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Research paper topic:

A legal analysis of the appointment of caretakers to act as council in terms of Zimbabwe's section 80 of the Urban councils Act.

Key words- Zimbabwe local government, legal status, ministerial powers, caretakers' appointment, local democracy, law reform, dissolution, intervention, Urban Councils Act.



Declaration

I declare that *A legal analysis of the appointment of caretakers to act as council in terms of Zimbabwe’s section 80 of the Urban councils Act* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Naison Machingauta 15th November 2009

Signed.....



Acknowledgements

I am grateful to the Community Law Centre (CLC) for making it possible for me to be part of this programme. Special thanks go to the Director Professor Nico Steytler, the Coordinator of the Local Government Project Professor Jaap de Visser and the Local Government Project team -Dr. Fessha, Annette May, Douglas Singiza, Zemelak Ayele and Valma Hendricks.

To my supervisor Professor de Visser, thank you for your dedicated supervision to the conception and development of this research paper. It was your guidance, invaluable comments, encouragement and patience that made the completion of this work possible.

To the staff at CLC, thank you for welcoming me so warmly into the CLC family. Special mention goes to Jill Claassen and Trudi Fortuin.

I am grateful to the South African Local Government Association (SALGA) for affording me the opportunity to learn about organised local government in South Africa. Special mention goes to Johann Mettler for his resourcefulness.

To Joyce, you are always a pillar of strength. This one is for you.

List of Abbreviations

MLGRUD Ministry of Local Government, Rural and Urban Development

PCAA Provincial Councils and Administration Act

RDCA Rural District Councils Act

UCA Urban Councils Act

TLA Traditional Leaders Act



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CHAPTER 1

1.0 Introduction

In terms of section 80 of the Urban Councils Act of Zimbabwe, [Chapter 29:15], the Minister of Local Government, Rural and Urban Development may appoint a caretaker to act as council in certain circumstances. While this power has been used to correct problems in some local authorities, it has not always been used for the purpose it was created. The amendments to the Act, brought about by the Local Government Laws Amendment Act 1 of 2008 were meant to address some of the shortcomings in the application of section 80. This study looks at the new provision with a view to establishing the correct basis for the appointment of a caretaker.

1.1 Background to the study

Local authorities in Zimbabwe are creatures of statute. Accordingly they can only do that which the enabling legislation says they can do. In other words they exercise what is commonly referred to as delegated authority. In Zimbabwe the primary local government legislation are the Urban Councils Act (UCA) [Chapter 29:15]¹, the Rural District Councils Act (RDCA) [Chapter 29:13], The Traditional Leaders Act (TLA) [Chapter 29:17] and the Provincial Councils and Administration Act (PCAA) [Chapter 29:11]. Section 2 of each of the above pieces of legislation places the administration of the Acts in the Minister of Local Government, Rural and Urban Development.

It is the Minister who is charged with the monitoring and supervision of local government. This supervision may be divided into three broad forms i.e. regulation, monitoring or evaluation and intervention. Regulation relates to the establishment of the institutional framework for the operation of local government as well as its functions. Monitoring relates to the establishment of mechanisms aimed at continuously looking at the general performance of local government to see whether there is compliance with the

¹ Legislation in Zimbabwe, except for subsidiary legislation such as statutory instruments and regulations is identified by way of chapters and classified in accordance with the subject matter. In this regard, the UCA is volume 15 of Chapter 29.

law. It is an ongoing exercise done by the central government and will invariably “include the functional mechanisms to evaluate local government performance coupled with mechanisms for intervening into local governments if the evaluations produce evidence of serious problems”.² It is similar to supervision where national government watches over local government in order to ensure appropriate behaviour. In its complex form, supervision may take the form of an intervention in the affairs of local government in order to correct an identified problem.

The monitoring and supervision of local government is usually done by central governments. However in some countries like South Africa where there three spheres of government the provincial executive is charged with the supervision of the local sphere of government.³ In Zimbabwe the monitoring and supervision of local government is done by the central government through the relevant Minister. This study will look at the appointment of a caretaker to act as council in terms of section 80 of the UCA. Although a similar provision exists in section 158 of the RDCA, it is section 80 that has been vigorously applied by the Minister in recent times and which has caused an outcry from urban local authorities.

1.2 Statement of the problem

Section 16 of the Local Government Laws Amendment Act⁴ introduced the new section 80 of the UCA. It provides for the appointment of a caretaker to act as council if:

- a) there are no councillors for a council area; or
- b) all the elected councillors for a council area have been suspended or imprisoned or are otherwise unable to exercise all or some of their functions as councillors.

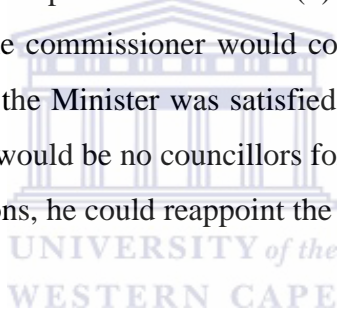
² De Visser (2005, 178).

³ Section 139 of the South African Constitution. Further section 155 (6) requires the provincial government to put in place legislative or other measures to provide for the monitoring and support of local government. Section 155 (7) requires both the provincial and national governments to exercise their legislative and executive authority to see to the effective performance by municipalities of their functions.

⁴ No. 1 of 2008.

The amendment followed the suspension and dismissals of councillors, particularly in urban areas and their replacement with commissioners in terms of the then section 80 of the UCA. In all the instances that the section was invoked, commissioners were appointed and reappointed for long periods thus raising the question whether the appointments were in fact meant to replace elected councillors with appointed commissioners. While section 80 is meant to provide a stop-gap measure by replacing councillors with a caretaker in certain circumstances while preparing for the election of a new council, the challenge is to ensure that the section is invoked for the reasons for which it was enacted.

In terms of the old section 80, a commissioner appointed to act as council would serve until a new council was elected, or for six (6) months, whichever occurred sooner, provided that if the six months expired within three (3) months of the date of the next succeeding general election, the commissioner would continue to hold office until such general election. In addition if the Minister was satisfied at the termination of the office of the commissioner that there would be no councillors for the council area who would be able to exercise all their functions, he could reappoint the commissioner for six months or until there was a new council.



1.3 Focus and objective of the study

This study seeks to address two issues. Firstly it seeks to critically examine the laws on the appointment of a caretaker to act as council in terms of section 80. In carrying out this critical examination, the questions to ask are: What does the appointment of a caretaker mean? Under what circumstances can the Minister exercise this power? What does it mean when the caretaker exercises all the functions of the council or such of the functions of the elected councillors as they are unable to exercise? What safeguards are in place to ensure that the appointment of the caretaker will be for *bonafide* purposes outlined in the Act? Lastly, is the new section 80 an improvement on the old section 80?

1.4 Literature Review

There is a paucity of local government law research in Zimbabwe. Consequently this study seeks to chart the way for a critical examination of local government laws in

Zimbabwe by looking at the laws that provide for the appointment of a caretaker as well as judgments from the courts on the appointment of a caretaker in terms of section 80 of the UCA.

1.5 Methodology

The research is mainly based on a desk review of relevant legislation, case law, and ministerial directives pertaining to the invocation of section 80 of the UCA. Additionally a comparative study will be made of the Zimbabwean system of the appointment of a caretaker with a similar form of intervention in another jurisdiction with a view to proposing changes to the law.

1.6 Structure of the Study

Chapter 1 will give a general background to the study as well as its outline. Chapter 2 is a brief outline of the history of local government in Zimbabwe from 1890 up to the present- its legal status, sources of revenue and challenges faced by local government. It will conclude by looking into the future and the role that local government can play in the development of local communities and democracy.

Chapter 3 explores the substantive and procedural requirements for the appointment of a caretaker. To put it differently, what circumstances existing in an urban local authority will trigger the appointment of a caretaker in terms of section 80? How is the caretaker appointed? Chapter 4 examines the functions of the caretaker after a section 80 appointment. Chapter 5 carries a case study of the appointment of commissioners for the City of Harare under the old section 80 of the UCA. Chapter 6 will carry a comparative analysis of the Zimbabwean and South African legal systems on the dissolution of a municipal council and the appointment of a caretaker and or administrator. Lastly Chapter 7 will be on recommended changes to the law.

CHAPTER 2

2.0 Introduction

Chapter 1 looked at the background to the study, statement of the problem, the focus and objective of the study as well as literature review. It also looked at the methodology to be followed in the study and concluded by giving an outline or structure of the study. This Chapter will give a general outline of the development of local government in Zimbabwe.

2.1 The Republic of Zimbabwe

The Republic of Zimbabwe succeeded the colonial state of Rhodesia upon its independence on 18th April 1980. Geographically it occupies the plateau between the rivers Zambezi and Limpopo in southeast Africa. It is bordered by South Africa to the south, Botswana to the southwest, Zambia to the northwest and Mozambique to the east. Demographically, it is made up of the Shona in their various tribes in the north, south and east. The major urban centres in these areas are Harare which is the capital city of Zimbabwe, Gweru in the centre of the country, Masvingo in the south, Marondera and Mutare in the east, Chinhoyi and Kariba in the west and Bindura in the north. The Shona constitute about 70% of the population. The Ndebele that make up about 30 % of the population occupy the western part of the country. The major urban centres in the western part of the country are Bulawayo which is the country's second largest city, Gwanda, Hwange, Lupane and Victoria Falls. The main indigenous languages are ChiShona and isiNdebele. English is the official language. Zimbabwe has a population of 12 million people and of these 52% are women.⁵

Zimbabwe is a unitary state. It is divided into ten administrative provinces⁶ to which no substantial political power is devolved.⁷ Two of the provinces, Bulawayo and Harare, are

⁵ The last population census was conducted in 2002.

⁶ Provinces are declared by the President in terms of section 3 of the Provincial Councils and Administration Act.

⁷ Chatiza (2009, 1).

metropolitan while the remaining eight are a mixture of urban and rural areas. Harare and Bulawayo became provinces only in 2005. The urban areas are divided into council areas which are in turn divided into wards. The wards are represented in council by a ward councillor elected by the local community.⁸ The rural areas are also divided into council areas which are further divided into wards. The wards are each represented in council by a councillor elected by the local community.⁹ Rural local authorities have within them hereditary chieftainships but the areas controlled by traditional chiefs do not always correspond with ward boundaries. The chieftainships are in turn divided into areas governed by headmen and village heads.¹⁰

2.2 Types of local government in Zimbabwe

2.2.1 Urban local government

Chakaipa¹¹ traces the history of modern day urban local government to the arrival of the first colonial settlers in 1890. This group of white settlers, commonly referred to as the Pioneers Column was led by Cecil John Rhodes who owned the British South Africa Company. They set up a board of management made up of both elected and appointed members of company. The management board was succeeded in 1892 by the Salisbury Sanitary Board. In 1894 the Town Management Ordinance gave legal effect to the sanitary boards that were sprouting in the emerging towns. The Municipal Ordinance of 1897 gave municipal status to the towns of Bulawayo and Salisbury with wholly elected councillors.

There was no place for Africans in the local government system that was developing until the 1950s when the African Advisory Boards were set up to look after the interest of the growing African population in the towns. The management of African townships and

⁸ Section 4A (1) (a) Urban Councils Act.

⁹ Section 11 (a) Rural District Councils Act.

¹⁰ Chatiza (2009, 1).

¹¹ Chakaipa (2009, 11-13).

‘whites only’ areas were divided along racial lines. At independence in 1980 significant changes took place that were aimed at addressing the imbalances of the past. Attempts were made to bring all urban areas together and for the first time Africans could participate in local government elections by electing councillors for their own areas.

Modern day urban councils are categorised according to size and functions. At the lowest level are the local boards followed by towns. Municipalities are ranked third and at the top are cities. In terms of section 14 of the Urban Councils Act, a growth point, an unincorporated urban area, local board or council can apply to the Minister for a change in status. There are currently thirty one (31) urban councils in Zimbabwe.¹² Table 1 below shows all the major urban areas in Zimbabwe and their categorisation.

Table 1 Hierarchy of Urban Councils in Zimbabwe



¹² Councillor Induction Handbook, Zimbabwe (2009).

Level 1 <u>Cities</u>	Level 11 <u>Municipalities</u>	Level 111 <u>Town Councils</u>	Level IV <u>Local Boards</u>	Total
Harare	Redcliff	Chiredzi	Ruwa	
Bulawayo	Chegutu	Norton	Chirundu	
Gweru	Chitungwiza	Shurugwi	Epworth	
Masvingo	Victoria Falls	Zvishavane	Hwange	
Kadoma	Chinhoyi	Gokwe		
Kwekwe	Gwanda	Beitbridge		
Mutare	Marondera	Rusape		
	Bindura	Karoi		
		Chipinge		
7	9	10	4	30

Source Chakaipa (2009, 13).

2.2.2 Rural local government

Rural local government existed before the coming of the colonial settlers. In its rudimentary form, it consisted of the traditional structures of kings, chiefs, headmen and kraal heads. Modern day rural local government was introduced in the 1920s when the first Native Boards were set up.¹³ The Native Boards were replaced in 1927 by the Native Councils which were made up of elected councillors and traditional leaders. The African Councils Act of 1957 consolidated the position of chiefs by elevating them to Vice

¹³ Chakaipa, (2009, 24).

Presidents while the District Commissioner was the President of the African councils in the district. With the rise in African nationalism, chiefs became more and more powerful as they were used as a counter balance to the threat posed by nationalism. As a result many African councils were set up in areas traditionally controlled by chiefs and by the time of independence in 1980, there were 241 such councils. These were merged into 55 district councils through the District Councils Act of 1980.

There were large-scale commercial farmlands, mines and small urban areas in rural areas which were run by the Rural Councils established in 1966. These catered for the interests of white large-scale commercial farmers in rural areas. They levied property taxes, rates and service charges on their members as well as on business enterprises located at urban centres in their areas. Although membership to the council was through regular elections, there was no provision for the representation of African labourers who worked on the farms. The current Rural District Councils Act was enacted in 1984; bringing together the Rural Councils and District Councils. There are sixty (60) rural district councils countrywide.¹⁴

2.3 Membership of councils

In terms of the new section 4A of the UCA, urban councils consist of an elected councillor for each ward of the council area and a number of appointed councillors representing special interests appointed by the Minister. A councillor is defined as a member of council other than a mayor.¹⁵ There is no definition of “special interests” in the UCA. However, practice has shown that these special interest councillors are appointed to represent such groups as women and children, the disabled, business, professional interests and minority groups who may not find representation in mainstream politics. Appointed councillors may not exceed a quarter of elected councillors and shall hold office at the pleasure of the Minister.¹⁶ While they are entitled

¹⁴ Councillor Induction Handbook, Zimbabwe (2009).

¹⁵ Section 2 (1) Urban Councils Act.

¹⁶ Section 4A (1) (b) Urban Councils Act.

to participate in council business and to the same benefits as elected councillors, appointed councillors have no vote at council meetings.¹⁷ Councillors for rural councils are elected or appointed in much the same way.¹⁸ The electoral system allows all contestants for public office to be elected on party political lines or as independents. Starting from the general election of March 2008, Zimbabwe now has a system of combined elections at which the President, Members of Parliament and councillors are elected into office for a period of five years.

Section 40 provides the qualifications for election as councillors. A candidate has to be a citizen of Zimbabwe, be at least 30 years old and must own a property or be resident in the council area for which he is contesting. Councillors lose their seats if convicted and sentenced to more than six months imprisonment,¹⁹ or if they have been convicted under the Prevention of Corruption Act.²⁰ In terms of section 80 of the Urban Councils Act, the



¹⁷ Section 4A (2) Urban Councils Act.

¹⁸ See section 11 of the Rural District Councils Act.

¹⁹ Section 41 (7) of the Urban Councils Act. Councillors are also disqualified from nomination as candidates or from election as councillors if-

- a) they members of another local authority;
- b) they are members of Parliament;
- c) they have been adjudged or declared insolvent or have made an assignment or arrangement or composition with creditors;
- d) in the last 5 years have been convicted of taking part in a council matter in which they had an interest, have acted for or against council or as agents have appeared before the valuations or other boards or licensing authorities; and
- e) he has been convicted of an offence involving dishonesty in connection with funds or other property of council;

²⁰ [Chapter 9:16].

Minister may appoint not more than three (3) people as caretakers to act as council in certain circumstances.²¹

2.4 The legal status of local government in Zimbabwe

Local government in Zimbabwe is a creature of statute, enjoying delegated powers. There is no constitutional recognition of local government as a distinct sphere of government. It is provided for in the UCA, the RDCA and to a lesser extent the Provincial Councils and Administration Act (PCAA) [Chapter 29:11] as well as the Traditional Leaders Act (TLA) [Chapter 29:17].

Councils are bodies corporate with perpetual succession. They may sue or be sued in their own names.²² The administration of all local government legislation falls under the Minister of Local Government, Rural and Urban Development (MLGRUD).²³ Basically there are two types of local authorities i.e. the urban council established under the Urban Councils Act and the rural district councils established under the Rural District Councils Act.

2.5 Other local government institutions

2.5.1 The Provincial Councils

Provincial councils are established in terms of section 11 of the Provincial Councils and Administration Act. Their functions include, among other things, the promotion of the development of the province,²⁴ the formulation of short and long term policies for the province,²⁵ the preparation of annual development and other plans for the province,²⁶ and

²¹ See Chapter 3.

²² Section 4 (8) Urban Councils Act and Section 12 Rural District Councils Act.

²³ See section 2 of the Urban Councils Act, Rural District Councils Act, Traditional Leaders Act, Provincial Councils and Administration Act.

²⁴ Section 13 (a) Provincial Councils and Administration Act.

²⁵ Section 13 (b) Provincial Councils and Administration Act.

²⁶ Section 13 (c) Provincial Councils and Administration Act.

reviewing and evaluating the implementation of development plans and policies within the province.²⁷ Provincial councils are classified here as local government institutions primarily because they draw the majority of their members from local authorities.

Section 14 of the Provincial Councils and Administration Act sets out the membership of a provincial council, which shall be made up of:

- the provincial governor as chairperson;
- mayors and one councillor from each municipal and city council in the province;
- chairperson and one councillor from town councils, local boards and rural district councils in the province;
- a representative from the Provincial Assembly of Chiefs

The provincial councils are largely irrelevant. They do not have a budget of their own and are therefore unable to implement any of the plans they come up with.

2.5.2 Traditional leaders

The appointment of chiefs is provided for in section 111 of the Constitution of Zimbabwe. They are appointed by the President in terms of the TLA. They have administrative, developmental and judicial duties where they resolve civil disputes in terms of African customary law. Chiefs chair ward and village assemblies and are often appointed by the Minister to sit in rural district councils as special interest councillors.²⁸ By and large, the history of traditional leaders has been tainted by their allegiance to and support for the government and ruling party. During the colonial era, the colonial government attempted to galvanise support for white rule from traditional leaders by giving them more powers over land allocation as well as judicial powers to try some crimes in their areas. Apart from counteracting nationalist support from the African

²⁷ Section 13 (d) Provincial Councils and Administration Act.

²⁸ Section 11 (1) (b) Rural District Councils Act.

population, these measures were also meant by the white government to divest itself of rural development responsibilities in the African rural areas.²⁹ The chiefs were expected by the colonial administration to deal with the large numbers of landless people, itself a result of the Native Land Husbandry Act of 1951. These were unpopular decisions and chiefs and headmen became the symbol of the hated colonial administration. Surprisingly they have continued as symbols of the ruling party in independent Zimbabwe.³⁰

2.6 Local government financing

Part XIII of the RDCA provides for the rural council's sources of income. these are levies, rates on rateable property, land development levies, interest on unpaid charges, interest on deposits, sales and leases of land, fees and charges for services rendered and fines, among others.³¹ For rural councils, it is difficult to raise revenue as their tax bases are very thin and their communities poor. For urban councils the revenue sources include property rates, fees and charges for services rendered, leases and sales of land, fines, commercial activities among others. In addition, councils may also receive money from the government either as block grants or tied grants. Most of this goes towards salaries for teachers and nurses employed in council schools and clinics, respectively. If the ministers of finance and local government agree, councils may apply for bank overdrafts or borrow money from the money market.³² Councils may also receive donations from non-governmental organisations mostly for humanitarian assistance. There is no entitlement to government grants and the level of government support dwindled to very insignificant levels over the years.³³ The collection of revenue by local authorities has also been affected by councils' failure to put in place an up-to-date database for all

²⁹ Makumbe (1998,21) .

³⁰ Makumbe (2009, 5).

³¹ Section 118 Rural District Councils Act.

³² Section 290 (5) (b) Urban Councils Act.

³³ Local government Policy Review (2005, 19-23).

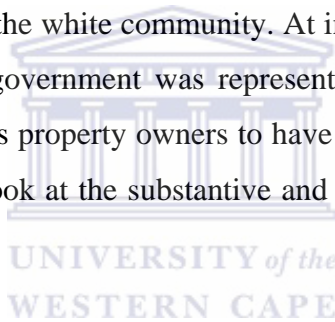
rateable properties and their failure to retain qualified staff to implement approved budgets.

2.7 Local government powers

The powers and functions of local government are set out in sections 198³⁴ and 71³⁵ of the UCA and the RDCA respectively. In addition, they are authorised to do all such things as are calculated to facilitate or are incidental to or conducive to the performance of the functions of the council or the exercise of council's powers in the 2nd Schedule.³⁶

2.8 Conclusion

Chapter 2 gave a general outline of the development of local government in Zimbabwe from the period of the coming in of the first white settlers to the present. The first local councils were created to serve the white community. At independence measures were put in place to ensure that local government was representative as well as democratic by allowing all residents as well as property owners to have a say in those that were elected into councils. Chapter 3 will look at the substantive and procedural requirements for the appointment of a caretaker.



³⁴ The 2nd Schedule to Act lists fifty three (53) powers of urban local authorities which include powers on land, open spaces, cultivation and farming, grazing, slaughter houses, conduct of liquor undertakings, charges, funerals, libraries and entertainment, among others. In addition, they are authorized to do anything calculated to facilitate or are incidental to or conducive to the performance of the functions of council or the exercise of these powers.

³⁵ The powers in the First Schedule include powers on land, conservation of natural resources, water, recreational facilities, roads, bridges, dams, parking, sewerage, fire brigade and ambulances, among others.

³⁶ Item 54 to the 2nd Schedule of the Urban Councils Act.

CHAPTER 3

3.0 Introduction

Chapter 2 traced the development of local government in Zimbabwe from the time of the arrival of the colonial settlers to the present day. It looked at the local government institutions that have developed over the years as well as local government powers and finances. This chapter looks at the substantive and procedural requirements for the appointment of a caretaker in terms of section 80 of the Urban Councils Act. Put differently, what circumstances existing in an urban local authority will trigger the appointment of a caretaker? How is the caretaker appointed and who qualifies for appointment as a caretaker?

3.1 Supervision of local government

As seen in paragraph 1.1 above local authorities in Zimbabwe are creatures of statute. As creatures of statute, they exercise what is commonly called delegated powers. In Zimbabwe the primary local government legislation are the Urban Councils Act (UCA) [Chapter 29:15], the Rural District Councils Act (RDCA) [Chapter 29:13], the Traditional Leaders Act (TLA) [Chapter 29:17] and the Provincial Councils and Administration Act (PCAA) [Chapter 29:11]. Section 2 of each of the above pieces of legislation places the administration of the Acts in the Minister of Local Government, Rural and Urban Development. It is the Minister who is charged with the monitoring and supervision of local government.

De Visser identifies three broad forms of supervision namely regulation, monitoring or evaluation and intervention. Regulation relates to the establishment of the institutional framework for the operation of local government as well as its functions.³⁷ Monitoring relates to the establishment of mechanisms aimed at continuously looking at the general performance of local government to see whether there is compliance with the law.³⁸ It is

³⁷ De Visser (2005, 170).

³⁸ De Visser (2005, 178).

an ongoing exercise done by the central government and will invariably “include the functional mechanisms to evaluate local government performance coupled with mechanisms for intervening into local governments if the evaluations produce evidence of serious problems”.³⁹ It is similar to supervision where national government watches over local government in order to ensure appropriate behaviour. In its complex form, supervision may involve central government intervening in the affairs of local government in order to correct an identified problem.

3.2 Local government challenges

Local authorities in Zimbabwe have for a long time faced many challenges. The challenges include the following:

- a) Human resources challenges at all levels due to the skills flight to neighbouring countries as a result of the inability by local authorities to pay living wages to their workforce. This shortage is manifested at both the manual and technical levels. The failure to pay living wages resulted in many council employees reporting for work not to provide any service but to use council resources for personal gain in order to survive. In the three years before 2009 it was acceptable in all local authorities for their employees to have private jobs or to use council resources like telephones, offices and vehicles for personal gain. In order to address this, it will be necessary to make councils employers of choice by paying attractive salaries, reorient council employees on the nature and importance of their duties, train councillors on the nature of their duties and how they can run councils as profitable businesses.
- b) Local authorities have seen their finances dwindle to unimaginable levels in the last decade because of hyperinflation and the general economic decline in the country. It was particularly difficult in 2008 when most local authorities could not afford to pay their employees, and for those that could still pay they had to be innovative and devise remuneration methods like paying salaries in the form of

³⁹ De Visser (2005, 178).

food hampers and fuel coupons or to pay employees well before payday, or paying salaries twice a month in order to try and beat inflation. Councils also began to accept payment for the services they continued to provide in the form of fuel coupons or to exchange land with the much needed machinery and vehicles. Although the economy has been “dollarised” now, many councils are still struggling to meet their expenses, particularly rural councils where the revenue base is very thin. For these councils it means they still cannot repair the vehicles that are parked in their yards for use in council operations, or to buy machinery used in upgrading infrastructure.

- c) The provision of water has now been handed back to local authorities after the failed experiment with the Zimbabwe National Water Authority (ZINWA).⁴⁰ It has been argued that the provision of water had been taken away from local authorities not because ZINWA could provide a better service, but was meant to cripple urban local authorities the bulk of whose finances (about 60%) come from water provision. This service was taken away by the government in 2005 after all urban local authorities fell under the political control of the opposition Movement for Democratic Change (MDC).
- d) Urban local authorities have endured political interference by the central government through the Minister who has used his wide powers to suspend and dismiss councillors, particularly from the MDC controlled urban areas. The Minister has also made it impossible, if not difficult for councils to charge economic fees, charges and rates on the basis that the service charges are not affordable to many households. The new inclusive government has given hope to local authorities for an economic revival.

⁴⁰ In 2005 Cabinet made a decision to take away the provision of water and sanitary services from urban local authorities and gave the responsibility to ZINWA despite the fact that ZINWA did not have the capacity to provide the service.

- e) Even if the economic outlook improves for councils, they will need to work on their capacity to charge and collect rates and other levies, something most councils have no capacity to do.
- f) Local councils will need to work hard to attract competent councillors and into their fold who will be able to run councils as business enterprises as opposed to the current situation where most councillors have no clue on their duties and responsibilities and staff members are not qualified to do the work they were hired to do.

3.3 The need for supervision

In the exercise of their delegated authority, local authorities often fail to carry out those functions or to exercise those powers which they are required to exercise in terms of the law. Their local policies may not be in sync with national policies and often there are allegations of corruption or misuse of council funds or property, or local authorities may be carrying out activities that do not benefit the local communities in which they operate. When this happens it is the responsibility of senior governments to ensure that local authorities comply with the law. In this regard, the senior governments may prescribe measures designed to bring about compliance but when these measures do not bring the desired outcome, senior governments may step in to perform those functions on behalf of the local authorities and where the councillors are an impediment to the turnaround, they may be replaced altogether. This exercise of power by senior governments, if provided for in terms of the law is perfectly legitimate.

In prescribing measures for the turnaround of a local authority, or when senior governments assume responsibility for the performance of a function and when they replace councillors because they are an impediment to the turnaround, they must be alive to the need to allow for local solutions or discretions in the exercise of their oversight role.

3.4 Defining support and intervention

The concept of support is broad in scope and generally has positive connotations.⁴¹ In the context of a poorly performing local authority, support processes will be noted where external resources or actors are requested or deployed to help the council in its improvement journey. From a central government point of view intervention is a form of support. The Oxford English Dictionary defines an intervention as “an action or an act of coming between or interfering, especially so as to modify or prevent a result.” However from the point of view of the local authority, intervention is seen as interference focused on avoiding negative outcomes. In general intervention is where a government department or ministry takes action that it would not otherwise have taken as a result of a critical inspection report or other external evidence of service failure.⁴²

Central government in Zimbabwe monitors local government in various ways. It may take the form of access to records of council, the use of self-reporting mechanisms, requests for information, ministerial directives, investigations into suspected wrongs, the suspension and dismissal of councillors as well as the appointment of a caretaker to act as council, among others.

The Urban Councils Act sets out the manner of the exercise of powers and functions by urban local authorities. The Act also sets out the powers of the Minister regarding the operations of urban local authorities. In terms of section 2 of the Act, the administration of the Act lies with the Minister of Local Government. One of the powers of the Minister is the power to appoint a caretaker where there are no councillors for the council area or the councillors have been suspended, imprisoned or are otherwise unable to exercise some or all their functions as councillors. This power must be exercised in a manner that shows respect and deference for an elected council and ought to be used only for the purpose for which it was created. In this regard it must be noted that the appointment of a caretaker is only a temporary measure meant to provide a council pending the holding of

⁴¹ Lewis M et al (2007, 10).

⁴² Ibid page 10.

an election or until there are councillors who are able to exercise all their functions as councillors. It must be used only if there are no other ways of correcting the problem. Even then, there must be sufficient checks and balances in the system to guard against the improper use of the law for other reasons not connected with correcting the problem in the local authority. This power will be abused if it is used to settle political scores or if it is used to deny people of the area concerned the opportunity to elect their own council.

3.5 The power to appoint a caretaker

Section 80 (1) provides as follows:

“If at any time-

(a) there are no elected councillors for a council area; or

(b) all the elected councillors for a council area have been suspended or imprisoned or are otherwise unable to exercise all or some of their functions as councillors;

the Minister may appoint not more than three persons to act as caretakers, whether or not such persons are qualified through residence or ownership of property to become councillors, to act as the council.”⁴³

3.6 When is a caretaker appointed?

Caretakers are appointed at any time when there are no elected councillors for a council area. This must mean the absence of elected councillors for the particular council area. It must refer to a council area that should otherwise have an elected councillor or councillors. The word “elect” means to choose someone to hold a position, especially public office, by voting.⁴⁴ It would therefore follow that an elected councillor is a person other than a mayor, chosen by voting, to be a member of a council. The absence of councillors may come about as a result of a mass resignation by councillors.

⁴³ Section 80 (1) (a) and (b) Urban Councils Act.

⁴⁴ Concise Oxford English Dictionary, 10th Edition.

3.7 Suspension, imprisonment or incapacitation of councillors

A council may have its elected councillors suspended⁴⁵ or imprisoned.⁴⁶ In this case the need for the appointment of a caretaker to act as council in such instance appears fairly straightforward. It is however not so clear when the Minister has to appoint a caretaker on account of the elected councillors being “otherwise unable to carry out all or some of their functions” in terms of section 80 (1) (b).

To be “otherwise unable to exercise all or some of their functions” implies a lack of skill, means or opportunity to do that which they are required to do,⁴⁷ or lack of capacity to do something. It is difficult to see when such a scenario might arise. An example of such a scenario may be where the council is unable to transact on account of lack of quorum.

3.8 Appointment of a caretaker

Where the conditions in section 80 (1) (a) or (b) exist, the Minister may appoint not more than three persons as caretakers. A “caretaker” is a person holding power temporarily.⁴⁸ The verb “act” means temporarily doing the duties of another.⁴⁹ In the case of a caretaker appointed in terms of section 80 to act as council, the appointment can only be for a

⁴⁵ In terms of section 114, a councillor may be suspended for:

- a) suspected contravention of the Prevention of Corruption Act (PCA) [Chapter 9:16];
- b) failing to recuse oneself in deliberations in which the councillor has an interest in breach of section 107, rendering professional services to or against council in breach of section 108, or where a councillor has acted as an agent and appeared before the valuation or other boards or licensing authority in breach of section 109; or
- c) suspected commission of an offence involving dishonesty in connection with any funds or property of council.

⁴⁶ Section 41 (7) Urban Councils Act.

⁴⁷ Collins (2006, 706).

⁴⁸ Collins (2006, 115).

⁴⁹ Collins (2006, 7).

temporary period and for the caretaker to temporarily carry out the duties that an elected councillor(s) would otherwise do.

3.9 Qualifications for appointment as a caretaker

The persons that may be appointed as caretakers do not have to meet the qualifications for election as councillors, like the requirement to own property or to be resident in the council area.⁵⁰ This means that the Minister can literally appoint anyone as he or she sees fit. It is submitted that in order that the objectives of the appointment of caretakers are met, the persons so appointed must have experience or expertise in local government especially as they are being appointed to take care of an existing problem at the local authority. For instance, the ministry could send its own officials to take care of the situation at council until the next election or until there are councillors who are able to exercise all their functions. Additionally the Ministry could bring in organised local government, in this case the Urban Councils Association of Zimbabwe (UCAZ) to help normalise the situation in the local authority. Lastly because councillors are elected by the communities in which they serve, their dismissal and replacement by a caretaker must only be done as a last resort and only in deserving cases, all the time striking a balance between the competing interests in a municipal council.

3.10 Conclusion

This chapter looked at the substantive and procedural requirements for the appointment of a caretaker in terms of section 80. A caretaker may be appointed where there are no elected councillors for a council area or where all the elected councillors for a council area have been suspended or imprisoned or are otherwise unable to exercise all or some of their functions as councillors. The caretaker does not have to meet the requirements for election as a councillor. It was noted that the Minister is not accountable to anyone in the suspension or dismissal of councillors and in their replacement by a caretaker. It was proposed that the Minister could be required to motivate to Parliament the need to suspend or dismiss councillors and replace them with a caretaker in order to provide

⁵⁰ Proviso to section 80 (1) (a) and (b) Urban Councils Act.

some checks and balance in the system. Chapter 4 will look at the functions of a caretaker.



CHAPTER 4

4.0 Introduction

Chapter 3 looked at the substantive and procedural requirements for the appointment of a caretaker. It was noted that the appointment of a caretaker is discretionary and that it may be done if there are no councillors or if the elected councillors have been suspended, imprisoned or are otherwise unable to exercise all their functions as councillors. It was also noted that in appointing a caretaker, the Minister is not accountable to anyone. It was therefore proposed that some accountability in the process could be introduced by requiring the Minister to justify the appointment to Parliament and that Parliament be empowered to block the appointment if it is not satisfied with the reasons given or the proposed terms of reference for the caretaker. This chapter will look at the functions of a caretaker.

4.1 The Functions of a caretaker

Chapter 3 looked at the appointment of a caretaker to act as council. This chapter will examine the functions of the caretakers after they have been appointed. Section 80 (2) provides that-

“Subject to any directions the Minister may give him, a caretaker appointed for a council area in terms of subsection (1) shall exercise—

- (a) all the functions of the council, where there are no elected councillors for the council area; or
- (b) such of the functions of the councillors as they are unable to exercise, where there are elected councillors for the council area:

In the scenario provided for in section 80 (2) (a) a caretaker is appointed to exercise all the functions of council. In this scenario there are no elected councillors. Under the scenario provided for in section 80 (2) (b) where there are elected councillors, the caretaker is appointed to exercise only those functions of the councillors that they are unable to exercise. It appears therefore that the caretaker is appointed to take over from

some functions of councillors leaving out those functions that the elected councillors are able to exercise. In this regard the caretaker does not take over the exercise of all of the functions of the entire council.

4.2 Limitations on the functions of a caretaker

Section 80 places a limit on what the appointed caretaker can do. If the council area has no elected councillors, the caretaker has no authority to levy rates or taxes or to alienate land or interest in land or to increase any charge fixed or levied by the council or to fix any new charge without the approval of the Minister.⁵¹ The need for the approval of the Minister to levy rates or taxes or to dispose of land simply reinforces the fact that the caretaker will be under the direction of the Minister.⁵² This may appear contrary to the reason of the caretaker's appointment, which is to act as council in certain circumstances. Perhaps it is recognition of the fact that these are important which can only be done by an elected council. It is submitted that this limitation is superfluous as the caretaker exercises his functions under the direction of the Minister as provided for in section 80 (2).

In a council area where there are elected councillors who are able to exercise some of their functions as councillors, the caretaker is obliged to consult them before exercising any function.⁵³ It is noted here that while the law provides for the consultation of elected councillors by the caretaker; there is no requirement that the caretaker shall be bound by the elected councillors' views. It is possible that the caretaker may effectively sideline the remaining elected councillors in the transaction of council business. Further there is no provision to resolve any disputes over the control of council between the remaining elected councillors and the caretaker. It is submitted that the Act must stipulate clearly, a clear division of the roles that the remaining councillors and the caretaker will play in council. If section 80 (2) (b) is understood to mean that the caretaker will only exercise

⁵¹ Section 80 (2) (b) (i) Urban Councils Act.

⁵² Section 80 (2) Urban Councils Act.

⁵³ Section 80 (2) (ii) Urban Councils Act.

those functions that elected councillors are unable to exercise where there are elected councillors, it would mean that the elected councillors would still have a role to play in the affairs of council. In practice however, as will be seen in Chapter 4, the remaining councillors have little or no say in what transpires at council once the caretaker has taken over.

4.3 The tenure of office of the caretaker

The caretaker shall hold office at the Minister's pleasure. In other words the caretaker shall hold the office at the wish and desire of the Minister. However the caretakership shall terminate-

as soon as there are "any councillors who are able to exercise all their functions as councillors".⁵⁴ The use of the word "any" indicates that these are councillors separate from those that had remained and combined with those that had remained, are enough to constitute a quorum to transact council business. For example, the Minister may suspend a certain number of councillors pending an investigation in terms of section 114 of the Urban Councils Act. The suspension may result in the remaining councillors not constituting a quorum as a result of which a caretaker is appointed. If at the end of the investigation all the suspended councillors or some of them are cleared and the suspension is lifted these councillors will be able to exercise all their functions. As soon as this happens, the office of the caretaker will terminate within ninety days after the date of his or her appointment.⁵⁵ If the period of ninety days expires within three months before the date of the next succeeding general election, the caretaker shall continue to hold office until such general election. In the context of time frames, "within" means before the period has passed. It would therefore mean that if the period of ninety days comes to an end within three months of a general election, the caretaker shall continue to hold office until the general election. However, in the past this provision was used to reappoint commissioners for longer than is permissible.

⁵⁴ Section 80 (3) (a) Urban Councils Act.

⁵⁵ Section 80 (3) (b) Urban Councils Act .

4.4 Conclusion

It is clear from section 80 that a caretaker may be appointed to act as council. At first glance it appears that the caretaker will have all the powers that a council would have. However the caretaker will carry out all the functions of the council only where there are no elected councillors or such functions of the elected councillors as they are unable to exercise, where there are elected councillors. In the first scenario, the caretaker will not exercise any power conferred on the council to levy rates or taxes or to alienate any land or interest in land or to increase any charge fixed or levied by council or to levy any new charge, without the approval of the Minister. In the latter, the caretaker shall exercise the functions in consultation with the elected councillors. Either way, the caretaker will be under the direction of the Minister. The scenario in which there are elected councillors may be a source of friction between the caretaker and the elected councillors as there is no clear demarcation of the roles that each one of them is confined to during the period of the caretakership. The case would be different if the caretaker took over the exercise of the functions of the whole council as opposed to the exercise of the functions of some of the councillors. By requiring the caretaker to consult the remaining councillors, the legislature showed deference to the local community that elected the councillors into office. It is submitted that in order for the council to run smoothly, the caretaker should not be bound by the views of the remaining councillors. The next chapter will look at the appointment of commissioners for the City of Harare under the old section 80 of the Act.



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CHAPTER 5

5.0 Introduction

Chapter 4 looked at the functions of a caretaker. It was observed that the caretaker is under the direction of the Minister and that the caretaker will serve at the pleasure of the Minister. Further, the caretaker will not be able to exercise some of council's functions to raise revenue or to alienate land without the approval of the Minister, where there are no councillors. However, where there are elected councillors, this power will be exercised in consultation with the other councillors. There is no clear demarcation of roles between the caretaker and any remaining councillors. It was proposed that in order for council to run smoothly, the caretaker should not be bound by the views of the remaining councillors. This chapter will carry a case study of the City of Harare where a commission was appointed in terms of the old section 80 which is similar in many respects to the new section.

5.1 Case Study: The Appointment of Commissioners for the City of Harare

The City of Harare was the only local authority where the old section 80 was used. It was run by commissioners during the period March 1999 to March 2002 and December 2004 to March 2008. It is important to look at how the old section 80 was applied to a local authority that was adjudged to have problems. This case study will show whether the amended section 80 addressed the shortcomings in the old law. It may also be useful in showing the shortfalls in the current law and thus the need for further reforms. It will be seen from the narration below that the section was used for political ends.

5.2 The old section 80 of the Urban Councils Act

The old section 80 of UCA provided as follows-

80 (1) "If at any time—

- (a) there are no councillors for a council area; or
- (b) all the councillors for a council area have been suspended or imprisoned or are otherwise unable to exercise all or some of their functions as councillors;

the Minister may appoint one or more persons as commissioners, whether or not such persons are qualified through residence or ownership of property to become councillors, to act as the council...”

Commissioners who were appointed in a council area where there were no councillors were entitled to exercise all the functions of council.⁵⁶ However, if there were councillors in the council area, the commissioners would only exercise such of the functions of council that the councillors were unable to exercise.⁵⁷ In addition the commissioners could not exercise any power conferred on council to raise funds or to dispose of land or rights in land, without the approval of the Minister.⁵⁸ The commissioners were also obliged to consult with those councillors that were still able to exercise some of their functions as councillors before exercising any function.⁵⁹ The notable differences between the old and new section 80 are the following:

- a) the new section limits the number of caretakers to three⁶⁰ whereas in terms of the old section there was provision for one or more commissioners;⁶¹
- b) in the new section, the caretaker now holds office until there are councillors who are able to exercise all their functions⁶² or the office terminates within ninety days. If the ninety days expire within three months of a general election, the caretaker shall hold office until the general election.⁶³ In the old section, the commissioners held office for six months and if the six months expired within

⁵⁶ Section 80 (2) (a) Urban Councils Act.

⁵⁷ Section 80 (2) (b) Urban Councils Act.

⁵⁸ Section 80 (2) (b) (i) Urban Councils Act.

⁵⁹ Section 80 (2) (b) (ii) Urban Councils Act.

⁶⁰ See the new section 80 (1) Urban Councils Act.

⁶¹ Section 80 (1) before the amendment.

⁶² Section 80 (3) (a) Urban Councils Act.

⁶³ Section 80 (3) (b) Urban Councils Act.

- three months of a general election, the period was extended to the general election;⁶⁴
- c) the commissioners were charged with causing the holding of an election at the end of their term of office whereas in terms of the new section, the responsibility to cause an election lies with the Zimbabwe Electoral Commission;⁶⁵
 - d) the old section 80 (5), which allowed the Minister to reappoint the caretaker was left out in the new section 80.
 - e) the term of office of commissioners could be extended for another term if at its end, the Minister was satisfied that there would be no councillors for the council area who would be able to exercise all their functions.⁶⁶

Although the formulation of the two sections is similar, it is submitted that the new section is not much different from the old section. It is not clearly stated that the appointment of a caretaker may only be done as a last resort, and only if other corrective measures have not yielded the desired result. In addition, the new section does not introduce any checks and balances in the exercise by the Minister, of his power to appoint a caretaker

5.3 The City of Harare

The City of Harare is the capital of Zimbabwe. It has an estimated population of 1.600.000 with 2.800.000 in its metropolitan area. Together with the city of Bulawayo, the two cities form the only metropolitan provinces in Zimbabwe. The cities were changed into metropolitan provinces in 2003.

⁶⁴ Proviso to the old section 80 (3) (b) Urban Councils Act.

⁶⁵ Section 80 (4) Urban Councils Act.

⁶⁶ The old section 80 (5) Urban Councils Act.

5.4 The Chanakira Commission March 1999 - March 2002

Before the Chanakira Commission was appointed to run the affairs of Harare City Council in March 1999, the city had a council that had been elected into office in August 1995. The term of this council would have come to an end in August 1999.⁶⁷ The councillors were suspended by the Minister on allegations of incompetence in February 1999 and a commission to run the affairs of the city was appointed in March 1999 (the Chanakira Commission). In June of the same year the mayor resigned from his post. In terms of the then section 103J of the Electoral Act, an election for the post of mayor was to be held within sixty days of the post becoming vacant. In terms of section 103K of the Urban Councils Act, the Minister could postpone the election of councillors for one year.

If the term of office of the commissioners had terminated within six months as provided for in the law, it would have coincided with the holding of elections for councillors in August 1999. It would also have coincided with the holding of an election for the mayor. However there were no elections for the mayor or for councillors until March 2002. Acting in terms of section 80 (5) the Minister simply reappointed the commissioners when their term expired. While the Minister was empowered to reappoint the commissioners, the effect was that this prevented elections from being held for the city of Harare.

5.5 Challenges to the reappointment of commissioners

The first legal challenge to the continued reappointment of the commissioners was made by the Combined Harare Residents Association (CHRA).⁶⁸ CHRA successfully obtained an order to compel the Registrar General of Elections to hold mayoral and council elections for the City of Harare by a certain date. The Court held that the appointment of commissioners was a stop-gap measure and could not be used to deny the inhabitants of

⁶⁷ Before its amendment, section 43 (2) of the UCA as read with section 103 I of the Electoral Act [Chapter 2: 13], council elections were held in every 4th year on any day in the month of August.

⁶⁸ *Combined Harare Residents Association and Another v The Registrar General of Elections and Others* HH 210/2001.

the City of Harare the right to elect a body of their choice to govern their affairs in Harare. This point was also made in *Stevenson v The Minister of Local Government and National Housing and Others*,⁶⁹ where it was held that the reappointment of commissioners was unlawful.⁷⁰ The Chanakira Commission ended with the council elections held in March 2002.

5.6 The Makwavarara Commission December 2004 - March 2008

The 2002 mayoral and council elections saw the opposition MDC take control of most urban local authorities.⁷¹ The city of Harare was, together with the city of Bulawayo, turned into metropolitan provinces in 2003. Two provincial governors were appointed to run the provinces. However, because the provinces covered the same geographical area as the two cities, this created tension between the mayors and the governors. The tension was made worse by the fact that the mayors and governors belonged to different political parties. In addition, the mayors felt that the appointment was meant to dilute the influence of their party in the areas they controlled. The mayor of Harare was suspended by the Minister in April 2003 on allegations of “mismanagement of the city affairs leading to a decline in service delivery to the residents and ratepayers of Harare.”⁷² In August 2004 all the MDC councillors had either been suspended or had resigned in protest over what they said was undue interference by the Minister in the running of council affairs. A commission to run the affairs of the city was appointed by the Minister in December 2004 (the Makwavarara Commission). Although the term of office of this commission was supposed to end in June 2005, it was reappointed over and over again until the

⁶⁹ SC 38/2002.

⁷⁰ At page 9.

⁷¹ In the City of Harare the MDC won 45 of the 46 council seats. Available at http://www.kubatana.net/html/archive/locgov/041024zimstand..asp?secto=LOCGOV&year=2004&range_start=1 (accessed 8th June 2009).

⁷² These accusations appeared in the letter of suspension from the Minister, dated 29th April 2003. Available at http://www.kubatana.net/html/archive/locgov/030429chombo.asp?sector=LOCGOV&year=2003&range_start=1 (Accessed on 8th June 2009).

general election in March 2008 when new councillors and a new mayor were elected. Although there were no direct legal challenges to the reappointment of this commission, some decisions from the High Court confirmed that the commission was in fact illegal.⁷³ The court reiterated its earlier finding that the appointment of commissioners was a stop-gap measure pending the holding of elections for the city. It went further to hold that the decisions that had been made by the commissions were illegal because they had been made by illegal bodies.

It must be pointed out that while the Minister gave the lack of service delivery as the reason for the appointment of commissioners or for his other interferences; there was no improvement in the way the City of Harare was run. During the tenure of the commissions some suburbs had no running water for months on end. There was no refuse collection and burst water and sewer pipes were not being attended to.

5.7 Conclusion

The appointment of commissioners in terms of the old section of the Urban Councils Act was a stop-gap measure meant to bring normalcy to council operations following the dismissal or suspension of councillors. It was not meant to deny the inhabitants of the council area the opportunity to elect councillors of their own choice. The reappointment of the commissioners after their terms had come to an end was unlawful and calculated to postpone indefinitely, council elections for the City of Harare. The new section 80 has no provision for the reappointment of caretakers once their term has come to an end. The next chapter carries a comparative analysis of section 80 of the Urban Councils Act and section 139 (1) (c) of the South African Constitution which provides for the dissolution of a council in certain circumstances.

⁷³ *Nomutsa Mushoma Chideya v Sekesai Makwavarara and Others* HH 13/2007 and *Christopher M. Zvobgo v City of Harare and Another* HH 80/2005.

CHAPTER 6

6.0 Introduction

Chapter 5 carried a case study of the City of Harare where commissioners were appointed for successive terms without following the law. It was noted that the appointments were made for political reasons which had nothing to do with the reasons given by the Minister. The new section 80 does not provide for the reappointment of the caretaker and places the duty to hold an election for the council in the Zimbabwe Electoral Commission, which are improvements on the old section. This chapter will carry a comparative analysis of section 80 and section 139 (1) (c) of the South African Constitution.

6.1 The dissolution of a council in terms of section 139 (1) (c) of the South African Constitution

The appointment of a caretaker to act as council pending an election can be likened to the dissolution of a municipal council in terms of section 139 (1) (c) of the Constitution of South Africa.⁷⁴ The comparison is relevant in several respects. Both systems take away from the elected council, the power to make decisions in respect of council affairs and pending an election, a caretaker or administrator is appointed to act as council. South Africa and Zimbabwe share a colonial past. The two countries legal history has a strong Roman-Dutch law influence as well as the English law influence. Both countries, but more particularly South Africa, have passed legislation to provide for a particular system of local government. The South African system will be briefly discussed here and some comparisons made with section 80 of the Urban Councils Act.

6.2 Constitutional framework for local government

In terms of section 40 (1) of the Constitution of South Africa, government is made up as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. All spheres of government must respect the

⁷⁴ Act 108 of 1996.

constitutional status, institutions, powers and functions of government in the other spheres.⁷⁵ They must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional and institutional integrity of government in the other spheres.⁷⁶ Each sphere has a budget,⁷⁷ and the division and allocation of revenue between the three spheres is done in accordance with national legislation.⁷⁸

In the new Constitution, local government assumed an enhanced status. While historically it was a creature of statute owing its existence to provincial ordinances,⁷⁹ the new local government derives its existence from the Constitution. The new status of local government was aptly captured in the words of former Deputy Minister V. Moosa MP when he described it as follows:

“Local government in this country, as in many other countries, has always been treated as a stepchild of the first and second tiers of government. We have attempted, and I think we have by and large succeeded, in removing this second-class status of local government. Local government is now recognised, side-by-side with the national and provincial level, as a tier of government in its own right with the full constitutional protection that provincial governments themselves enjoy.”⁸⁰

⁷⁵ Section 41 (1) (e) Constitution.

⁷⁶ Section 41 (1) (g) Constitution.

⁷⁷ Section 215 (1) Constitution.

⁷⁸ Section 214 (1) Constitution.

⁷⁹ Steytler and de Visser (2007,1-3).

⁸⁰ Debates of the Constitutional Assembly 1996:239. In this regard see also the words of the Constitutional Court in *re: Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC) at para. 364.

Being a distinctive sphere is ‘...suggestive of an equality as between the concepts of national, provincial and local governmental structures, as opposed to the more traditional levels of power and importance’.⁸¹

The new local government enjoys a relatively high degree of autonomy. It is made up of municipalities which were set up for the whole of South Africa.⁸² The municipal council is vested with both the executive and legislative authority.⁸³ The municipality has the power to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation.⁸⁴ In terms of section 151 (4) both the national or provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions.

The relationship between the different spheres is predicated on cooperative government and each sphere is obliged to observe and adhere to the principles of cooperative government in Chapter 3 of the Constitution.⁸⁵ Every provincial government has a duty to support local government and to promote its developmental capacity so as to enable local government to perform their functions and duties.⁸⁶ Section 154 (1) requires national and provincial government to support and strengthen the capacities of municipalities to manage their own affairs and to exercise and perform their functions. The autonomy of local government is limited by national and provincial legislation⁸⁷ and the provincial government must, by legislative and other measures, provide for the monitoring and

⁸¹ *Uthukela District Municipality and Others v President of the Republic of South Africa and Others* 2002 (5) BCLR 479 at 485 G-H.

⁸² Section 151 (1) Constitution.

⁸³ Section 151 (2) Constitution.

⁸⁴ Section 151 (3) Constitution.

⁸⁵ Section 40 (2) Constitution.

⁸⁶ Section 155 (6) Constitution.

⁸⁷ Section 151 (30) Constitution.

support of local government in the province.⁸⁸ In terms of section 155 (7), the national and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions.

To sum up, local government is a “...sphere of government that is profoundly democratic, enjoys a measure of self-government, is mandated to be developmental and functions in cooperation with and under the supervision of the provincial and national spheres of government”.⁸⁹

6.3 Section 139 (1) (c) of the South African Constitution

The dissolution of the municipal council is provided for in section 139 (1) (c) and (3) of the Constitution. Section 139 (1) (c) provides that:-

- 1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation, including-
 - a)...
 - b)...
 - c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council is declared elected, in exceptional circumstances warrant such a step.

In order for the provincial executive to intervene there must be a statutory precondition or jurisdictional fact,⁹⁰ i.e. that it cannot or does not fulfil an executive obligation. The words “... cannot or does not...” are in the present tense and mean an ongoing failure as opposed to a past failure to fulfil an executive obligation.⁹¹ The provincial executive has

⁸⁸ Section 155 (6) (a) Constitution.

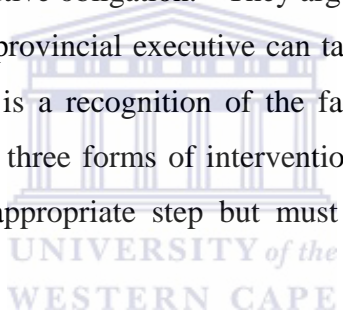
⁸⁹ Steytler and de Visser at (2007,1-23).

⁹⁰ *Mnquma Local Municipality and Another v Premier, Eastern Cape and Others* para 49.

⁹¹ *Supra* para 51.

the discretion to intervene but when the executive decides to intervene, he or she may do so by taking “any appropriate steps.” In deciding on what constitutes appropriate steps the court ruled that they are steps that are suitable or proper, taking into account the conflicting interests of all those involved and affected i.e. the nature of the obligation that has not been fulfilled, the interests of those affected by the failure to fulfil the executive obligation and the interests of the municipality. It is a balance of the constitutional imperative to respect the integrity of local government against the constitutional requirement of good government.⁹²

In explaining what would constitute exceptional circumstances, Steytler and de Visser argue that the general principle should be that dissolution is an instrument for dealing with the situation where the municipal council’s conduct is the cause of the continued failure to comply with an executive obligation.⁹³ They argue further that dissolution is the last of a series of steps that a provincial executive can take in correcting a municipality that has failed to govern.⁹⁴ It is a recognition of the fact that dissolution is the more drastic and far-reaching of the three forms of intervention authorised in sub-section (1) which must not only be an appropriate step but must be resorted to in exceptional circumstances only.⁹⁵



6.4 Comparison

The two types of interventions arise in a fundamentally different context. In the Zimbabwean local government system, local government is a creature of statute and exercises delegated powers. Local government in Zimbabwe is not an autonomous sphere as is the case in South Africa. It is therefore expected and fitting for Zimbabwe to have a more intrusive system of supervision. However, it is important that there be respect for the law and where intervention becomes necessary, the law must allow for some measure

⁹² Supra para 72.

⁹³ Page 15-26.

⁹⁴ Page 15-27.

⁹⁵ Supra para 79.

of discretion and respect for the institutional integrity of local government. The following differences can be identified in the two systems:

- a) In terms of section 139 (1) (c) a council may be dissolved and an administrator appointed until a newly elected municipal council is declared elected, if exceptional circumstances warrant such a step. As shown above, section 139 (1) (c) envisages an incremental series of steps with dissolution as the last step to be taken in correcting a municipality that will have failed to govern. Dissolution is justified by the manifest failure of the previous intervention.⁹⁶ However the court in the Mquma judgement seems to have taken a different view in its interpretation of the word “or” in section 139 (1).
- b) Before dissolving the municipal council, the provincial executive may notify the municipal council in writing of the intention to dissolve the council. In the South African intergovernmental relations system, it seems proper that the municipality be notified of the impending dissolution.
- c) In Zimbabwe, a caretaker may be appointed if there are no elected councillors for a council area, or if the councillors have been suspended or imprisoned or are otherwise unable to exercise all or some of their functions as councillors.⁹⁷ The main difference here is that while in South Africa a council may be dissolved if it cannot or does not fulfil an executive obligation, the Zimbabwean scenario looks more at the conduct of the councillors.
- d) The most significant difference is in the system of intergovernmental checks and balances that is in place in the South African system. Section 139 (3) (b) provides that the dissolution takes effect unless the National Council of Provinces (NCOP) or the Minister sets it aside within 14 days from the date of receipt of the notice by the NCOP. During this 14 day period the Minister or the NCOP may set aside the dissolution and the decision to set it aside is done independently of the other.

⁹⁶ Section 34 (3) (b) Local Government: Municipal Structures Act 117 of 1998.

⁹⁷ Section 80 (1) (a) and (b) Urban Councils Act.

In addition, a notice must also be sent to the provincial legislature⁹⁸ to which the MEC is accountable. Steytler and de Visser identify two purposes for the notice to the provincial legislature.⁹⁹ Firstly, it is intended to inform the provincial legislature of the intended dissolution so that it exercises its function of overseeing the exercise of provincial executive authority. Secondly, the notice is intended to facilitate the provincial legislature's decision on a mandate for its delegates in the NCOP with regard to the approval of the dissolution. In Zimbabwe, while the Minister may be called upon to answer questions in Parliament, this has no bearing on the Minister as he is appointed by the President and serves during the pleasure of the President.¹⁰⁰

- e) Section 139 (1) (c) has both legal and political safeguards. First is the objective determination of whether there has been a failure to fulfil an executive obligation. Second is the need to intervene in a manner that is appropriate. Thirdly, there must be exceptional circumstances to warrant a dissolution and lastly on a political level, the Cabinet member for local government or the National Council of Provinces are empowered to terminate any form of action taken against a municipality under sub-section (1) (c).
- f) Lastly, in the South African scenario, a province will take over from an entire council whereas in Zimbabwe the incapacity of some councillors may result in a takeover. However the remaining councillors must be consulted before the caretaker exercises any function.

6.5 Conclusion

This Chapter compared the South African and the Zimbabwean legal regimes on the appointment of administrators or caretakers to act as council following the dissolution of

⁹⁸ Section 139 (3) (ii) Constitution.

⁹⁹ Page 15-23.

¹⁰⁰ Section 31G (2) Zimbabwe Constitution.

council or the suspension of councillors. It has been noted that the South African system allows for a system of intergovernmental checks and balances. Further the provincial executive is accountable to the provincial legislature which exercises an oversight over the exercise of provincial executive authority. There are no such intergovernmental checks and balances in Zimbabwe. The next chapter will carry the conclusion of the study.



CHAPTER 7

Conclusion

The Minister of Local Government can appoint a caretaker if there are no elected councillors for a council area or if all the elected councillors for a council area have been suspended or imprisoned or are unable to exercise all or any of their functions as councillors. This power to appoint a caretaker represents one of the most intrusive forms of intervention into local government affairs by the Minister. This power must be used sparingly and only in deserving circumstances. As creatures of statute, local authorities can only exercise those powers assigned to them in terms of the law. In terms of the current legislation they are treated more as an extension of central government and therefore operate at the pleasure of the Minister. This is legitimized by the inferior status of local government in Zimbabwe which allows for intrusive intervention mechanisms. While the country is decentralized, no real power has been transferred to local authorities. It is therefore important that the law is obeyed by all and that the system for the appointment of a caretaker is not used for political ends.

While the amendment to section 80 took away some of the powers of the Minister, it is argued that the amendment did not go far enough. Granted, it will be necessary for the Minister to suspend councillors or to dissolve councils in appropriate circumstances. However the system must allow for openness, transparency and objectivity in dealing with wayward councils. This can be achieved only if there are adequate checks and balances to guard against arbitrary behaviour that may be motivated more by political considerations than the need to improve the performance of councils. It is proposed that the appointment of a caretaker could be improved by requiring the Minister to motivate the need for the suspension of councillors and therefore the need for the appointment of a caretaker to Parliament. Further he could be required to outline in his motivation, the proposed measures to get the council back on track, with Parliament empowered to block the suspension or appointment if it is not satisfied that these are justified. At the end of the caretakership, the Minister must table a report before Parliament on the suspension and the work of the caretaker.

The constitutional review process that is under way provides an opportunity for some of the proposed changes to local government legislation. One of the important changes would be the recognition of local government as a separate form of government, distinct from central government. Further, while central government will retain its supervisory powers over local government, the manner of supervision will be governed by the constitution. The constitutional recognition of local government and the delineation of circumstances when central government may intervene will provide protection to local government as constitutional changes will need a certain amount of support before they can be passed.

A comparison was made with the dissolution of a municipal council in terms of section 139 (1) (c) of the South African Constitution. It was noted that the South African system provides safeguards to local government by limiting the intervention to the non-fulfilment of executive obligations and by requiring the provincial executive to take “appropriate steps including dissolution if exceptional circumstances warrant such a step”. In addition the Cabinet Minister or the National Council of Provinces can veto the dissolution if they are not satisfied with the reasons given by the provincial executive. Parliament in Zimbabwe could be empowered to play the role that the Cabinet Minister or the National Council of Provinces plays in the South African system.

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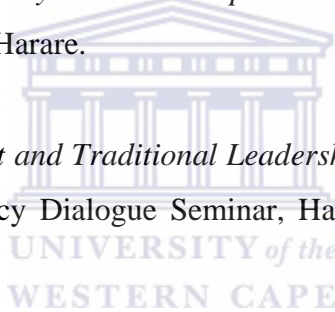
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