DISTRIBUTABLE (8)

Judgment No S.C. 13\03
Civil Appeal No 355\02

THE CITY OF MUTARE v THE MUTARE RESIDENTS AND RATEPAYERS ASSOCIATION

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & MALABA JA
HARARE MARCH 24 & JUNE 5, 2003

T. Biti, for the appellant

R.M. Fitches, for the respondent

SANDURA JA: In a judgment handed down on 25 September 2002, the High Court declared that the owners rates, charges and levies set by the appellant for the year 2001 were of no force and effect. Aggrieved by that decision, the appellant instituted this appeal.

The factual background is as follows. On 10 and 17 November 2000 the appellant ("the Council") advertised its proposed increases in the owners rates, charges and levies for the year 2001 in two local newspapers and called for objection, if any, to be lodged on or before 11 December 2000. Thereafter, the respondent ("the Association") submitted a petition signed by over 2 500 residents objecting to the proposed increases. In addition, over 35 companies objected to the increases.

After the objections had been submitted, a special meeting of the Council was called for 14 December 2000 to consider the objections. The notice which was sent to the councillors informing them of the special meeting was accompanied by a summary of the objections set out in the Association's petition, and a statement to the effect that the petition had been signed by more than 2 500 residents. However, the booklet containing the signatures of the more than 2 500 residents did not accompany the notice, although it was later circulated to the councillors at the meeting on 14 December 2000.

The special meeting was attended by eleven of the seventeen councillors. About six councillors spoke in favour of the confirmation of the proposed increases, and no councilor spoke against it. At the end of the meeting the councillors resolved to confirm the increases as they were of the view that the objections which had been submitted and considered at the meeting did not justify a reduction of the charges.

Aggrieved by that decision, the Association filed a court application in the High Court seeking an order nullifying the Council's budget for the year 2001. That order was subsequently granted by the learned judge in the court *a quo*. The Council has now appealed against that order.

The learned judge granted the order sought by the Association because, in his view, the Council had failed to comply with the provisions of subsections (3)

and (4) of s. 219 of the Urban Councils Act [Chapter 29:15] ("the Act"). Those subsections, in relevant part, read as follows:-

> "(3) If … objections to the proposed tariffs, charges or deposits are lodged -
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> (a) by thirty or more persons who are voters or who are users of the service to which the tariff, charge or deposit relates; or
>
> (b) …;
>
> such tariffs, charges or deposits shall be reconsidered by the council, together with the objections so lodged, and they shall not come into operation unless the resolution is again passed by a majority of the total membership of the council …
>
> (4) The notice to councillors of any meeting at which the proposed tariffs, charges or deposits are to be reconsidered for the purposes of subsection (3) shall contain a copy of all objections lodged in terms of subsection (3) unless all councillors have been previously circulated with a copy of the objections."

Dealing with subsection (3) the learned judge said:-

> "The requirements of s 219(3) of the Act are also crystal clear. Where the requisite number of objections to the proposed tariffs and charges have been lodged, the proposed tariffs and charges shall not come into operation unless the resolution is passed by a majority of the total membership of the council. In order to ascertain whether that test has been passed, a vote must be taken. It is not sufficient for the respondent (the Council) to say that the Council acts by consensus and seldom resorts to votes. That may well be the case, and it obviously suffices, for the vast majority of the resolutions that come before the Council. However, the requirements of the Act must be strictly observed. S 219(3) requires that in the circumstances specified therein, (the) proposed tariffs and charges shall not come into operation unless the resolution has been passed by a majority of the total membership of the Council. That means that a vote must be taken and the number of votes in favour of the resolution must be recorded. If that is not done, it cannot be established that the resolution was passed in accordance with the requirements of s 219(3) of the Act. That being the case, the proposed new tariffs and charges cannot come into operation."

In my view, what the learned judge said would apply where there is disagreement amongst the councillors present at the meeting. In that situation, a vote must be taken in order to determine whether a majority of the total membership of the Council is in favour of the resolution.

However, where there is no such disagreement the practical need for voting does not exist. That was the position in the present case. The total membership of the Council was seventeen. Eleven of the seventeen councillors attended the special meeting on 14 December 2000. According to the minutes of that meeting, six of the councillors present spoke in favour of the confirmation of the increased levies and charges, and no councillor spoke against the confirmation. No-one, therefore, dissented.

In addition, the minutes of the meeting indicate that immediately before the resolution was passed the following occurred:-

> "The Executive Mayor requested the Deputy Mayor to summarise what Council had agreed upon.
>
> In response, the Deputy Mayor commented that Council had agreed to reaffirm its position on the 2001 budget because the objections received did not warrant a review of the charges." (emphasis added).

It was then resolved by the Council that the 2001 budget be reaffirmed and it was.

In the circumstances, there can be no doubt that the resolution was unanimously passed by the eleven councillors. As the decision was a unanimous one,

there was no need for a vote. The resolution was, therefore, passed by a majority of the total membership of the Council as required by s 219(3) of the Act.

With regard to s 219(4) of the Act, the learned judge said the following:-

> "Subsection (4) of s 219 of the Act requires that a copy of all the objections lodged shall be sent to all councillors with the notice for the meeting. That means that a copy of each objection that has been lodged must be sent to councillors. The objection lodged by the applicant contained the signatures of over 2 000 people. Therefore any copy of that objection should also contain the same number of signatures. The requirements of s 219(4) of the Act are quite clear. A copy of each objection must be sent to councillors, not a copy of part of the objection together with an explanation of what the other part of the objection consists of."

I entirely agree with those comments. However, by nullifying the increases on the ground that the Council had not complied with s 219(4) of the Act the learned judge overlooked the fact that when the Council sent "a copy of part of the objection together with an explanation of what the other part consisted of" it was acting on an erroneous direction given to it in an *ex tempore* judgment of the High Court in an earlier application brought by Mr White, the Chairman of the Association, in 1998 for the nullification of the 1996 budget. The learned judge in that case said:-

> "In July and August of 1996 the respondent advertised in the newspaper various rates and other tariff increases. A petition objecting to the proposed increases was lodged with the respondent. There were two thousand (and) five hundred signatures on the petition. Section 219(4) of the Urban Councils Act provides that (the) notice to councillors of any meeting at which proposed tariffs and charges are to be reconsidered shall contain a copy of all objections lodged unless councillors have been previously circulated with a copy thereof …

> The Acting Town Clerk says in his affidavit that it was practically impossible to circulate all the two thousand (and) five hundred objections before the date of the meeting.
>
> It was of course the gist of the petition and the fact that it contained two thousand (and) five hundred signatures (that) had to be notified to the councillors. Not all the signatures" (emphasis added).

The judgment, of which the above passage is a part, was given on 2 June 1999. It is quite clear from the judgment that the learned judge was of the firm view that it was not necessary to send the booklet containing the 2 500 signatures to the councillors. I have no doubt in my mind that that is an incorrect interpretation of s 219(4) of the Act.

Nevertheless, in the present case the Council proceeded in terms of what had been directed by the learned judge to be the best way of satisfying the requirements of s 219(4) of the Act. In doing so, the Council cannot be faulted. In my view, this is a special feature in this case which would justify the issuing of a declaratory order without setting aside the increased levies and charges, which have been operational since 2001.

Finally, I wish to point out that the owners rates are not dealt with in terms of s 219 of the Act, but in terms of s 274 which does not provide for objections to any increases. For that reason, the increased owners rates should not have been set aside.

As far as the costs of appeal are concerned, since the appellant Council did not comply with the provisions of s 219(4) of the Act there will be no order as to costs, notwithstanding the fact that the appeal has been successful. However, the

costs in the court *a quo* stand on a different footing because there is no reason why the respondent Association should not be awarded its costs of suit.

In the circumstances, the following order is made:

1. The appeal is allowed with no order as to costs.
2. The order of the court *a quo* is set aside and the following is substituted:

   "a. It is declared that the respondent did not comply with the provisions of s 219(4) of the Urban Councils Act [Chapter 29:15].

   b. The respondent shall pay the costs of the application, including the costs of the application for the rescission of the default judgment."

CHEDA JA : I agree

MALABA JA: I agree

Bere Brothers, appellant's legal practitioners

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