**CONSTITUTION WATCH 7/2016**

**[11th May 2016]**

**Suspension of Mayor of Harare – Constitutional?**

**Introduction**

The story is well known, at least to local residents.  Following a dispute between the City Council of Harare and the Minister of Local Government, Public Works and National Housing over the appointment of a Town Clerk, the Minister purported to suspend the mayor from office.

In his letter of suspension the Minister said:

“The grounds for your suspension are that you have, without legal basis, made an employment offer to a person for the position of town clerk without the necessary approval of the local government board as required by the Urban Councils Act, as read with section 265(1)(b) of the Constitution of Zimbabwe … You will be brought before a competent authority to answer the allegations above.  During the period you shall not receive any allowance and you shall not carry out any council business within or outside council.”

The mayor challenged his suspension in an application in the High Court.  He argued that, by virtue of the new Constitution, the Minister no longer has power to suspend him.  Judgment in the application has not yet been delivered.

Normally Veritas does not comment on issues before the courts but this matter is of such importance, affecting as it does relations between central government and local authorities, that we consider it in the public interest to outline the legal issues involved.

**The Urban Councils Act**

**Section 132** of the Urban Councils Act states that a council may appoint a person “approved by the Local Government Board” to be town clerk, and requires councils to recommend to the Board the names of suitable candidates for appointment.  *[The Local Government Board is established under Part VIII of the Act with the function, amongst other things, of approving the appointment of senior officials of local authorities]*.

So under the Act councils do not have a free choice in the appointment of senior officials and, if the council appointed a town clerk without getting the Board’s approval, it contravened the Act.

**Section 114** of the Act is headed “Suspension and dismissal of councillors” *[and it should be noted that the word “councillor” in the Act includes a mayor]*.  The section gives the Minister power to suspend a councillor on various grounds, mainly involving dishonesty or corruption but also on the ground that the councillor:

“has been responsible … for gross mismanagement of the … affairs of the council, whether or not the councillor’s responsibility is shared with other councillors …”

This is the provision on which the Minister based his suspension of the mayor of Harare:  by implication he claims that by appointing a town clerk without approval from the Local Government Board, the mayor and other councillors have grossly mismanaged the affairs of their city.

**Comment on Minister’s Use of Urban Councils Act**

The Minister’s claim stretches the meaning of section 114 to the limit and, perhaps, beyond.  It is hard to see how appointing a town clerk without approval amounts to “gross mismanagement” unless the person appointed is so obviously unsuitable that no reasonable councillor would have dreamt of appointing him – and no one has suggested that that was the case here.

The Minister’s case becomes even shakier when one considers the rest of section 114 of the Act.  It will be remembered that the section is headed “Suspension *and dismissal* of councillors”, and it goes on to say that after a councillor has been suspended the Minister must cause the matter to be investigated within 45 days; if the investigator’s report establishes the grounds for the suspension, the Minister may dismiss the councillor from office.

So section 114 of the Act does not allow the Minister to suspend a mayor or councillor and then do nothing further:  the suspension must be followed by an investigation and, where appropriate, a dismissal by the Minister within 45 days.

It is here that the Constitution comes in.

**The Constitution**

The Constitution is the supreme law of Zimbabwe and overrides anything to the contrary in the Urban Councils Act or any other law.

**Section 278** of the Constitution deals with the tenure of mayors and councillors.  It states:

“An Act of Parliament must provide for the establishment of an independent tribunal to exercise the function of removing from office mayors … and councillors.”

And it goes on to say that mayors and councillors do not vacate their seats except in accordance with the section.  This means they cannot be removed from office except through the decision of an independent tribunal established under an Act of Parliament.  To the extent that section 114 of the Urban Councils Act states the contrary it is unconstitutional and void.

**Comment on the Minister’s mention of section 265(1)(b) of the Constitution**

In his letter to the mayor of Harare the Minister mentioned section 265(1)(b) of the Constitution.  The section merely states that local authorities must within their spheres assume only those functions conferred on them by the Constitution or an Act of Parliament.  By selecting only this largely irrelevant provision the Minister has ignored the more important provisions of Chapter 14 of the Constitution dealing with the devolution of power and the independence of local authorities.

**Illegality of Suspension of Mayor**

No independent tribunal has been established in accordance with section 278 of the Constitution to remove the mayor of Harare from office.  The Minister cannot appoint one himself because no Act of Parliament authorises him to do so – and under section 278 an independent tribunal has to be appointed under an Act of Parliament.  Hence even if the Minister had good grounds for suspending the mayor of Harare – and, as we have said, that is doubtful – he cannot go further and remove the mayor from office.  This means the suspension itself is illegal because, as we have said, section 114 requires a suspension to be followed by an investigation and, where appropriate, a removal from office within 45 days.  The suspension, investigation and removal are inextricably linked together in the section.  In the absence of the last two – an investigation and a decision on removal – there cannot be a suspension because the purpose of the suspension is impossible to achieve.

On this ground alone, the Minister’s action in suspending the mayor was illegal.

We say “on this ground alone” because there are other reasons for questioning the suspension.  We have mentioned one – that the ground of suspension does not seem to fall within section 114 of the Urban Councils Act, much less the Constitution.  It can also be argued that section 132 of the Urban Councils Act, which prohibits municipalities from appointing town clerks without the Local Government Board’s approval, infringes the autonomy that Chapter 14 of the Constitution confers on local authorities.

**Previous suspensions of councillors**

The Minister must be aware that he can no longer suspend mayors and councillors under section 114 of the Urban Councils Act.  In August last year he purported to suspend the mayor and 10 councillors of Gweru, but his action was declared unlawful by Bulawayo Judge Nokuthula Moyo.  Her reasoning was substantially the same as that given above, namely that section 114 has been overridden by section 278 of the Constitution *[the section is quoted and discussed above]*.  Judge Moyo’s ruling was confirmed by Justice Francis Bere in February this year.

Despite the judges’ rulings, however, and despite the fact that the 45-day period laid down in section 114 of the Urban Councils Act has long since expired, the Minister refused to reinstate the mayor and councillors.  He has lodged an appeal against the earlier ruling but not, apparently, against the second one.

**Conclusion**

**It is most regrettable that the Minister has persisted in trying to suspend councillors under section 114 of the Urban Councils Act after being told by two judges of the High Court that he has no power to do so.  Whatever his motive, his conduct undermines the independence of local authorities and the devolution of governmental powers that are keynotes of Chapter 14 of the Constitution**.

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