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Judgment No S.C. 116\2001
Civil Appeal No 89\2001

TOMHILLER TAONA SITHOLE v CITY OF HARARE

SUPREME COURT OF ZIMBABWE
McNALLY JA, MUCHECHETERE JA & SANDURA JA
HARARE OCTOBER 30 & DECEMBER 21, 2001

A.J. Manase, for the appellant

L.T. Biti, for the respondent

McNALLY JA: The appellant was employed as a Chief Accountant by the respondent (the City). He was dismissed on 22 December 1999. This dismissal followed two adverse reports on the appellant, one by the Commission of Inquiry into the affairs of the City, and one by a disciplinary tribunal chaired by a Regional Magistrate.

The appellant took his dismissal on review to the High Court almost a year after the event, but the delay was condoned and the matter was heard.

Two grounds for review were advanced. First, that the procedures under the Urban Councils Act, Chapter 29:15 were not observed, and second, that the decision was grossly unreasonable. The learned JUDGE PRESIDENT dismissed

both grounds and accordingly dismissed the application with costs. The appellant now appeals, relying on the same grounds.

The first procedural question revolved around the provisions of s 141 of the Urban Councils Act (the Act). The section clearly provides that where one is concerned, as here, with a municipal council, then the decision to dismiss a junior employee (which the appellant was) must be taken by the Executive Committee of the Council, and then approved by the full Council. In the present case, so it was said, it was the full Council which took the decision. Accordingly the decision was unlawful.

The learned JUDGE PRESIDENT declined to uphold this contention on the ground that the Executive Committee exercises power delegated to it by the full Council. It follows that what the Executive Committee can do, the full Council can do unless the Act specifically provides otherwise. Accordingly there was no irregularity.

On appeal the appellant urged us to consider sections 84 – 88 of the Act which provide for the functioning of Councils and sections 92 – 94 of the Act which provide for the functioning of Executive Committees. The powers of Executive Committees flow, not from delegation by the Council, but from the terms of the Statute. Therefore it was not correct to say that a Council could exercise the powers of an Executive Committee.

It seemed to us on appeal that neither party in the court *a quo* had adverted to the most important fact in the case. At the relevant time the City of Harare was governed, not by a normally elected Council, but by a Commission appointed by the relevant Minister in terms of section 80 of the Act.

The Commission consisted of nine members, whereas a full Council has a Mayor and some thirty-four Councillors. Obviously the Commission could not man the full eight standing Committees normally established by the Council. Accordingly the Commission at its first meeting on 10 March 1999 decided:-

1. that all the Commissioners be members of the Executive Committee;
2. that the seven other standing committees be combined into three.

The Act does not make specific provision for the way in which a Commission should conduct itself in running the affairs of the City. We cannot therefore find fault with the Commission's decision that, in effect, it should combine the functions of the full Council and the Executive Committee. The Commission took the place of the Council, and the Commissioners-as-Executive-Committee took the place of the Executive Committee.

Once that is accepted, as it must be accepted, the appeal becomes unarguable on this point. There is, in fact, no longer a Council and an Executive Committee. There is a Commission, and an Executive Committee of the Commission which consists of all the Commissioners. The two are indistinguishable.

It is pointless for the Executive Committee to seek the approval of itself under another guise.

I turn next to consider the second point - that the decision to dismiss was grossly unreasonable.

The decision with which we are concerned is the decision of the Commission. We are not concerned with the correctness, or reasonableness, of the various bodies which made their recommendations to the Commission.

In the present case, as the learned JUDGE PRESIDENT correctly pointed out, there were two reports on which the Commission relied. A Commission of Enquiry appointed by Government into the running of the affairs of the City made serious and grave allegations of mismanagement against the appellant. Following upon that, charges of misconduct by reason of incompetence, were levelled against the appellant. Disciplinary proceedings presided over by a Regional Magistrate were conducted and concluded in accordance with the legislation. The Presiding Officer recommended dismissal.

It is true that a review board of the Employment Council for the Harare Municipal Undertaking suggested a lesser penalty. But it must be noted that the Review Board did not dispute the findings of negligence, incompetence and inefficiency made by the Regional Magistrate. Its recommendation was as follows:-

> "While there is no technical basis in legal terms to challenge the recommendation of the Inquiries Committee and consequently the decision to

> dismiss the employee, taking into account the record of service of the employee in the difficult circumstances in which he found himself operating, it is felt that, whereas dismissal is one option open to the Executive Committee, a lesser penalty would not be inappropriate in the circumstances."

This is nothing more than a plea *ad misericordiam*. The Board does not say the decision to dismiss was wrong. No misdirection is alleged. In fact it is conceded that the decision to dismiss was justified. All that it says is that a lesser penalty "would not be inappropriate".

In the circumstances it is not possible for this Court, nor was it possible for the learned JUDGE PRESIDENT, to say that the decision to dismiss was a decision that no reasonable Tribunal would have taken.

It follows that the appeal must be dismissed with costs.

MUCHECHETERE JA: I agree

SANDURA JA: I agree

Manase & Manase, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners