

GIFT BANDA
versus
THE INDEPENDENT TRIBUNAL
and
HILDA MAKUSHA MOYO N.O
and
MIDARD KHUMALO N.O
and
LUCY MANHOKWE N.O
and
THE MINISTER OF LOCAL GOVERNMENT
PUBLIC WORKS AND NATIONAL HOUSING N.O
and
BULAWAYO CITY COUNCIL

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 20 AUGUST 2017 AND 24 AUGUST 2017

Application for Review

K Ngwenya for the applicant
No appearance for the respondents

MAKONESE J: In terms of the provisions of sections 26, 27 and 28 of the High Court Act [Chapter 7:06], this court is empowered to review the decisions of all inferior courts, tribunals and administrative authorities. The application in this matter concerns an application to review the decision of an Independent Tribunal established in terms of section 114 (c) of the Urban Councils Act [Chapter 29:15] as amended by section 3 of the Local Government Laws Amendment Act Number 8, of 2016.

It is now well settled under our law that this court will only exercise its powers of review where it is shown that there was an irregularity or bias in the conduct of the proceedings in an inferior court or tribunal. This court will intervene where the applicant establishes that the decision of such court or tribunal is grossly irregular or unreasonable. A decision of a tribunal will be held to be irregular and unreasonable where the decision sought to be impugned is shown

to be unsustainable on the facts on the record or where the decision is so unreasonable as to defy logic and common sense.

For the sake of completeness I must indicate that this application for review was brought before me in motion court on 20 July 2017 as an unopposed matter. I was informed by counsel for the applicant, *Mr K Ngwenya* that the papers were in order and that since no notice of opposition was timeously filed I was being invited to grant an order in terms of the Draft Order. I indicated then, that due to the voluminous nature of the application constituting the record of proceedings of the Independent Tribunal, I needed time to examine all the papers to enable me to come up with an informed decision on the matter. I was satisfied that at the time the matter was set down, the respondents were duly barred by reason of their failure to file opposing papers.

I shall therefore explore the nature of the application and examine the grounds of review as they relate to the decision of the Independent Tribunal, which is sought to be reviewed and set aside.

Background

On the 20th September 2016, the Deputy Mayor of Bulawayo, Gift Banda, (the applicant) was suspended from the office of councillor and Deputy Mayor by the Minister of Local Government Public Works and National Housing. The suspension was in accordance with the provisions of section 114 (1) (c) of the Urban Councils Act [Chapter 29:15] as amended by section 3 of the Local Government Laws Amendment Act Number 8, 2016. The allegations against the applicant as laid out in the letter of suspension are in the following terms:

- “1. *You used your position as Deputy Mayor and Councillor to unprocedurally acquire stand number 18826B T. Town house Ascot, measuring 35 hectares in May 2015, which stand should have been put to tender. You went on to wall the said property prior to receiving council approval for same.*
2. *You used your position as Deputy Mayor and councillor to unprocedurally acquire a lease for stand 187964 Bulawayo Township Lands on behalf of Entertainment Headquarters , which stand should have been put to tender.”*

The applicant was required to give a response to these allegations within a period of 7 days, in terms of section 114 (2) (2) of the Urban Councils Act as amended by section 3 of the Local Government Laws Amendment Act, Number 8 of 2016.

On 23 September 2016 the applicant provided a detailed response to the Minister's allegations by way of a letter spanning 73 pages inclusive of annexures. The applicant denied the allegations and on the first charge of allocation of stand 18826BT Town House Ascot, stated that he acquired the stand procedurally in May 2015 and that there was no requirement for the stand to be put to tender. The land was undeveloped, vacant and was not designated for any specific purpose. In terms of council policy there was no need to place such stands to tender. On the second allegation that applicant used his position as Deputy Mayor to unprocedurally acquire a lease for stand 187964 Bulawayo Township Lands on behalf of Entertainment Headquarters, applicant refuted these allegations. He restated his position that there was no requirement for such proposed leases to go to tender. In any event, the applicant averred that the application was never approved by council but was in fact rejected. Applicant further stated that the co-signing of the lease by the applicant was never meant to influence council. Applicant stated that he declared his interest in the matter and recused himself from all committee meetings where the subject of the lease was being discussed.

On 15 November 2016, applicant was advised that following his suspension as Councilor and Deputy Mayor, an Independent Tribunal would be set up in terms of section 114 (1 (c) of the Urban Councils Act as amended by section 3 of the Local Government Laws Amendment number 8 of 2016. The applicant was requested to furnish the Tribunal with his response to the allegations. Applicant availed his detailed response to the Tribunal. On 13 and 14 December 2016 the Independent Tribunal conducted hearings where the applicant gave oral testimony in his defence. He maintained that the allegations against him were baseless and that both charges against him had no legal basis. The Tribunal led evidence from the Town Clerk of Bulawayo Mr Christopher Moyo who essentially absolved the applicant on both charges. He testified that there was no requirement for the Ascot stand to be put to tender. The Tribunal was advised that where undeveloped and vacant stands were undesignated, applicants were free to apply for such land. Regarding the lease of lease 187964 Bulawayo Township Lands, the Town clerk stated that the lease would only go to tender if the land was designated for a specific purpose. The Town clerk pointedly told the Tribunal that an Investigating Committee set up by the Minister had wrongly advised the Minister that the stands in question were subject to tender requirements.

The Tribunal also heard testimony from the Mayor of the City of Bulawayo Martin Moyo. His evidence was substantially similar to that of the Town Clerk. He confirmed that regarding the allocation of stands the tender process only applied to those stands that would have been designated by council for a specific purpose. Where there was no designation, then any individual could apply for allocation. The application is then subjected to the normal vetting process by various council departments. Once approved, the stand would be allocated. The Mayor indicated that what triggered the entire investigation against the applicant were false misrepresentations made to the Minister of Local Government that the whole of the Ascot Race course in Bulawayo had been parceled out to the applicant at a very low price. The Mayor stated that the applicant had not been allocated the Ascot Racecourse and the stand in question is not part of the racecourse. The Mayor was at pains to reassure the Tribunal that the racecourse was still intact. On the issue of the proposed lease by Entertainment Headquarters, the Mayor confirmed that no tender process was required as the property was not designated. The Tribunal then heard evidence from the Chamber Secretary Sikhangele Zhou. She clarified that the Urban Councils Act and regulations governing council stands does not have any provisions which stipulate which stands should be sold by tender and which should not. She confirmed that undesignated stands have never gone for tender. This was not council policy and only stands that were designated would routinely go for tender. She further pointed out that there were no reports from any single councillor or staff member indicating that applicant had influenced or applied undue influence regarding the allocation of the Ascot stand. There were no reports of any intimidation of staff members regarding the application for lease relating to Entertainment Headquarters.

A careful reading of the record of proceedings before the Tribunal reflects that the Town Clerk, the Mayor and the Chamber Secretary all exonerated the applicant or both charges. The evidence of these witnesses is weighty and compelling. The Town Clerk is the Chief Executive of Council and his evidence could not be disregarded as it was grounded both on fact and in the law. The evidence of the Mayor served to place the matter into its proper context. The allegations against the applicant were based on personal conflicts with certain sections of the society. There appears to have been an element of *mala fides* on those that misrepresented facts to the Minister.

TRIBUNAL'S FINDINGS

Ascot Stand

The tribunal held that by virtue of his position as councillor and Deputy Mayor, the applicant had access to and was privy to information regarding the Ascot stand and its availability. The Tribunal could not find any evidence to come to the conclusion that applicant was guilty of gross misconduct in respect of the acquisition of the stand. The stand was not required to go for tender. There was therefore no basis to find that applicant was guilty of any improper conduct. In that respect, the Tribunal found that the applicant did not commit an act of misconduct in the acquisition of stand 18826B Ascot. The Tribunal found no wrong doing on the part of the applicant in the construction of a perimeter wall around the stand.

HUME PARK LEASE

The allegations against the applicant regarding the lease of this property are that he used his position as Deputy Mayor to unprocedurally acquire a lease on behalf of Entertainment Headquarters. It was alleged that the lease of this stand should have gone for tender. The evidence placed before the Tribunal was to the effect that the City of Bulawayo has no policy requiring leases to go to tender, unless the property was designated for special purpose. As far as council was concerned, all proper procedures were followed and the acquisition was done in accordance with council policy. The Tribunal concluded, quite correctly, in my view that there was no need for the lease to go for tender.

Having made that correct finding, the Tribunal then proceeded to make a finding that by co-signing the lease for Entertainment Headquarters, applicant abused his position and sought to influence council. The Tribunal came to the conclusion that applicant had a substantial interest in the lease. The Tribunal "closed its eyes" to the fact that applicant was neither a shareholder nor Director in Entertainment Headquarters. The Tribunal did not consider that at all stages of the application, the applicant had disclosed his interest. Further, evidence was led from the witnesses to indicate that applicant did recuse himself from all the committees that sat to consider the application by Entertainment Headquarters. The Tribunal came to its final conclusion in the following manner:

*“It is the Tribunal’s finding that the mere inclusion of Banda’s name and signature on the application for lease and the project proposed was wrong and unacceptable conduct on the part of a person who holds the position of Councillor and Deputy Mayor and therefore constitutes an act of gross misconduct. The old adage, “**Ceaser’s wife must be above reproach/suspicion**” is totally applicable in this case---.”*

Having reasoned that an act of gross misconduct had been committed, the Tribunal then assessed an appropriate penalty and came to the following conclusion:

“The Tribunal members were of the view that perhaps Banda could be reprimanded for the role he played in the acquisition of the lease. The Urban Councils Act as amended, however does not provide for any alternative penalty once such finding is made. The reasoning is presumably because a councillor holds office via elections. He is not an ordinary employee of Council and therefore cannot be treated as such. To impose any penalty other than that provided for by the Act would be a violation of the provisions of the Act.

Section 4 (2) of the Rules of Independent Tribunals FOURTH SCHEDULE of the Urban Councils Act as amended states:

4(1) ----

- (2) where the independent tribunal determines that the respondent is guilty of misconduct.*
- (a) the respondent is deemed to be removed from office on the date of that determination and his or her last seat becomes vacant on that date...”*

GROUND FOR THE REVIEW

The applicant contends that the Tribunal’s finding that he is guilty of misconduct in the acquisition of the lease by Entertainment Headquarters is grossly irregular. Once the Tribunal made a factual finding that the application for lease by Entertainment Headquarters was not required to go to tender it followed that it was unsustainable on the facts to find that applicant had unprocedurally acquired the lease in the absence of evidence of applicant’s interference with the processing of the application. To the contrary evidence led from all the witnesses at the Tribunal proved that procedure was religiously followed. All witness testified that there was no interference brought to bear upon councilors or staff members of council. In fact witnesses suggested that the Minister was misled into believing that there was misconduct on the part of the applicant. The Mayor made the point clearly when he testified that the Minister of Sport had phoned him after reports were made that the whole of Ascot racecourse had been sold. This

information was false. The Mayor allayed fears that the racecourse had been sold. This essentially led to the institution of investigations against the applicant.

In my view, where a finding is made that a person is guilty of gross misconduct, such a decision is grossly irregular and unreasonable where such a finding is not supported by any evidence in the record of proceedings. The decision would be clearly irregular and unreasonable in that it would not be grounded on any factual findings proving guilt. The decision by the Independent Tribunal is not only grossly irregular and unreasonable but constitutes an unreasonable exercise of its powers and mandate.

In *Pangeti v Grain Marketing Board* 2002 (1) ZLR 454 H, MAKARAU J, (as she then was), held at page 459D as follows:

“The applicant has alleged as one of the grounds for review that the decision of the respondent was grossly unreasonable. This in my view, brings under the spotlight the content of the decision of the respondent to dismiss the applicant.”

The powers of the High Court on review have also been extensively discussed in the cases of *Fikiluni v Attorney General* 1990 (1) ZLR 105 (S), and *Secretary of Transport v Makwavarara* 1991 (1) ZLR 18 (5).

In *Zambezi Proteins (Pvt) Ltd and Others v Minister of Environment and Tourism and Another* 1996 (1) ZLR 378H GARWE J, (as he then was) stated as follows:

“The question not infrequently arises what is meant by “reasonable”. In this regard LORD GREEN MR remarked in *Associates Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223 at 229.

“Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must be done. For instance, a person entrusted with discretion must so to speak, direct himself properly in law. He must call this own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to that he has to consider. If he does not obey those rules, he may truly be said, to be acting “unreasonably.” Similarly there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority...”

DISPOSITION

The decision taken by the Independent Tribunal in finding the applicant guilty of gross misconduct is premised on the fact that he co-signed a lease agreement in behalf of Entertainment Headquarters. The Tribunal referred to the lease of property in Hume Park. However, in the allegations as contained in the letter of suspension dated 20 September 2016, it is specifically alleged that:

“---2. You used your position as Deputy Mayor and Councillor to unprocedurally acquire a lease for stand 187964 Bulawayo Township Lands on behalf of Entertainment Headquarters, which stand should have been put to tender.”

Firstly, the Tribunal based its finding in relation to the Hume Park stand, which was never part of the allegations against applicant. Secondly the lease in respect of stand 187964 Bulawayo Township Lands, which is referred to in the letter of suspension and which forms part of the allegations on the second charge was never approved by Council but was rejected. In any event, I have already concluded that the co-signing of the lease agreement by applicant on behalf of Entertainment Headquarters, was not shown to have influenced Council in its deliberations regarding whether or not to grant the lease. Applicant disclosed his interest and recused himself from all committee hearings pertaining to the lease. Thirdly, and most importantly, the basis of the allegation on the second charge was that the lease was required to go for tender. All the witnesses who gave evidence stated that there was no policy that required lease of stands in undesignated areas to go for tender. It is therefore clear that the decision of the Tribunal was not grounded on any facts on the record and, was not based on any sound legal basis. Such a decision is grossly irregular and unreasonable.

Accordingly, I am satisfied that the applicant is entitled to the relief sought in the Draft Order. It is therefore ordered as follows:

1. The decision of the first respondent finding applicant guilty of an act of gross misconduct be and is hereby set aside and substituted with an order finding applicant not guilty of any act of misconduct.
2. The applicant be and is hereby reinstated as Councillor for Ward 5, Bulawayo and Deputy Mayor of the 6th respondent with no loss of allowances and benefits.

3. 5th respondent to bear the costs of suit on the ordinary scale.

T J Mabhikwa and Partners, applicant's legal practitioners