LOVEMORE WARURAMA
versus

MINISTER OF LOCAL GOVERNMENT
PUBLIC WORKS AND NATIONAL HOUSING N.O.
and

MUTARE CITY COUNCIL
and
LOCAL GOVERNMENT BOARD

HIGH COURT OF ZIMBABWE
CHINAMORA J,
HARARE , 14 April 2021 and 8 March 2023

Opposed application

Adv T Zhuwarara, for the applicant
Adv F Chinwawadzimba, for the 2nd and 4th respondents

CHINAMORA J:

I heard argument in this matter on 14 April 2021 and granted an *ex tempore* judgment. This full judgment contains reasons for my decision. It was an application for a declaratory order in terms of s 14 of the High Court Act [*Chapter 7:06*]. The relief which I granted is as follows:

1. The application for the declarater is granted.
2. The first respondent's decision to rescind the applicant's approval by the third respondent and a directive to the second respondent to effect the directive abovementioned be and is hereby set aside.
3. Consequently, the applicant's approval and appointment to the second respondent as Finance Director shall stand at law.
4. The first, second and third respondents shall pay costs of suit.

When the application was filed in March 2019, the applicant averred that the second respondent advertised a vacancy for the position of Finance Director, among other positions. He applied for the post and was called for interviews on 10 November 2017. Through a letter dated 6 February 2018, which is at p 10 of the record marked Annexure "A1", the second respondent

advised the applicant that he had been successful in the interviews. The relevant part of the letter reads:

> "Following the interviews held on 10 November 2017 in the Committee Room, Civic Centre, I have pleasure in offering you the above post in the Finance Department effective 1 March 2018 on the following conditions and terms …
> …
> In terms of the foregoing, please confirm in writing in writing your acceptance of this position within (7) seven days of receiving this letter. For matters not covered in this letter, please refer to the Human Resources Manager."

The applicant accepted the offer of employment by letter dated 9 February 2018, which appears on p 11 of the record marked Annexure "A2". He submitted that the second respondent approved his appointment in terms of the Urban Council Act [*Chapter 29:15*] ('the Act'). Following his appointment, the applicant states that he resigned from his previous employer in order to start work on 1 March 2018. However, around 22 February 2018, the applicant received a call from the second respondent advising him that his appointment was placed on hold as directed by the first respondent.

On 27 February 2018, the applicant wrote to the second respondent protesting against what he perceived as irregularities. Notably, he argued that a contract was concluded between him and the second respondent. He then referred to section 276 (1) of the Constitution of Zimbabwe which gave the Council power to govern its own affairs, and contended that the directive by second respondent constituted undue influence. In this letter, he also highlighted that there was an investigation at Bindura Municipality and no adverse findings had been made against him that would affect his appointment. The second respondent did not give a reply, prompting the applicant to engage his legal practitioners who also wrote to the second respondent. Having got no joy, the applicant referred the matter to a Labour Officer, in essence, claiming specific performance of the contract of employment. It is not clear from the papers what became of that process. Then, on 25 January 2019, the second respondent wrote to the applicant advising him that his appointment had been rescinded following a directive from the first respondent. It is the applicant's case that once the third respondent had approved his appointment, it could not be rescinded by the minister in the manner he did.

The respondents filed their opposing affidavits out of time and were barred. However, I condoned the non-compliance with the rules to allow the resolution of the matter on the merits, in order to avoid parties incurring unnecessary delays and costs. See *Nelson Mandela Metropolitan Municipality and Ors* v *Greyvenouw CC and Ors* 2004 (2) SA 81 (SE) at 95F-96A. The first and third respondents' case is that the applicant was mistaken in thinking that first respondent does not have the power to rescind his appointment. They relied on s 314 (1) of the Act, which provides as follows:

> "Where the Minister is of the view that any resolution, decision or action of a council is not in the interests of the inhabitants of the council area concerned or is not in the national or public interest, the Minister may direct the council to reverse, suspend or rescind such resolution or decision or to reverse or suspend such action".

In addition, the first and third respondents argue that the applicant failed to disclose that there was a pending investigation between him and the Mayor of Bindura which caused the first respondent to invoke s 311 of the Urban Council Act. Since first respondent wanted to gather all the facts, he gave the directive that the appointment be held in abeyance. Thus, the first and third respondents submit that after the investigation was done, a report was compiled, which the first respondent used to rescind applicant's appointment. In the first respondent's view, there was enough evidence that the appointment of the applicant was not in the best interest of the council.

The second respondent said, in terms of s 314 (3) of the Act, it was obliged to comply with the ministerial directive. Further, it argued that a new Finance Director was appointed and has already commenced his duties and, therefore, the matter has been overtaken by events. In the same vein, it also argues that the applicant ought to have cited the new Finance Director. In my view, once a matter is subject of dispute before the courts or competent arbitrator, whatever the case maybe, it is advisable for the parties to stop acting in the way that the second respondent acted. In this respect, the case of *Mudzvova* v *Mudzvova and Anor* HH 228-15 is particularly relevant. MATHONSI J (as he then was) noted that it would be prudent that when a dispute arises, the other party should respect the process for the determination of that dispute instead of acting in a way that negates the process. The second respondent ought to have respected the process for the determination of the dispute and not compounded the problem. I notice that the second respondent states that the purported acceptance by the applicant was conditional and amounted to a counter-

offer which it never accepted. Consequently, its argument is that no employment contract was concluded by the parties. The second respondent also asserts that the applicant did not procure the waiver of notice and never resigned from Bindura Municipality.

Having been joined to the proceedings as the fourth respondent, Blessing Kapuya Chafesuka filed his opposing papers thereby curing the perceived defect of his non-joinder. He argues that he was appointed as the Finance Director on 15 January 2019 pursuant to interviews held on 10 November 2017. Therefore, in considering the present application, the court must consider his rights as an innocent third party. Cumulatively, the applicant's answering affidavits maintained his claim. However, he raised a preliminary point to the effect that the deponent to the first and third respondents' opposing affidavit lacked authority to do so. He also challenged the authority of the deponent to the second respondent's opposing affidavit. After filing their opposing affidavits, it appears that the first and third respondents strategically retreated from the matter. I say so because; they left the matter to be argued between the second and fourth respondents. This is quite unfortunate as their input would have assisted this court in the determination of this dispute. Let me begin by considering the preliminary points raised.

As indicated above, the first and third respondents did not take further part in the matter. Consequently, this court will not dwell much on the preliminary point that the deponent to the first and third respondents' affidavits lacks authority. On the other hand, it seems that this point in *limine* was not motivated the heads of argument. I therefore take it that the applicant has abandoned the said preliminary point. (See *Vegypro (Pvt) Ltd* v *University of Zimbabwe* HH 112-17.

Regarding the merits of the case, the present application is for a declaratory order in terms of s 14 of the High Court Act, which allows this court to enquire into and then determine, existing, future and contingent rights and obligations if the applicant has the requisite *locus standi*. (See *Agricultural Bank Zimbabwe t/a Agribank* v *Clemio Machingaifa and Anor* SC 61-07). It can be little doubted that the applicant has an interest in these proceedings arising from his acceptance of the offer of employment. I observe that, in the letter dated 9 February 2018, the applicant merely advised the second respondent that he was going to ask for a waiver of notice. To me, that does not constitute a condition or a counter-offer as contended by the respondents. There is certainly nothing in the applicant's acceptance letter that can be construed as equivocal or ambiguous or to suggest that it had a counter offer. (See *Joubert* v *Enslin* 1910 AD 6 at 29).

At any rate it is clear from the letter of 9 February 2018, that he expressly said that he accepted the offer of employer made in the letter of 6 February 2018. Additionally he entered his letter by saying that he hoped a to join your organisation soonest. Clearly, there was no counter offer.

I will now examine the appointment of the fourth respondent. He was appointed as a result of the second respondent's rescission of the applicant's job offer. It is applicant's submission, and correctly in my view, that this was a nullity. As already noted above, by letter dated 9 February 2018, the applicant accepted the offer of employment as Finance Director. It is not in dispute that the second respondent called the applicant on 22 February 2018 advising him that the first respondent had directed second respondent not to proceed with the appointment of the applicant. Also not disputed is that the applicant engaged the second respondent to have the matter resolved, but the second respondent did not cooperate leading to the referral of the matter to a Labour Officer. On 25 January 2019, the second respondent wrote to the applicant informing him that the Council had rescinded the resolution to appoint him to employ him. The view that I take is that the second respondent declined to appoint the applicant on the basis of the ministerial directive. At this stage, it is important to note that an employment agreement had been concluded between the two parties.

The respondents have relied on s 314 (1) to justify the decision to rescind the contract of employment. I do not read this provision as conferring power to suspend the appointment of the applicant to the post in question. In fact, it gives the first respondent authority to give a Council direction of a general nature as to the policy it should observed, and to alter the Council's decisions in the interest of the inhabitants. Consequently, the power does not extend to issues of appointment of senior members of the Council. It is evident that the reference to resolution, decision or action of the Council must be read in context as relating to policy matters and not appointments. In this regard, in *Hlophe* v *Judicial Service Commission & Ors* [2022] 3 ALL SA 87 (EJ), the court aptly acknowledged that the context is an invariable consideration in statutory or constitutional interpretation. Therefore, no basis exists for rescinding the applicant's contract of employment. I am inclined to grant the relief sought by the applicant.

The award of costs is in the discretion of the court. Generally, costs are granted to the successful party. An award of costs on a legal practitioner and client scale is a drastic measure, one which courts resort to sparingly and only in exceptional circumstances. However, I do no find

anything in this case that justifies awarding punitive costs. There is nothing to suggest that, despite losing, the respondents were motivated by bad faith.

It is for the above reasons that I granted the order appearing on page 1 of this judgment.

Mafongoya & Matapura Law Practice, applicant's legal practitioners
Civil Division of the Attorney General's Office, first and third respondents' legal practitioners
Bere Brothers, second respondent's legal practitioners