

TINOFARA KUDAKWASHE HOVE
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 19 January 2016 and 23 March 2016

Opposed Application

E Matsanura, for the applicant
C Kwaramba, for the respondent

MUREMBA J: The applicant is the lawful owner of the property known as No. 7 Atkinson Road, Hillside, Harare. The property is being used for the legal practice of T. K Hove Law Chambers. The applicant is the sole partner of T. K. Hove Law Chambers.

This is an application to, *inter alia*, interdict the respondent from unilaterally disconnecting water supplies to the applicant's property without a court order. The applicant also wants the respondent interdicted from unilaterally charging him commercial rates for the use of water at the said property. The relief that the applicant is seeking is couched as follows:

"It is ordered that:

1. The respondent and all its employees be and are hereby interdicted from interfering whatsoever with, disrupting or terminating the applicant's water supply without a court order;
2. Respondent be and is hereby ordered to supply applicant with a detailed breakdown of the charges levied on the rates and water bill.
3. Respondent be and is hereby ordered to charge applicant domestic tariffs for water and rates, calculated from the 2nd of February 2009 to date.
4. That the respondent shall pay the costs of suit on the higher scale of legal practitioner and client scale only if it opposes the application."

In his founding affidavit the applicant averred that the basis of the application is that in November 2014 the respondent sent him a water bill indicating the he owed it US\$18 876-00. He

said that by way of 2 letters, which letters he did not attach as proof, he wrote to the respondent asking for a breakdown showing how the figure of US\$18 876-00 was arrived at. The applicant averred that the respondent did not supply the breakdown, but instead continued to send bills. At the time of the application the bill stood at US\$19 663-93. The applicant stated that the respondent's employees are now threatening to disconnect the water supplies if no payment is made. The applicant said that he is now afraid that the respondent will disconnect the water on the basis of a disputed water and rates bill without a court order. Citing the case of *Mushoriwa v City of Harare* HH 195/14 the applicant averred that this court has already made a decision that in a case where the water bill is disputed, it is unlawful for the respondent to unilaterally cut water supplies the consumer without first obtaining a court order.

The applicant said that the balance of convenience favours the granting of the interdict because he has over 10 employees at the premises. They need water for health and hygienic purposes. The applicant stated that there is no other remedy available to him as the respondent is the only authority that is mandated to supply water to him. He said that if the water supplies are cut he will not be able to access running water and he together with his employees will suffer irreparable harm. He said that more importantly, from a constitutional point of view, s 77 (a) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 provides that every person has the right to safe, clean and potable water. The applicant said that if the respondent proceeds to cut off the water supply without a court order its actions will be unconstitutional and illegal. He stated that the cutting of the water supply will infringe on his constitutional right to water.

The applicant also stated that he was informed that his premises were designated as commercial premises (as opposed to residential premises) without his knowledge or consent. He stated that the respondent had no right to unilaterally designate his premises as commercial to his prejudice. He said that the respondent should have given him the notice of intention to charge commercial rates and allowed him to make representations first before charging him with same.

In responding to the application the respondent in its opposing affidavit raised a point in *limine* to the effect that the issue about the applicant being charged commercial rates as opposed to domestic rates for the use of water is a matter which falls squarely within the expertise and province of the Administrative Court. It stated that this court should decline to exercise its inherent jurisdiction and refuse the application on that basis. In his answering affidavit the

applicant stated that the primary relief he was seeking is an interdict and the issue of the charging of commercial rates is ancillary relief, and as such this court which has jurisdiction to deal with the matter.

However, in the heads of argument the respondent seemed to have abandoned the point in *limine*. At the hearing the applicant's counsel did not pursue the point in *limine*.

In responding to the merits the respondent said that it had sent several bills to the applicant for which he did not pay. It said that he is in breach of a tacit agreement between the parties in terms of which the applicant must pay for water services supplied to him. It stated that the applicant cannot be allowed to enjoy service provision such as water supply without meeting his reciprocal duty to pay for it. The respondent stated that the applicant did not attach to his application proof of the queries he says he made to it, and furthermore, he did not attach proof that he had been paying any money towards settling even that which he admits owing. More importantly, the respondent averred that the applicant never queried with it the water bills.

The respondent stated that water disconnections are done in terms of the law which is s 8 of the Water By-Laws 164/1913 which is borne directly from s 69 (2) (e) (i) of schedule 3 of the Urban Councils Act [*Chapter 29:15*].

The respondent also averred that the applicant cannot be surprised that his premises are zoned as commercial premises when he accepts in his founding affidavit that his premises are used as offices for the business of T.K. Hove Law Chambers. It stated that the practice of law is a commercial enterprise and inevitably attracts obligations of a commercial magnitude. It stated that the premises cannot be used for commercial purposes while being charged domestic rates.

The respondent averred that in terms of its by-laws it does not require a court order to disconnect water supplies for non-payment of charges. The respondent stated that this is because disconnections are the only practical way by which it can collect enough revenue to provide the essential service of water. The respondent further averred that it is not practical for it to be expected to first go to court for adjudication for what is due in every case where the water bill is disputed. It said that if that is allowed to happen, it will result in every rate payer using the stratagem of disputing the bill to avoid paying and in the end it will never collect any revenue. It said that its failure to collect revenue means that it cannot fund for the provision of the service, which service it is expected to provide for the benefit of the same rate payer. The respondent said

that the law that allows it to make water disconnections without court orders is rooted in considerations of policy and practicality. The respondent admitted that this court has previously made a ruling on such disconnections in the case of *Mushoriwa v City of Harare supra* which ruling is to the effect that where a bill is disputed Council cannot disconnect water supply without a court order. The respondent however, stated that it does not agree with that ruling and has taken the case to the Supreme Court on appeal, but the appeal is still pending. The respondent said that it maintains that the mere fact that the applicant is disputing the water bill does not take away its right to disconnect water in terms of the cited water by-laws.

The respondent further stated that in any case the *Mushoriwa* decision did not strike down the legislation in terms of which water disconnections are done. It argued that the court cannot stop or reverse that which can be done in terms of the law. It also said that the applicant cannot challenge actions which are taken in terms of the law without challenging the law in terms of which the action was taken. It said that this is what the applicant is seeking to do in the present case yet he does not seek an order that strikes down the applicable law. It said that this court cannot rule that its conduct of disconnecting water supplies without a court order is illegal without first striking down the applicable law. It said this is exactly what happened in *Mushoriwa* case and this is the very reason why it has taken the case on appeal.

The respondent said that the applicant's constitutional argument is misplaced because while it is true that every person has a right to clean, safe and potable water, there can be no doubt that there are obligations attached to the exercise of that right. It said that for the applicant and his workers to enjoy the use of clean water, they should pay a related cost. It said that, that right should be considered in light of limitations and other people's rights. The respondent said that for water to be clean, safe and potable it has to be purified. It then has to be piped to his premises. It said that the cost for all this cannot be met by others while he enjoys a free ride.

The respondent said that litigation by its very nature is costly and time consuming. It said that if it is required to litigate in every case where a bill is disputed, it will end up spending all its time in court trying to recover costs for services rendered instead of spending time providing the service. It said that at the same time it will be using the same money collected from rate payers to litigate instead of directing such money towards service provision.

In his answering affidavit the applicant said that a close reading of his founding affidavit and draft order shows that he is seeking among other things a determination of whether or not the respondent's action of unilaterally cutting the water supply is not contrary to s 77 (a) of the Constitution. However, while it is mentioned in the applicant's affidavit that the act of disconnecting water supplies without a court order is unconstitutional as it contravenes s 77 (a) of the Constitution, a look at the draft order does not show that the applicant wants the Water By-Law which authorises the water disconnections declared unconstitutional. There is no request for the relief of a declaration of constitutional invalidity of the by-law.

The applicant said it is not true that he has not been paying for the water charges. He said that he has been paying reasonable rates and water charges. The applicant however, said that the onus is on the respondent to produce a detailed breakdown of the water bills showing that there has been non-payment of the bill and that the bill is justified. He averred that he will continue paying reasonable rates and water charges until the issues in dispute have been determined by the courts. He said that in the meantime the respondent should not cut his water supplies.

The applicant further said that he attached to the application the letters he wrote to the respondent on 7 October and 5 November 2014. However, no such letters are attached to the application. The applicant also said that he was attaching proof of the payments he made towards the water bills to the answering affidavit, but again no such proof was attached.

Let me hasten to point to out that in the answering affidavit the applicant was now making averments that water supplies were disconnected by the respondent and it was done without him having been given the requisite 24 hours' notice that is provided for in s 8 of the Water By-Laws. Even in his heads of argument the applicant was arguing on the premises that water supply to his property was disconnected. On that basis he was arguing that the respondent had already committed an injury on him warranting the granting of the interdict. However, at the hearing his counsel, Mr. *Matsanura*, submitted that water supply had not been cut off.

I must make it clear at this juncture that my mandate in the present application is to simply decide whether or not the respondent should first obtain a court order before disconnecting water supply to a consumer in a case where the water charges are disputed. I am not here to inquire into the constitutional invalidity of the water by-law which allows the respondent to disconnect water for non-payment of charges. In his application the applicant did

not ask me to make a declaration of constitutional invalidity of the said by-law. I say this because the applicant did not ask for this relief in his founding affidavit and in the draft order. All he said in his founding affidavit in paragraphs 18 and 19 which are the last two paragraphs of the affidavit, is that he has a constitutional right to water and if water supplies are cut without a court order that will amount to an infringement of his constitutional right to water as enshrined in s 77 (a) of the Constitution. After that he said nothing further. He did not say that the by-law in question is unconstitutional and should be declared as such. It was only in the answering affidavit that the applicant sought to bring in the issue of the unconstitutionality of the by-law and the need to have it declared unconstitutional saying that it is one of the issues for determination. The applicant's approach is clearly wrong because an application is found on its founding affidavit and not on the answering affidavit. The applicant cannot bring in new issues for determination in the answering affidavit.

The Law and its application

It is clear that the respondent draws its strength to cut off or disconnect water supplies for non-payment of charges from s 8 of the Water By-Laws 164/1913 which says:

“The council may, by giving 24 hours’ notice, in writing without compensation and without prejudicing its right to obtain payment for water supply to the consumer, discontinue supplies to the consumer.

(a) if he shall have failed to pay any sum which in the opinion of the Council is due under these conditions or the water by-law”

The above by-law is borne out of s 69 (2) (e) (i) of schedule 3 of the Urban Councils Act [Chapter 29:15] which expressly gives Council the right to make by-laws that allow it to cut off water supplies. The provision reads:

“Without derogation to the generality of sub paragraph (i), by – laws relating to matters referred to in that subparagraph may contain provision for or any of the following;

- (a)
- (b) cutting off the supply of water, after not less than twenty four hours’ notice on account of
- (i) failure to pay any charges which are due; or”

The provision simply states that the respondent can make by-laws which allow it to cut off or disconnect water supplies on not less than 24 hours’ notice to the consumer for non-payment of charges. It does not say that in the by-law it should be stated that before water

disconnections are made the city council should first obtain a court order. Under the both the by-law and the enabling Act it is Council which decides whether or not the debt is due. Section 8 of the By-Law says that Council may discontinue water supplies to the consumer “**if he shall have failed to pay any sum which in the opinion of the Council is due.....**” The Act says that Council may make by-laws that allow it to cut off water supply for “**failure to pay any charges which are due**”

The Urban Councils Act derives its authority from s 276 of the Constitution which reads:

“Functions of local authorities

(1) Subject to this Constitution and any Act of Parliament, a local authority has the right to govern, on its own initiative, the local affairs of the people within the area for which it has been established, and has all the powers necessary for it to do so.

(2) An Act of Parliament may confer functions on local authorities, including—

(a) a power to make by-laws, regulations or rules for the effective administration of the areas for which they have been established;

(b) a power to levy rates and taxes and generally to raise sufficient revenue for them to carry out their objects and responsibilities.(My emphasis)”

So the Constitution itself empowers Council to charge rates and taxes for service provision. This therefore means that whilst the respondent has a duty to provide safe, clean and potable water to people within its jurisdiction in terms of s 77 (a) of the Constitution which says, “every person has the right to safe, clean and potable water,” the people have a reciprocal duty to pay for the service. Paying for the service enables continued provision of the service.

In *casu*, the applicant never disputed that he has a duty to pay for the service of the water he receives from the respondent. He also did not dispute that if a consumer is not paying the water charges Council is entitled to discontinue water supplies to him or her. The gist of his argument was that, where the bill which in the opinion of the Council is due, is disputed by the consumer, Council cannot and should not proceed to unilaterally disconnect water without the dispute having been referred to the courts for the determination of what is actually due. However, on the other hand it was the respondent’s contention that even if the bill is disputed it can and it should proceed to disconnect water supply to the consumer in terms of s 8 of the Water By-Law. What is apparent from s 69 (2) (e) (i) of the Urban Councils Act and s 8 of the Water By- Laws is that Council is entitled to discontinue water supplies to a consumer if the consumer fails to pay water charges. However, there is no mention of what should happen in the event of a disputed bill. It is not stated whether or not disconnections should be done without

recourse to the courts if the bill is disputed. So both the by-law and the Act do not give us an answer on the course of action the respondent should take.

The right to water is a basic human right and the Constitution even obliges the State to respect, protect, promote and fulfil it¹. The State is further obliged to work progressively using the resources available to it for the full realisation of this right by its people². The obligation to respect this right by the State means that the State should refrain from interfering with the existing enjoyment of the right. Any measures that worsen a person's access to water are considered a violation of this right unless it can be fully justified. The obligation to protect the right to water means that the State must prevent third parties from interfering in any way with its people's enjoyment of the right. The obligation to fulfil the right means that the State must ensure that there are conditions in place for everyone to enjoy the right. The right to water is necessary for the enjoyment of other human rights such as the right to life, human dignity, health and food. Individuals require a minimum of 20 - 50 litres of safe water each day in order to meet basic needs. So water is a necessity to life.

Whilst our Constitution protects the right to water it also empowers local authorities to levy rates and taxes in order to raise revenue for service provision³. This means that costs committed for the purpose of providing a safe water supply must be recovered. I take this to mean that the right to water does not prohibit disconnections of water services for non-payment. I however, think that there should be limits and conditions on such disconnections. The disconnections must be performed in a manner warranted by law and must be compatible with the Constitution. In cases where water charges are genuinely disputed those affected must be provided with effective procedural guarantees which include an opportunity for genuine consultation, timely and full disclosure of information on the disputed bills and recourse to the courts for remedies. It is my considered view that the right to water contains the protection against or freedom from arbitrary and illegal disconnections. In cases of genuinely disputed water charges or bills I would define arbitrary and illegal disconnection of water as the cutting off of water supply by council without reasonable opportunity for redress being accorded to the consumer. Such action is arbitrary in the sense that it is done by council which is a party to the

¹ S 44 of the Constitution of Zimbabwe Amendment (No.20) Act 2013.

² S 77 of the Constitution of Zimbabwe Amendment (No.20) Act 2013.

³ S 276 (2)(b) of the Constitution

dispute autocratically and in an unrestrained manner. It is contrary to the principles of justice and as was said by Bhunu J in the *Mushoriwa* case the respondent cannot be allowed to be the arbiter in its own case. This is clearly despotic and tyrannical. The consumer's right to water is violated without him being given a chance to be heard by an impartial and independent arbiter. What if the consumer is correct in his challenge of the bill? Is it fair for him to be cut off or denied access to such a basic human right under such circumstances? In terms of s 69 (3) of the Constitution every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute. On the other hand the courts have a role to safeguard human rights and freedoms and the rule of law⁴. In view of the foregoing it is my conclusion that where the bill is genuinely disputed there should be recourse to the courts before Council disconnects the water supply to the consumer. In the *Mushoriwa* case (*supra*) the court was concerned with the unlawful arbitrary disconnection of water on the basis of a disputed water bill. The court held that since the bill was disputed it was improper for the City of Harare to disconnect the water without obtaining a court order. In that case the City of Harare had actually disconnected the water. I do agree with Bhunu J's reasoning in that case that it was wrong for City of Harare to disconnect water when it was well aware that Mr. Mushoriwa was disputing the bill. I believe that if there is a genuine dispute there should be recourse to the courts for remedies, but in a case where the charges are being disputed for the sake of avoiding payment and buying time no such recourse is necessary. I believe that what determines the genuineness of a complaint is the proof or evidence that is availed by the consumer to show that a complaint has been made and the reason(s) for the complaint. Recourse to the courts entitles both council and the consumer to present their cases to an impartial arbiter who will make a decision of what the consumer is entitled to pay after weighing all the evidence presented. Council cannot be allowed to be a law unto itself.

In *casu*, the applicant wants an order restraining the City of Harare from disconnecting water supplies to it without a court order because it is disputing the water bill. A party seeking an interdict of a final nature like in the present application has to establish⁵:

- a) a clear right ;

⁴ S 165 (1)(c) of the Constitution of Zimbabwe, 2013

⁵ Innocent Maja *The Law Contract in Zimbabwe* p.

- b) a well-grounded apprehension of irreparable harm if the relief is not granted
- c) that the balance of convenience favours the granting of an interdict; and
- d) that he has no other satisfactory remedy.

In *casu* whilst the applicant has a clear right to water which is protected in the Constitution he has not shown that that the bill is genuinely disputed. He failed to attach proof of the letters of complaint he wrote to the applicant disputing the charges. He even lied under oath that he had attached same to his founding affidavit when he had not. He did not attach proof which shows that he has been paying anything at all for the water services he has been receiving over the years. His argument that it is the respondent which should attach proof that he has not been paying is quite astonishing. It is him who brought his application on the basis that he has been making reasonable payments for what he believes he ought to be paying, so the onus is on him to prove the truthfulness of his averments. It is him who should provide proof that he has been paying. He who alleges must prove and in this case the applicant could have simply attached receipts.

Again the applicant lied under oath that he was attaching proof to his answering affidavit to show that he has been paying, but he never attached anything. At the hearing when I queried about the existence of the letters of complaint and the proof of payment Mr. *Matsanura* simply said that the applicant had made an oversight in failing to attach the letters and the proof of payment. This explanation is not good enough. It left me with the impression that the applicant just made this application in order to buy time because he is well aware that he has not been paying the water bill for quite some time and he is afraid that the respondent may disconnect the water anytime. In the absence of the letters of complaint and the proof of payment there is nothing to show that there is a genuine dispute of the bill in this matter. The balance of convenience does not favour the granting of the interdict. For this reason I will not grant the prohibitory interdict against the respondent ordering it not to disconnect water.

The applicant having failed to furnish proof to show that he once requested the respondent to furnish him with a breakdown of the water charges I see no basis for ordering the respondent to give the applicant such a breakdown. In any case, as correctly submitted by the respondent, the respondent has been sending an itemized bill to the applicant every month. The itemized bill reflects the items that are levied. The applicant even attached one such bill to this

application. The bill gives a breakdown which comprises tax, the water charge, sewerage charge, refuse charge among other things, and the balance brought forward. This is the bill which shows that the applicant now owes the respondent \$19 663-00. It is clear that the amount has accumulated over the years. The applicant was being sent such bills monthly, so if he puts them together he can see for himself how the total amount of US\$19 663-00 was arrived at. The bills are self-explanatory. He, therefore, has no reason for asking for a breakdown of the bill from the respondent.

On the issue that I order the respondent to charge the applicant domestic tariffs for water and rates with effect from February 2009, I do not feel compelled to do so for two reasons. Firstly, the applicant converted domestic premises for use as commercial premises. He is running a law firm at the premises and has more than 10 employees. I do not see the logic by the applicant to demand that he be charged domestic rates when he is running a commercial enterprise. By choosing commercial benefits the applicant should naturally be prepared to meet commercial expenses. The applicant cannot be allowed to take up two positions inconsistent with one another. The applicant cannot be allowed to blow hot and cold, to approbate and reprobate. Secondly, zoning and rating of properties are essentially town planning issues which are the domain of the respondent. The respondent argued that in conducting valuations and assessments of properties for purposes of rating it has no obligation to seek the consent of the property owner. It said that all that it is required to do is to publish the valuations so that whoever may have any objections can object to the Valuation Board in terms of part XVIII and part XIX of the Urban Councils Act. The respondent argued that it did everything procedurally. The applicant did not give me adequate information which shows that the respondent did not follow the correct procedure in zoning and rating it. For example, the applicant did not explain how and when he converted his domestic premises to run a legal practice and what steps the respondent ought to have taken (and in terms of what law), which it did not take in order to notify him about the change in his zoning and rating. I believe that this is an issue which needs proper and full ventilation especially considering that the zoning and rating of the applicant's premises as commercial was done as far back as February 2009. I believe that this is a matter which can be adequately dealt with by the Valuation Board or by the Administrative Court. The applicant is at liberty to approach any of the two if he wants to pursue the issue.

In the result, it is ordered that:-

1. The application to interdict the respondent from discontinuing water supplies to the applicant without a court order and for the applicant to be supplied with a breakdown of the water bill by the respondent be and is hereby dismissed with costs.
2. The applicant may approach the Valuation Board or the Administrative Court for the determination of the zoning and rating issue if he so wishes.

T K Hove and Partners, applicant's legal practitioners
Mbidzo Muchadehama and Makoni, respondents' legal practitioners