and legal, and a tribunal that was paying scrupulous attention to detail. The minister's charge on this score had been unfounded. In his letter of suspension of the town secretary, the applicant had expressly made reference to s 139 of the Urban Councils Act and, in part of his letter,

to sub-section [5] especially. It is sub-section [5] that limits a suspension to not more than six months. The reference in the minister's charge sheet to the national employment code of conduct was just plain confusion. That however, did not interfere with the tribunal's thought process.

[B] Bringing lawsuit against the town secretary without council approval

[52] The factual matrix on this point, in brief, was this. By letter dated 8 April 2016, the applicant suspended the town secretary. The letter expressly invoked s 139[3], [4] and [5] of the Urban Councils Act.

[53] On 4 May 2016 the town secretary returned to work on his own accord. He cited the national employment code of conduct. He wrote to council saying that his suspension had gone beyond the fourteen day period enshrined therein without any disciplinary proceedings against him having been undertaken.

[54] On 6 May 2016 the applicant, represented by his current legal practitioners of record, reacted by obtaining from the magistrate's court, *ex parte*, a rule *nisi* for an interdict barring him from coming back to work. The rule *nisi* was confirmed on 27 May 2016. Among other things, the magistrate interdicted the town clerk from presenting himself at work when the six months period enshrined in s 139 of the Urban Councils Act had not yet lapsed.

[55] Thereafter, the town secretary reported to a labour officer a case of unfair labour practice by an employer, namely unlawful suspension. The matter was heard on 8 July 2016. On 3 August 2016 the labour officer ruled and declared, among other things, that council not having proceeded in terms of S.I. 15/2006, the town's secretary's suspension was null and void. The suspension was uplifted.

[56] At a meeting of council on 10 August 2016, chaired by the applicant, a previous resolution of council, namely resolution 69/2016, was brought up. It was noted that by that resolution, council had dissociated itself from the applicant's legal tussle with the town secretary before the labour officer. It was said the applicant had acted without a council resolution. It had also been resolved that no council representative would

attend any such proceedings and that the applicant would personally bear the costs of suit.

[57] In the meeting of 10 August 2016 aforesaid, and following the labour officer's ruling, council adopted resolution 92/2006. It endorsed the labour officer's ruling. The town secretary would be asked to resume duty immediately. On the same day, the vice-chairman of council wrote to the town secretary to report for duty with immediate effect.

[58] Without council's approval, the applicant appealed to the labour court against the ruling by the labour officer. On 25 October 2016, council passed a resolution dissociating itself from the applicant's appeal, and re-affirming its position that the applicant would be responsible for the costs. On 26 October 2016, the Labour Court upheld the decision of the labour officer. Eventually the town secretary returned to work.

[59] The applicant himself had been under investigation at the instance of the minister. The report by the investigation team had been submitted to the minister in May 2016. On 12 January 2017 the minister suspended the applicant from the office of councillor for ward 7 for gross misconduct in terms of s 114[1][*c*] of the Urban Councils Act. As said before, the verdict of the independent tribunal following that suspension was on 5 June 2017.

[60] In convicting him of this leg of count 2, the tribunal's reasoning was as follows:

- That the applicant might have had the power to suspend the town secretary, but nowhere in the Urban Councils Act is he given the authority to litigate without a resolution of council.

- That the applicant had acted in an emergency and that he could not cause a meeting of council to be convened to seek the necessary resolution as the town secretary had suddenly come back to work, he allegedly being the only person through whom such a meeting could be convened, something impractical

given the town secretary's direct interest, was unreasonable because the applicant could have sought guidance from the parent ministry, or from the district administrator who was close by. Not being an executive chairman, the applicant could not litigate in the manner he did without a council resolution.

The diligens paterfamilias: Count 2, second leg

[61] The bane of applicant's style of management, as already been said before, was his inability to work with others. He did not have the blessings of council to litigate against the town secretary.

[62] Several minutes of council show that on numerous occasions, the other councillors tried to dissuade the applicant from plunging headlong into fruitless legal fights with the town secretary and the director of finance. In my view, their decision to make him bear the costs of suit; to go and report him to the minister; and quite incredibly, to fire him as council chairman, never mind the legal efficacy of that decision, must have marked the lowest point of their exasperation with him.

[63] The point is not whether the town secretary was himself a saint. It is whether in wanting to getting rid of, or disciplining him, or fighting corruption in council, or whatever else he might have considered his mission to be, the applicant needed to be clothed with lawful authority in the form of council resolutions.

[64] In terms of s 5 of the Constitution, local authorities are one of the three tiers of government [the other two being the national government and the provincial and metropolitan councils]. In terms of s 274[2] of the Constitution, urban local authorities are managed by councils composed of elected councillors and presided over by elected mayors or chairpersons. In terms of s 4A of the Urban Councils Act, a town council consists of elected ward councillors and appointed special interest councillors. In terms of s 4[8] of the Act, any town council is a body corporate with perpetual succession and capable of suing and being sued.

[65] Unquestionably, the concept of local governance entails governance by resolutions passed through properly constituted meetings. Section 84[2] of the Urban Councils Act provides that all the councillors present at the meetings shall vote on every matter which is put to the vote. Except for situations in which he is expressly empowered to act on his own, such as s 139 for example, the chairman, cannot always go it alone.

[66] The applicant unnecessarily embroiled himself in management issues when he was not an executive functionary. At one point the minister had to warn him in writing. That letter, dated 12 May 2016, is worth quoting in full as it aptly describes the applicant's conduct and the concerns about him:

> "I wish to express my grave concern over your recent conduct. You are hereby reminded that you are not an executive mayor and as such you do not have the power to make arbitrary, solo decisions. Zvishavane Town Council must operate on the basis of resolutions.
>
> I am dismayed by the fact that you have embroiled Zvishavane Town Council in unnecessary legal action without Council backing and have engaged a firm of lawyers without following tender procedures and without formal requisitioning.
>
> In terms of section 315 of the Urban Councils Act, I hereby direct that you submit a detailed report explaining your actions to me within ten days of receipt of this instruction to enable me to determine future action."

[67] Thus, I find that the applicant was properly convicted of the second leg of count 2.

iii] <u>Count 3</u>: <u>Engaging a lawyer, other than council lawyer, to process lawsuit against town secretary</u>

[68] In convicting the applicant of count 3, the tribunal went about its reasoning process as follows:

- That by a resolution in 2014, council had appointed certain two law firms as its legal advisers. These two law firms would be used concurrently, depending on the nature of the case. The management had been given "… the lee-way …" to elect any other lawyers of their choice, depending on the nature of the case at hand.

- That, as the applicant argued, the two law firms in question did indeed appear conflicted, but however that the discretion to choose any other lawyers to represent council in any legal proceedings, apart from those two, had been vested in the council's management only. As such, on no account would the applicant select lawyers of his own choice without a council resolution.

- That the applicant could not cause a meeting of council to be convened to seek the necessary resolution, the town secretary having bounced back to work, was an unreasonable excuse as the applicant could easily have sought guidance from the parent ministry.

[69] Before me, the applicant has persisted with the same arguments. He stresses that the situation was one of emergency that called upon him to act expeditiously, the town secretary having suddenly rocked up at the work place. He says it would have been futile to try and convene a meeting for a council resolution when such a meeting could only have been arranged by the town secretary himself, who would obviously scuttle it on account of his self interest in the matter. He also mentions that he approached independent lawyers in the company of the vice-chairman.

The diligens paterfamilias: Count 3

[70] The *diligens paterfamilias* would note that the applicant's arguments under this count suffer the same pitfalls as those for the other counts. In addition, he would observe that the so-called emergency was self-created or illusory. An acting town secretary had been appointed during the absence of the town secretary on suspension. The meeting could be convened through him, or anyone else delegated to do so. Or the town secretary himself would be asked to recuse himself from any such meeting.

[71] The *diligens paterfamilias* would also observe that after he had suspended the town secretary, and there were efforts to set up a hearing committee to try the case, the applicant, true to character, had come up with a list of names for that committee but which he alone had compiled. He had shot down suggestions for alternative names, exhibit 13.

[72] Among the names of the prospective members for the hearing panel chosen by the applicant was one individual referred to as "local lawyer Mr. Mudisi." However, the next lot of minutes, exhibit 14, says that Mr Mudisi had been dropped from the hearing committee "… as advised from some quarters".

[73] It was the firm of Mutendi, Mudisi and Shumba that got the *ex parte* interdict to bar the town secretary from coming back to work. All that information was before the tribunal when it tried the case. It was Mr Mudisi who represented him before the tribunal. If the applicant, in proposing a hearing panel that would include his own legal practitioner, did not see the obvious conflict of interest, then that was a huge question mark on his fitness to remain chairman of the fifth respondent's council.

[74] To demonstrate the conflict of interest in this regard, the council ended up absorbing all the costs of suit, not only those incurred by the town secretary, but also those incurred by the applicant and due to Mutendi, Mudisi and Shumba, exhibit 20.

[75] In my view, the applicant was properly convicted of count 3.

iii] <u>Count 4</u>: <u>No respect for the doctrine of separation of powers</u>

[76] The particulars of the charge on this count were that the applicant did not respect the separation of powers as he involved himself in executive functions, like his crafting of misconduct charges against the town treasurer, allegedly conduct that contravened s 140[3] of the Urban Councils Act.

[77] Like count 2, the issue was of no moment before me because the applicant was acquitted.

[78] In acquitting him on this count, the tribunal reasoned that it was not in dispute that the applicant had a council resolution behind him authorising the suspension of the finance director, even though that resolution might have been unlawful. Furthermore, the tribunal went on, the town secretary had himself written to the applicant for details of the charges of misconduct against the finance director. As such, the tribunal

concluded, it could not be said that the applicant had breached the doctrine of separation of powers.

The diligens paterfamilias: count 4

[79] Whilst the conclusion of the tribunal on this count cannot be impugned for irrationality or lack of logic, its legal soundness is open to question.

[80] The resolution calling for the suspension of the director of finance and authorising the applicant to craft the actual charges, was all applicant's doing. This was despite some loud voices against such a move. The tribunal based its findings on very narrow grounds and ignored the bigger picture presented by the totality of the documents before it. Even the provincial administrator for the Midlands Province, by letter dated 27 October 2015, ended up writing to the district administrators for Zvishavane, instructing them to advise council to rescind the resolution relating to the finance director on the ground of illegality, exhibit 25A. But this was not immediately achieved owing to the applicant's intransigence.

[81] The applicant was lucky to be acquitted of count 4. The overwhelming evidence before the tribunal was that he embroiled himself in management issues. He was not an executive chairman. He was all over the show and left little or no room for council, as a collective body, to speak.

[c] *Conclusion*

[82] In the applicant's supplementary heads of argument received after the matter had been postponed for judgment, the point is made that the tribunal did not give the applicant the opportunity to mitigate the sentence. This is said to be a gross irregularity that violates the right to a fair hearing. In support of this argument, reference is made to the recent judgment in the case of *Kombayi & Ors v the Independent Tribunal* HB 328 -17. In that judgment MATHONSI J, in an application for review of the decision of a similar tribunal constituted to investigate certain acts of misconduct preferred against the mayor and several councillors of the City of Gweru, criticised the conduct and the decision of the tribunal on several grounds, one of which was its failure to afford the applicants the chance to mitigate the sentence. The learned judge felt that

by not affording the applicants the chance to mitigate the sentence was a violation of the *audi alteram partem* rule of natural justice, and a breach of the elementary notions of fairness and justice.

[83] I consider *Kombayi's* case above a totally inapposite precedent. Among other things the factual matrix, and the time frames, are completely different. The suspensions in question, despite the minister's subsequent disingenuous attempt to re-instate them after they had previously been set aside by the court, had effectively commenced before the amendment of the Urban Councils Act in 2016 to provide for independent tribunal and their powers.

[84] Furthermore, the judge's comments in *Kombayi's* case, on the absence of mitigation, were made in the context of a complete failure by the tribunal to deal and pronounce itself on certain cogent points *in limine* that had been taken by the applicants, a decision on which would have disposed of the matter. This was compounded by the fact that the tribunal itself had not seen itself as having been reposed with the power to pronounce judgment, but merely to recommend to the minister the appropriate verdict, leaving the judge to wonder who between it and the minister would pronounce the sentence.

[85] At any rate, in terms of Rule 4[3] of the Rules of Independent Tribunals in the Fourth Schedule to the Urban Councils Act, where the independent tribunal determines that a respondent is guilty of misconduct, he is deemed to be removed from office on the date of that determination, and his or her seat becomes vacant on that date.

[86] Thus the penalty of loss of office by a councillor of a local authority by reason of a conviction on an act of misconduct is one that is automatic by operation of the law. The independent tribunal is not vested with the discretion to mitigate that type of outcome.

[87] However, an aspect that has exercised my mind is whether or not the acts of misconduct preferred against the applicant by the minister on some of which the tribunal found him guilty, are the kind of gross misconduct as contemplated by s 278

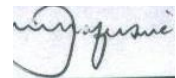
of the Constitution. Subsection [2][c] provides that, among others, the chairman of a local authority must only be removed from office on grounds of gross misconduct.

[88] Whilst the term ‘gross misconduct’ may be an abstract notion the definition of which may defy exactitude or precision, in my view it imports serious acts of unacceptable or intolerable behaviour which are completely at variance with someone’s expected modes of behaviour for the position occupied by him.

[89] In this matter, I have concluded that the conduct of the applicant for the period in question, as canvassed in this judgment, and that of the tribunal, reflects character that is unsuitable for the post in question. The decision of the tribunal cannot be impugned on the grounds of gross irrationality or lack of logic or of acceptable moral standards as argued by the applicant.

[90] In the premises, the application for review is hereby dismissed with costs.

29 November 2017



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Civil Division of the Attorney-General’s Office, legal practitioners for the first respondent
Chigariro, Phiri & Partners, legal practitioners for the fifth respondent