AUSTIN ZVOMA
versus
LOVEMORE MOYO N.O
and
NOMALANGA KHUMALO N.O
and
BRIAN TSHUMA N.O
and
SHEPPARD MUSHONGA N.O
and
EDNA MADZONGWE N.O
and
WILLIAS MADZIMURE N.O
and
LYNETTE KARENYI N.O

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 21 & 30 December 2011 and 20 January 2012

Urgent Chamber Application

Adv. *Ochienge*, for the applicant
B Mtetwa, for 3rd and 4th respondents
C. Mhike, for 1st , 2nd ,5th , 6th and 7th respondents

BERE J: On 12 December 2011 the applicant filed an application in this court under case No HC 12336/11 seeking a prohibitory interdict against the respondents. The remedy sought was to prevent the respondents from moving or accepting any motion from any member of the House of Assembly to dismiss the applicant without the matter of his dismissal first being brought before the Committee on Standing Rules and Orders (CSRO) or its sub committee or other independent and impartial disciplinary authority.

On realising that despite having filed the aforesaid application the respondents were determined to proceed with the motion to have him dismissed, the applicant filed the instant urgent application whose amended interim relief is couched in the following terms:-

"1. Pending the determination of the Court Application under case Number HC 12336/11 the respondents are prohibited, restricted and interdicted from continuing to debate and voting on any motion to dismiss the applicant.

2. Pending the determination of the Court Application under case Number HC 12336/11, any debate, voting or decision on the motion to dismiss the

applicant with or without amendments be and is hereby declared null and void *ab initio* and therefore of no force and effect".

The notices of opposition filed by the respondents have raised two preliminary points which I must deal with first.

It was contended on behalf of the respondents that the motion whose passing the applicant had sought to prevent was passed as amended by Parliament on Thursday 15th December 2011 and therefore the applicant's urgent application has been overtaken by events.

Secondly, it was argued through the sixth respondent that the certificate of privilege prepared by the first respondent ousted the jurisdiction of this court upon its mere production.

I propose to deal first with the certificate of privilege.

With all due respect I do not share the sentiments expressed by the two counsels for the respondents that once produced the certificate of privilege must be viewed as some immutable document which has the effect of ousting the jurisdiction of this Court.

The strong view that I take and as highlighted by the applicant's counsel is that a defective certificate will not be conclusive of the matter and further, that the Court is empowered to consider the jurisdictional basis of such a certificate first before its effect can be determined. Such a certificate should never be looked as some biblical verse.

DUMBUTSHENA CJ (as he then was) after carrying out a fairly detailed survey of the legal position in other jurisdictions eloquently put it in *Smith v MutasaAnor*in the following words

> "When construing the provisions of [*Cap 10*] (the Privileges, Immunities and Powers of Parliament) the Courts of justice cannot ignore any breaches of fundamental rights in order to rule in favour of Parliamentary privilege. To do so would be inconsistent with the provisions of the Constitution"[1].

GUBBAY CJ emphasised that the jurisdictional basis of such a certificate must be established first before it can be accepted to stay proceedings[2]. In the instant case the applicant has expressed reasonable apprehension that Parliament appeared to be determined to continue dealing with the matter in a manner which is in complete violation of its own rules which precludes members to debate or refer to any matter on which a judicial decision is pending[3].

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[1]Smith v Mutasa N.O. & Anor 1989(3) ZLR 183 (SC) at p 194 B-D
[2] Mutasa v Makombe N.O. 1997(1) ZLR 330 S at p 335
[3] Section 62(d) 4 Parliament of Zimbabwe House of Assembly Standing Order, 1st edition 2005

There can be no argument that the Members of Parliament continued to debate the alleged shortcomings of the applicant after the 12th of December when his matter was already awaiting determination in this court under case HC 12336/11.

Section 62(d) of the Parliament of Zimbabwe House of Assembly Standing Orders is clear on this point. It is Parliament which crafted its own rules and this same Parliament must not take pride in assaulting its own rules. This court will not aid Parliament in violating its own Standing Orders or stay aloof in circumstances which manifestly demonstrate Parliament is off rail merely because of the doctrine **o**f the separation of powers.

Secondly, and as argued by counsel for the applicant, the certificate of privilege must be specific in its disclosure of the matters of privilege that it seeks to be protected. It must not be left to the Court to speculate on such issues as suggested by Counsel *Mtetwa* that the issues the certificate referred to are apparent in the opposing papers.

In my view, the certificate before me is devoid of detail. So the attempted pronouncement by the Speaker to persuade me to stay the proceedings or to owner the privilege so desired has not been properly done.

Contrary to the ratio pronounced in the Landmark case of Smith and Mutasa N.O. & Anor (*supra*) the certificate produced is completely silent on detail.

Because of the cumulative shortcomings of the certificate as highlighted coupled with the attempt by Parliament to severely dislocate its own standing orders, I hold a very strong view that the certificate is incapable of ousting the jurisdiction of this Court in hearing this matter. I remain firmly seized with this matter despite the production of the certificate of privilege.

Let me quickly revert to the 1st preliminary point. I do not believe that the mere passing of the motion on 15 December 2011 deals a death knell to the concerns raised by the applicant in his application.

The passing of the motion was significant but it is not the conclusion of the whole process as evidenced by the amended motion eventually passed. Applicant has argued that the only body that supervises him in the execution of his duties is the committee on Standing Rules and Orders chaired by the first respondent and it is my view that it is this committee which is mandated to initiate disciplinary proceedings against him should the need arise. The argument is persuasive and I have no difficulties in following it as I will look at it in detail as I will deal with the matter on merits.

If the applicant's position in this regard is correct (which I am certain it is) the rules of natural justice would be seriously stampeded upon if his dismissal were to be initiated by Members of Parliament instead of the Committee which appoints him in the first place because he who hires must be empowered to fire or initiate disciplinary proceedings.

In conclusion it is worth noting that the CSRO is constitutional provided for in terms of s 57 of the Constitution of this country and, in my view, this committee may not be subordinated to any other committee desired by the respondents in terms of their amended motion.

For the above reasons I am more than satisfied that the urgency of this matter is beyond reproach. The applicant's matter deserves to be heard on urgent basis.

ON MERITS

Having disposed of the preliminary points raised I wish to focus on the substantive issues raised by the parties in this application.

The fundamental guiding principle in this case was eloquently summed up by Mr Shepherd Mushonga the fourth respondent when he put it in the following words:-

> "The principle of separation of powers is he hallmark of a constitutional democracy which entails that the three (3) arms of State namely Parliament, the Executive and the Judiciary are separate and independent of each other in so far as the exercise of their powers is concerned.
>
> The Constitution vests parliament with the powers to regulate its own affairs. Parliament exercise judicial powers in respect of certain matters that fall within its domain to the exclusion of the Courts[4]".

I applaud the sentiments and indeed associate myself with same.

Be that as it may, one needs to appreciate the often overlapping function that characterize the legislature, the Executive and the Judiciary. Whilst these three arms of Government must enjoy their independence, they do not exist outside each other. They play a complimentary role.

The sovereignty of Parliament or to put it simply, the power enjoyed by Parliament is not absolute, for if it were so the citizens would be extremely vulnerable. It would mean that Parliament would do virtually everything it desired including violating its own rules and regulations to the detriment of its citizen with impunity. Such a scenario in my view would

[4] Paras 2.1. -2.2. of Mr Shephered Mushonga's notice of opposition to the urgent chamber application.

not be tenable. There must be some control mechanism through which Parliament is to be held accountable by disgruntled citizens. See the British Constitution by J.S. Dugdale, M.A[5].

From my reading of the applicant's urgent chamber application and the notices of opposition filed by the respondents, I discern the following issues to be pertinent and decisive in this matter;

(a) Whether or not the House of Assembly violated Standing Order 62(d) of the House of Assembly Standing Orders by continuing to debate and voting on the motion to dismiss the applicant after the applicant had filed case no HC 12336/11.

(b) Whether or not the Members of Parliament have *locus standi* to initiate the applicant's dismissal in the manner that they have done in this case.

(c) Whether or not the House of Assembly through the active participation of the respondents used illegal means to initiate the dismissal of the applicant.

(d) What is the correct procedure which should be used to initiate the dismissal of the applicant?

(e) Whether or not the amended motion proposed on 14 December 2011 and eventually adopted by the House of Assembly cures the defects which are of concern to the applicant.

Having identified the issues, I propose to deal with them in seratium.

(a) <u>Alleged violation of standing orders 62(d)</u>

It was contended by the applicant that after he had filed his application in this court seeking among other things to interdict the respondents from continuing to debate on the issue of his dismissal, and to force compliance with proper disciplinary procedures, the House of Assembly was obliged to follow the dictates of Standing Order 62(d) of the House of Assembly Standing Orders.

In countering this argument the respondents argued that the existence of a court application could not operate as a bar to the conduct of Parliamentary business and that only a court order had the capacity to stop further debate on the motion that was already before the House. The argument by the respondents in this regard is quite pronounced in para 8 of the joint notice of opposition filed by the first, second, fifth, sixth and seventh respondents.

[5] The British Constitution by, J.S. Dugdale, M.A. published by Bath James Brodie Ltd, London 1962 at pp 32-33

In supporting the same argument the fourth respondent on his behalf and also duly authorised by the third respondent reaffirmed the position that Parliamentary debate on the issue could not be stoppedby the Court application alluded to by the applicant.

It is evident from the hansard of the day that the members of the House offered conflicting views on this issue. It is necessary to refer to the specific section in issue. The section reads as follows:-

> "62 No member shall, while speaking to a question …..
> (d) use derogatory, disrespectful, offensive or unbecoming words against the Head of State, Parliament or its members, the Speaker, nor reflect upon an statute unless for the purposes of moving for its repeal; nor shall a member refer to any matter on which a judicial decision is pending;"(my emphasis).

It appears to me that if one were to concentrate on the ordinary grammatical meaning of the standing order in question one would find it extremely difficult not to understand what the House intended when it crafted these rules of debate. It is trite that in interpreting statutes the very basic approach is first to ascribe to the words used their ordinary grammatical meaning.

It is clear to me that the standing order referred to simply meant that when a matter is pending before the Courts or when a matter is subjudice, House members are obliged to respect the Court process until a determination on that matter is made. In this regard I feel more inclined to lean on the views of the learned judge VAN DEN HEEVER JA when he remarked on the use of the word 'shall' as follows:-

> "If a statutory command is couched in such peremptory terms it is a strong indication, in the absence of considerations pointing to another conclusion that the issuer of the command intended disobedience to be visited with nullity"[6].

It will be noted that during debate on the issue those who spoke in favour of proceeding with the tabled motion suggested, strangely so in my view, that the members of the House could only be stopped from debating the issue if at the time there was a Court order barring them from so acting.

With respect, the standing order in question does not say what the respondents and those who contributed in support of the motion desire it to mean. If Parliament intended the standing order to mean what the respondents say, surely Parliamentcould have had no difficulty in crafting the standing order to that effect.

[6] Messenger of the Magistrate's Court. Dupbata v Pillay 1952(3) SA 678 (AD) at p683

It is not in dispute that the respondents, despite having been duly served with case no. HC 12336/11continued to debate the motion in complete defiance or violation of the standing order in question.

This belligerent attitude displayed by the respondents can only lead to one inevitable conclusion. That disobedience by the House of its own standing orders must be visited with "nullity" over what it did because it was not competent for the House to stubbornly ignore the clearprovisions of s 62(d) of the House of Assembly standing orders.

(b) Did the Members of Parliament (the respondents inclusive) have *locus standi* to initiate the applicant's dismissal in the manner they did?

The applicant's case in this regard is that he is constitutionally appointed by the CSRO chaired by the Speaker of the House of Assembly. He likened the CSRO to a board of directors in a company set up and the Members of parliament to shareholders in a similar set up.

It was the applicant's position that it is this organ of Parliament (CSRO) which is mandated to supervise him in the execution of his duties and that it should therefore be this body which should initiate disciplinary proceedings against him as opposed to Parliamentarians should the need arise.

The applicant also argued that in his belief s 48(2) of the Constitution does not preclude s 57 of the Constitution, the House of Assembly Standing Orders, Officers of Parliament (Terms of Service) Regulations, 1977 and the Labour Act, from regulating his employment relationship with Parliament.

The respondents argued that it was within the power of Parliamentarians to initiate the applicant's dismissal and that the officers of Parliament (Terms and Service) Regulations 1977 and the Labour Relations Act are not applicable to the applicant.

Both counsels for the respondents, viz Mr *Mhike* and Ms *Mtetwa* argued to my satisfaction that the applicant, being a constitutional appointee is not covered by the Labour Act and that his attempt to seek refuge in the Labour Act may have been misplaced. I agree.

In advancing this argument reliance was placed on s 3 of the labour Act which is self explanatory and reads as follows:-

"3 Application of Act

(1) This Act shall apply to all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution[7]".

[7] Section 3 of the Labour Act [*Cap 28:01*]

I did not hear the applicant to have attempted to rebut this watertight argument. This argument was therefore conclusively made in favour of the respondents.

In order to appreciate whether or not the respondents and other members of Parliament have *locus standi* to initiate disciplinary proceedings against the applicant there is need to look closely on the office of the applicant.

The office of the applicant is created by s 48(1) of the Constitution of Zimbabwe and that section reads:-

"**48 Clerk of Parliament and other staff.**

(1) There shall be a Clerk of Parliament <u>appointed by the Committee on Standing Rules and Orders</u>[8]"(my emphasis).

Section 57(2) of the Constitution then goes further to define in an exhaustive manner the composition of the Committee on Standing Rules and Orders (CSRO).

I do take the argument raised by Mr *Mhike* that the CSRO is not a stand alone body but it is an organ of Parliament.

Despite this however, it must be appreciated that the legislature has given the SCRO the mandate to appoint the applicant and consequently the power to supervise him and other staff members of Parliament. I see the CSRO as the administrative arm of Parliament.

If it is accepted that the CSRO is constitutionally mandated to appoint the applicant then surely it must be to this same body that the constitution reposes the power to initiate the dismissal of the applicant by following due process.

Because the Clerk of Parliament is a professional person whose life goes beyond the life of Parliament his supervision cannot be left in the hands of every Member in the August House who incidentally do not appoint him. The view that I take is that the body which appoints the applicant is the same body that must supervise him. It is this same organ that must enjoy the prerogative to initiate disciplinary proceedings against him. I am fully cognisant of the existence of s 48(2) of the Constitution and I intend to deal with its application and implications in greater detail later in this judgment.

If my reading of the role of the CSRO vis a vis the applicant is correct (which I am certain it is) then it goes without saying that the respondents must have lacked *locus standi* to initiate the motion, debate, and vote on it to determine the fate of the applicant. In so doing,

[8] Section 48(1) of the Constitution of Zimbabwe

the respondents violated the constitutional provisions dealing with the appointment and supervision of the applicant and consequently their actions were illegal.

As I will demonstrate in this judgment there are grave consequences that would remain visible if the respondents conduct is not interfered with by this Court.

(c) The correct procedure in initiating the dismissal of the applicant

I intend to deal with issues (c) and (d) together.

To fully understand the fear that gripped the applicant in this case one needs to understand the motion that was tabled for debatein Parliament.

Following numerous allegations which touched on the alleged shortcomings of the applicant in the execution of his duties as the Clerk of Parliament the motion that eventually stood in the name of the third respondent was worded as follows:

> "Now therefore, this House places on record its disapproval of the untoward behaviour and actions exhibited by the Clerk of Parliament, Mr Austin Zvoma, and further resolves to invoke provisions of 48(2) of the Constitution of Zimbabwe to dismiss Mr Austin Zvoma from the service of Parliament forthwith through a secret ballot process – Hon Tshuma[9]". (my emphasis)

The wording of the motion shows the inherent dangers of allowing the respondents and other Parliamentarians to determine the fate of the applicant. The motion as it stood had no provision for proper disciplinary proceedings yet the right to be heard even for a murderer is one of the core values of the rules of natural justice.

As already alluded to elsewhere in this judgment, s 48(1) of the constitution of this country has vested the power to appoint a Clerk of Parliament (the applicant) not to every Member of Parliament but to a special organ of Parliament called CSRO which organ is tasked to supervise not only the applicant but also other staff members of Parliament who are appointed in terms of s 48(3) of the Constitution.

Section 48(4) of the Constitution then gives Parliament the power to formulate terms or conditions of service for the staff members. The officers of Parliament (Terms of Service) Regulations 1977were approved by Parliament in terms of this section. These rules, cover in sufficient detail the appointment procedure, conditions of service including the procedure to be adopted in the termination of the employee's service should the need arise.

It is pertinent to note that in terms of Part 1 of the Officers of Parliament (Terms of Service) Regulations, 1977 it is stated that "the staff of Parliament shall in addition to the

[9] Parliament of Zimbabwe: Votes and proceedings of the House of Assembly No. 21 p 243; Wednesday 14-12-11

Clerk of Parliament, consist of such officers…"The regulations go on to identify these other officers or employees as specified in the regulations.

I do not read this section to exclude but to include the person in the position of the applicant.

A simple perusal of the regulations concerned clearly show that the administration of the staff members of Parliament as well as their appointments is vested in the CSRO.

The rules in so far as they deal with the disciplinary proceedings of the staff members of Parliament are clear and they do not require any complicated interpretation. The Speaker of the House of Assembly (first respondent) is firmly empowered by the rules to initiate any enquiry against any of the staff members of Parliament who incidentally include the applicant. There does not seem in my view to be any room for the CSRO through the Speaker of the House of Assembly to relinguish or to delegate its administrative functions to the ordinary members of Parliament. This appears to me to have been done for obvious reasons. Ordinary members of Parliament do not appoint the staff of Parliament and the applicant and may not have the capacity or ability to supervise the employees in their day to day activities.

There seems to be greater wisdom in dealing with disciplinary proceedings in terms of the regulations of Parliament. That procedure comments itself in that before anyone is condemned, the individual is given an opportunity to explain his conduct in line with the much cherished and time honoured principle of the *audi alteram partem*.

It occurs to me that it is only when the CSRO has conducted a proper inquiry against the applicant and the applicant found to be guilty that the speaker can then advise Parliament in terms of s 48(2) of the Constitution. It is only then that the House of Assembly can then resolve by the affirmative votes of more than one-half of its total membership to have the applicant removed. Anything short of this would be illegal and any finding in support of the approach taken by Parliament would amount to this Court sanctioning Parliament to act in breach of its own regulations. This Court did not make the Parliament regulations in question. It was Parliament in its own wisdom which made them and the members of Parliament must be seen to be complying with such regulations.

Having said this I have not the slightest hesitation in concluding that, Parliament, in allowing the motion, debating on same and voting on it clearly overstepped its authority. This is so because the voting that is referred to ins 48(2) of the Constitution must be the end result of due process in the removal or dismissal of the applicant.

(e) **Has the amended motion cured the defect alluded to by the applicant?**

During argument it was suggested to me by the two counsels representing the respondents that the seemingly rough edges of the motion that triggered debate in Parliament on the …….. of the applicant was ultimately refined by the amendment that was proposed by the fourth respondent and subsequently adopted by the House thereby removing the defect complained of by the applicant.

I am not persuaded by this argument. It completely misses one fundamental issue in these proceedings. The issue is that the respondents or Parliament as a body did not have the power to do what it did.

Even if I were to assume for a moment that the respondents and Parliament in general had such powers, one needs to look at the resolution that was eventually passed with particular regard to the terms of reference of the proposed five member committee to appreciate the fallacy of the position taken by the respondents.

The House concluded by proposing the appointment of a special 5 member committee whose terms of reference is as follows:-

"(a) The Special five member committee is to make recommendations to the full House on its findings whether:

(i) To terminate immediately the Clerk of Parliament's contract of employment.

(ii) To suspend without pay for a period of time.

(iii) To demote and or reprimand the Clerk of Parliament …."

The terms of reference on their own make it impossible for the committee of 5 to approach the inquiry with an open or impartial mind. Their mandate is simply to find the applicant guilty at all cost and consider the nature of punishment to be meted out against him. Such an approach clearly represents kangaroo proceedings which must not be allowed to happen within the precincts of the supreme law making body of this country – Parliament.

If allowed to happen this would be a clear violation of the applicant's constitutionally recognised right to be afforded a fair hearing before an impartial body. The applicant's apprehension is clearly justified and Parliament must not be allowed to stampede on his rights with impunity.

During submissions I was referred to two very important decisions in this country for guidance, viz the case of *Bennett v Mnangagwa N.O & Ors*[10] and the case of *Mutasa v Makombe N.O.*[11] These two cases were referred to me as authority for the reaffirmation of

[10] 2006(1) ZLR 218(S)
[11] (supra)

the doctrine of the separation of powers and generally as authorities demonstrating the reluctance of Courts to interfere in the internal processes of Parliament in regulating its own practices and procedures.

With respect, I believe reference to these two cases missed one fundamental issue. In both cases Parliament was dealing with the punishment of its members for contempt of court. There is no doubt in my mind that Parliament by its very nature and largely as a result of the doctrine of the separation of powers enjoys quite some latitude in dealing with its own members but even in such circumstances the cited cases clearly show that where Parliament's conduct exceeds the bounds of reasonable justification the Courts will interfere with its decision. See the case of *Smith v Mutasa*[12]. But the main line of distinction between these cases and the applicant's case is that the applicant is not a member of Parliament but a professional in the employment of Parliament. There is no way the applicant can be treated like a politician or a member of Parliament.

As already highlighted Parliament's involvement in the treatment of a person in the position of the applicant is greatly curtailed and is clearly limited by the provisions of s 48(2) of the Constitution not as a starting point but as the end result after a proper enquiry has been carried out and concluded in terms of the applicant's contract of employment, and that action having been initiated by that organ which appoints and surprises him – the CSRO. So really, reference to these cases was clearly out of context.

In conclusion I wish to point out that, Parliament, because of its unique position as the supreme law making body must projects itself as the epitome of fair play. It must demonstrate to the citizens of this country the importance of complying with its own rules and regulations. It visibly came short in this regard and because of this its processes scream for interference by this Court. In *Smith v Mutasa N.O& Anor*[13] the full Supreme Court bench unanimously agreed to reverse the decision of the Parliament in depriving the appellant of his salary and allowances.

The interference by the Courtswith the activities of Parliament, (respondents inclusive) must be seen as a desperate clarion call by the Court to insist on Parliament conducting its affairs above board.

[12](supra)
[13] (supra)

I am satisfied that the applicant's apprehension as captured in his papers is more than justified. He stares irreparable harm to his employment if corrective action as prayed for is not taken.

I accordingly grant the following order:-

1. Pending the determination of the Court Application under case Number HC 12336/11 the motion passed by Parliament as amended be and is hereby declared to be null and void *ab initio* and therefore of no force and effect.

Dube Manikai & Hwacha, applicant's legal practitioners
Atherstone & Cook, 1st , 2nd , 5th , 6th& 7th respondents' legal practitioners
Mtetwa & Nyambirai, 3rd& 4th respondents' legal practitioners