

FREDERICK MUKONGOLWA MUSHAMBATWA AND LIVINGSTONE MUNICIPAL COUNCIL AND THE ATTORNEY-GENERAL IN THE MATTER OF LOCAL GOVERNMENT ACT NO. 22 OF 1991 STATUTORY INSTRUMENT NUMBERS 137 AND 138 OF 1991 AND STATE PROCEEDINGS ACT CAP. 92 OF THE LAWS OF ZAMBIA) (1992) S.J. (H.C.)

HIGH COURT
MAINGA W., J
28TH AUGUST, 1992
1992/HL/27

Flynote

Removal of council official from his position - Whether minister has such powers

Headnote

The applicant sought from the court declarations to the effect that the Minister of Local Government and Housing has no power to remove, replace and or transfer him to another Council or Institution; that the Applicant's refusal to vacate his office as District Executive Secretary of Livingstone Municipal Council was legitimate as he could not do so without any justified cause or excuse and that as the Minister had no power to remove the Applicant from his office, the move constituted maladministration, political harassment and victimization without just cause or excuse as the said Minister's action was devoid of both Legal and Administrative authority. The applicant sought an injunction restraining the first respondent from evicting him from his house and damages. The applicant based his action on the grounds that he as an employee of the second respondent, he could only be removed from his office by the first respondent and not the minister and that the applicant's eviction from his house could only be done within the provisions of the Local Government Act and its relevant regulations and not according to the dictates of the minister.

Held:

- (i) The order to remove the applicant from office was illegal and ultra vires the powers of the Minister. The order also amounted to maladministration because the applicant was being forced out the office without having been given a posting elsewhere.
- (ii) The applicant is still a District Executive Secretary or Town Clerk for Livingstone Municipal Council and that his refusal to vacate his office after 10th December, 1991 following the Minister's failure to redeploy him was legitimate and that the transfer of Mr. Machai to Livingstone by the Minister before making redeployment arrangements for the applicant constituted maladministration

Cases referred to:

1. **Kangombe v The Attorney-General (1973) Z.R. 114**

Legislation referred to:

1. **Local Administration (Amendment) Act No. 21 of 1986 Sections 92, 97(3), 98(1) and 99(2).**
2. **Local Government Act No. 22 of 1991 Section 3; 94(2), 94(3) (d) and 100(1) (a).**
3. **Statutory Instruments No. 137 and 138 of 1991, Regulations 2 and 5.**

Rules referred to:

- 1. Order 6 Rule 2 of the High Court Rules, Cap. 50. of the Laws of Zambia.**

For the Applicant: Mr. C.L. Mundia, Messrs Mundia Kakoma & Company

For the Respondents: Mr. M. Mukelabai, Ass. Senior State Advocate

Mr. Mwango Chaiwila, Counsel, Lusaka City Council

Judgment

By his originating Notice of motion made pursuant to Order 6 Rule 2 of the High Court Rules, Cap. 50 of the Laws of Zambia, Frederick Mukongolwa Mushambatwa, (hereinafter referred to as "the Applicant") applied to this Court for the following declaratory orders:

- That the Minister of Local Government and Housing has no power to remove, replace and or transfer him to another Council or Institution.
- That the Applicant's refusal to vacate his office as District Executive Secretary of Livingstone Municipal Council was legitimate as he could not do so without any justified cause or excuse.
- That as the Minister had no power to remove the Applicant from his office, the move constituted maladministration, political harassment and victimization without just cause or excuse as the said Minister's action was devoid of both Legal and Administrative authority.

The Applicant also applied for:

- An Injunction to restrain the 1st Respondent, its servants and/or employees from repossessing his official vehicle or evicting him from house No. 2 Flamboyant Lane in Livingstone as he is still lawfully in the employment of the aforesaid 1st Respondent.
- Damages for inconveniences, mental strain and anguish to his family and himself caused when his vehicle was impounded by the police on the instructions of the 1st Respondent through the instrumentality of David Machai and that the costs of this Application be borne by the Respondents.

The grounds upon which the Applicant is seeking reliefs are:

- That the Applicant being an employee of Livingstone Municipal Council can only be removed or asked to stop carrying out the functions of his said office by the 1st Respondent and not by the Minister.
- That the Applicant's removal from house or office can only be done in accordance with the provisions of the Local Government Act and the relevant regulations made there under and not according to the dictates of the Minister.

The Respondents did not file Affidavits in opposition but they were represented at the trial. The Appellant relied on viva voce and documentary evidence. The plaintiff, Frederick Mukongolwa Mushambatwa told the court that he was the Town Clerk for Livingstone Municipal Council but he was not carrying out the functions of the office because early in December, 1991 he had received a copy of a letter which was addressed to Mr. Machai who was the District Executive Secretary for Chililabombwe from the Permanent Secretary, Ministry of Decentralisation informing Mr. Machai that he was transferred to Livingstone in the same capacity. When he asked the Permanent Secretary, Professor Lungu, as to what would become of his position since Mr. Machai was coming to Livingstone Professor Lungu had advised him to travel to Lusaka. He went to Lusaka where Professor Lungu told him that he would be transferred to Mongu, a Council of inferior status to that of Livingstone. He has asked for the letter of transfer but the Professor has told him that there was no letter as he had advised the Minister against making such transfers but that the Deputy Permanent Secretary would write to him. When he returned to Livingstone he wrote and pleaded with the Professor to ask the Minister to reconsider the decision to transfer him to Mongu as such a move amounted to a demotion. He also wrote to the Minister explaining his position but the Minister has responded on 4th December, 1991 by ordering him to handover the office and stay at home. He instructed Messrs Lisulo and Company to write to the Minister who replied to their letter on 3rd January, 1992 to the effect that he had not ordered the applicant to leave employment but merely

handover the office; to stay at home and enjoy the benefits that went with the job. Later Mr. Simwinga the Assistant Secretary in the Ministry telexed Mr. Machai and asked him to remove him from the office and while that was going on, the police impounded his motor vehicle on Mr. Machai's orders. He applied for an injunction and the court granted it to him on 28th February, 1992. He has not been working ever since and he decided to bring the matter to court because he has not been offered a job as the one to go to Mongu had been made verbally and the man in Mongu was still there.

The Applicant told the court that the Minister has no power to transfer him under the Local Government Act as power over staff matters rests with Livingstone Municipal Council which has not written to him on any matter. He explained that at the time he came to Livingstone the Minister had power over staff matters but the Minister had to act in consultation with the Councils under Section 97(3) of the Local Government (Amendment) Act No. 26 1986 but the Minister ceased to have such powers on 10th December 1991 and that any purported action to remove him was irregular because from 10th December, 1991 the power over staff vested in the Local Government Service Commission and the Councils. The Applicant was asking the court to restore him to the post of Town Clerk, Livingstone. When cross-examined, the Applicant explained that under Section 97(3) of the Local Government (Amendment) Act of 1986 the Minister had power to make staff transfers but that such powers ceased on 10th December, 1991. He had received a copy of the letter dated 22nd November, 1991 addressed to Mr. Machai and he had realised that although Mr. Machai was taking over from him the Minister had not told him where he was going that was why he had written to the Minister to reconsider his position. He further explained that since the Minister had not consulted the Councils before he made the transfer, the Minister's decision was irregular. After the Applicant had closed his case, Mr. Mukelebai told the court that the Respondents were not calling evidence because the position had been clarified by the Applicant.

The court received submissions. Mr. Mukelebai submitted that the applications by the Applicant were misconceived because the actions complained of by the Applicant were properly exercised by the Minister in terms of Section 97(3) of the Local Administration (Amendment) Act No. 21 of 1986 which gave wide powers to the Minister to co-ordinate and make administrative staffing arrangements in the interests of Local Government Administration and that the Minister could exercise his discretion and could therefore transfer Mr. Machai to Livingstone pending the deployment of the Applicant and that on the facts of this case, it was clear that the Applicant was not prejudiced in any way by the exercise of the discretion because at that time, the Minister had not made a definite stand regarding the Applicant's next posting.

On complaints of harassment and anguish, Mr. Mukelebai submitted that those complaints have not been proved as they depended on whether the Minister had power to transfer Mr. Machai so that any acts following that transfer could not be used as a cause of action entitling the Applicant to damage since the same were lawful acts. Mr. Machai asked the court to dismiss the Applicant's action with costs. Mr. Chaiwila told the court that he was relying on the submissions made by Mr. Mukelebai because he concurred with Mr. Mukelebai on all the aspects of the matter.

For the Applicant, Mr. Mundia submitted that the Applicant had adduced sufficient evidence to show that the Minister had acted ultra vires the power provided by Section 97(3) of the Local Government Act (No. 21) of 1991 as read with regulation 2 of Statutory Instrument No. 137 and Regulation 5 of Statutory Instrument No. 138 of 1991 and that under Section 97(3) of the Local Administration (Amendment) Act of 1986, the Minister had no power to transfer staff as he wished because that Section only gives the Minister power to make regulations and administrative arrangements relating to recruiting and transfer of staff and that the intention of the Legislature should be interpreted to mean that those matters could be enforced by Statutory Regulations and that the Minister could issue a circular and make regulations governing transfers of members of staff.

Mr. Mundia submitted that the Applicant had adduced evidence to show that even the Minister had conceded that by 3rd January, 1992 the Applicant had not been transferred but had merely been instructed to handover the office to Mr. Machai. Mr. Mundia argued that since the Minister's instructions were ambiguous, the Applicant was ordered to be removed from office through the police even though by 3rd January, 1992 the Applicant was still an employee of the Livingstone Municipal Council which was the competent authority to transfer, demote or remove the Applicant from office. Mr. Mundia submitted that it was therefore his position that the Applicant was still the substantive holder of the post of Town Clerk for the Livingstone Municipal Council and that it was ultra vires the powers of the Minister even if he had the power, to transfer Mr. Machai to Livingstone where there was still a substantive holder of the post and that after 10th December, 1991 the power vested in the Council to deal with the Applicant and further that although the Minister had power to create councils under section 3

of Act No. 22 of 1991, the Minister could not exercise original jurisdiction over staff matters in the councils. Mr. Mundia cited the case of *Kangombe v The Attorney-General* (1) where the Supreme Court had held that where power were vested in body or an institution, only that body or institution could exercise original jurisdiction and it was further held that the actions of the President purporting to exercise the original jurisdiction of the Teaching Service Commission were ultra vires the powers conferred by statute and were therefore null and void. Mr. Mundia submitted that in the present case the Minister's intention to request the resignation of the Applicant in order to take up another appointment should be construed as an attempt to terminate the Applicant's employment with the council and was equally not within the Minister's competence to induce a breach of the contract of employment between the applicant and the Livingstone Municipal Council. Mr. Mundia submitted that in all employment contracts there is an offer and an acceptance but that in this particular case there was no offer but an attempt to breach the existing contract when the Applicant was told that he should first retire before he moved to the Commission.

Mr. Mundia further submitted that even if there was an offer made to the Applicant, there should have been terms and conditions given to the Applicant spelling out what was being offered to the Applicant but in this case there was no evidence placed before this court to show that the Applicant was going to enjoy better or similar conditions to the ones he was currently enjoying if he moved to the Commission or took up another appointment.

Mr. Mundia had further submitted that the Applicant came to court to seek redress over matters of utmost importance of himself and his family and that it was within the court's power to protect the interests of the weak against those people in authority otherwise there would be a total negation of justice in society. Mr. Mundia asked the court to declare the acts of the Minister as totally ultra vires the purported powers of the Local Government Act of 1991 and also declare that the Applicant is still legitimately employed by the Livingstone Municipal Council as its Town Clerk. Mr. Mundia asked the Court to award the applicant with damages for distress and harassment and with the costs of these proceedings.

In reply, Mr. Mukelabai submitted that offer was made to the Applicant not by the Minister but by the Permanent Secretary to condition being a member of the Local Government Service Commission and that at that stage the Minister had no power to transfer or offer employment to the Applicant by virtue of Act No. 22 of 1991 and that as such, the Permanent Secretary was not corroborating with the Minister but that such an offer showed the bonafide intentions of the employer, the Ministry of Local Government to give a post to the Applicant but that as of 22nd November, 1991 when Mr. Machai was appointed District Executive Secretary District Councils were still in existence and they were semi autonomous though subject by and large to control by the Minister whereas of now, the Local Government Act created District, Municipal and city Councils which have powers to employ their own staff so that to hold now that the applicant should go back to Livingstone Municipal Council would amount to forcing the Council to take up a contract of employment with the applicant long after the status of the Council has changed from what it was when the Minister had power over the Council staff.

I have taken into consideration the evidence given by the Applicant; the documents he had produced in support of his Application and the submissions made by Mr. Mukelabai and Mr. Mundia and after analysing all that evidence I make the following findings of fact:-

- (1) that the Applicant was at the material time the District Executive Secretary for Livingstone District Council.
- (2) that by a letter referenced DA/1481 Mr. J.C. Sikala, a Deputy permanent Secretary, informed Mr. David Machai who was at the time the District Executive Secretary for Chililabombwe district Council that the Honourable Minister of Local Government and Housing had directed that he be transferred on promotion to Livingstone District Council in the same capacity as District Executive Secretary. By copy of that letter, that Applicant who was the District Executive Secretary, Livingstone District Council was informed of Mr. Machai's transfer and appointment.
- (3) that on receipt of the letter referred to in paragraph (2) above the applicant had inquired by telephone from Professor Lungu who was the Permanent Secretary as to what was to become of his position following Mr. Muchai's appointment and Professor Lungu had advised the applicant to travel to Lusaka where during their meeting Professor Lungu had told the Applicant that he would be transferred to Mongu, a District Council of inferior status to that of Livingstone.
- (4) that on return to Livingstone and without waiting for a letter of transfer, the applicant wrote to the Minister of Local Government explaining what his position was regarding his pending transfer to Mongu and the applicant had also written to Professor Lungu to ask the Minister to reconsider the transfer to Mongu as it would have amounted to a demotion in rank.

- (5) that the Minister replied to the applicant's letter on 4th December, 1991 in the following manner:

"re: TRANSFER - YOURSELF

Thank you for your unnecessarily long letter.

If you are a strong MMD supported as you claim to be, one would have expected you to make an effort to come and discuss with me rather than writing such a long and boxing letter when do not even know where you are going"

- (6) that the applicant had hired Messrs Lisulo and Company who on 24th December, 1991 wrote to the Minister of Local Government and Housing who on 3rd January, 1992 responded as follows:-

"First and foremost, we wish to point out that your office seems to be labouring under a mistaken belief that the minister of Local Government and Housing erred in law by transferring your client. As a matter of fact, your client has not been transferred but merely instructed to handover office to the incoming District Executive Secretary. He is to continue receiving all the benefits that go with his present status. In view of the foregoing, you will no doubt realise that your client has not and is not likely to suffer any pecuniary loss or any disadvantage whatsoever. That being the case, we see your intended action not only as being ill-conceived in law, academic, frivolous and vexatious, but also disadvantageous to your client in the sense that at the end of it all, he will have lost money in form of fees and his appointment delayed till the completion of the action.

However, should you decide to proceed with your intended suit, this Ministry is ready to defend itself to the maximum."

- (7) that on 20th January, 1992 Mr. Nelson J. Mapala sent a telex to the Applicant advising the Applicant as follows:

"You are required to report to Permanent Secretary's office on Wednesday 22/01/92 in the capacity of Commissioner in order to meet the president. Please treat this as urgent. You will first meet the Permanent Secretary, Ministry of Local Government and Housing."

- (8) that the Applicant's application for an injunction to restrain the minister of Local Government and Housing was refused under Section 16 of the State Proceedings Act Cap. 92 of the Laws of Zambia and on 29th January, 1992, Mr. S.D. Simwinga, a Legal Secretary sent the following telex to Mr. Machai on behalf of the Permanent Secretary, Local Government and Housing:-

Kindly be advised that as Mr. Mushambatwa has not obtained any court injunction to remain in the office, the Honourable Minister does not require any court order to remove him from the office. Please advise the police and proceed to remove Mr. Mushambatwa accordingly."

- (9) that on the strength of that telex message, Mr. Machai with the help of the police impounded the vehicle that was allocated to the applicant for use as District Executive Secretary.

- (10) that on 20th February, 1992 Mr. Nelson J. Mapala wrote the following letter to the Applicant:

"re: APPOINTMENT AS MEMBER OF THE LOCAL GOVERNMENT SERVICE COMMISSION

I write to draw your attention to the provisions of Section 94 subsection 3(d) of the Local Government Act of 1991 which says that no person shall be qualified for appointment as a member of the Commission if he is employed in the Local Government Service or by the Council. In this regard you are requested to make arrangements to retire with effect from the date of your appointment as a member of the Local Government Service Commission."

- (11) that on 28th February, 1992 this Court granted an injunction to the Applicant

restraining the 1st Respondent from evicting the applicant from the Council house which the Applicant was occupying as District Executive Secretary.

The issues that I have to resolve are:

- (a) Whether the Minister of Local Government and Housing had no power to remove, replace and or transfer the Applicant to another Council or Institution.
- (b) whether the applicant's refusal to vacate the office of District Executive Secretary of Livingstone Municipal Council was legitimate as the Applicant could not vacate the office without any justified cause or excuse.
- (c) if the Minister had no power to remove the Applicant from his office, whether the move to remove the Applicant constituted maladministration, political harassment and victimization without just cause or excuse and if the Minister's action was devoid of both Legal and Administrative authority.

I will deal with those issues. The first is whether the Minister of Local Government and Housing had no power to remove, replace and or transfer the Applicant to another Council or Institution. Both Mr. Mundia and Mr. Mukelabai submitted on this issue. For the applicant, Mr. Mundia had submitted that the Minister had acted ultra vires the powers provided by Section 97(3) of the Local Government Act (No. 21) of 1991 as read with Regulation 2 of Statutory Instrument No. 137 and Regulation 5 of Statutory Instrument No. 138 of 1991 and that even under section 97(3) of the Local Administration (Amendment) Act of 1986, the Minister had no power to transfer staff as he wished because the Section only gave the Minister power to make regulations and administrative arrangements relating to recruiting and transfer of staff and what the intention of the Legislature should be interpreted to mean that these matters could have been enforced either by Statutory Regulations or through a circular issued by the Minister to govern recruitment and transfers of members of staff. Mr. Mundia submitted that on 3rd January, 1992 the applicant had not been transferred but had been instructed by the Minister to handover his office to Mr. Machai and that since the Minister's instructions were ambiguous, the applicant ended up being removed from office by the police even though the applicant was still an employee of the Livingstone Municipal Council which after 10th December, 1991 was the only competent authority which could transfer, demote and remove the applicant from office. It was Mr. Mundia's position that the applicant was still substantive holder of the post of Town Clerk of the Livingstone Municipal Council and that it was therefore ultra vires the power of the Minister even if the Minister had the power on 22nd November, 1991 to transfer Mr. Machai to Livingstone where the applicant was still the substantive holder of the post of Town Clerk. Mr. Mundia had further submitted that although the Minister had power to create Councils under Section 3 of Act No. 22 of 1991, the Minister could not exercise original jurisdiction over staff matters in the Council because where powers were vested in a body or an institution, only that body or institution could exercise original jurisdiction over staff matters. For this submission Mr. Mundia relied on the case of *Kangombe V The Attorney-General* (1) and went on to submit that in the present case, the Minister's intention to request the applicant to resign from the council and take up another appointment should be construed as an attempt to terminate the applicant's employment with Livingstone Municipal Council, a move which was equally not within the Minister's competence as it has tried to induce a breach of contract of employment between the applicant and the Livingstone Municipal Council. Mr. Mundia concluded his submissions by asking the court to declare that acts of the Minister totally ultra vires.

For the respondents, Mr. Mukelabai submitted that the reliefs being sought by the applicant were misconceived because the actions complained of by the applicant were properly exercised by the Minister in terms of Section 97(3) of the Local Administration (Amendment) Act (No. 21) of 1986 which gave wide powers to the Minister to co-ordinate and make administrative staffing arrangements in the interests of Local Government Administration and that under that Section, the Minister could exercise his discretion and could therefore transfer Mr. Machai to Livingstone pending the deployment of the Applicant and that on the facts of this case, it was clear that the applicant was not in any way prejudiced by the exercise of that discretion because at that time the Minister had not made a definite stand on the applicant's next posting. Mr. Mukelabai's position is that as of 22nd November, 1991 when Mr. Machai was appointed District Executive Secretary, District Councils were still in existence; that they were semi autonomous and were still subject to control by the Minister until 10th December, 1991 when the Local Government Act (No. 22) of 1991 created District, Municipal and City Councils which have powers to employ their members of staff so that if the Court ordered that the Applicant should go back to Livingstone Municipal Council such an order would force the Council to take up a contract of employment long after the status of the Council had changed from what it was when the Minister who had power over the Council had transferred Mr. Machai to the Council.

After analysing the evidence on this issue I found that when Mr. Machai was promoted and transferred to Livingstone District Council as the District Executive Secretary on 22nd November, 1991 the Minister was effectively replacing the applicant with Mr. Machai and the effect of replacing the applicant with Mr. Machai was to remove the applicant from the office of District Executive Secretary for Livingstone District Council. I found this to have been the position because there is no provision under the Local Administration (Amendment) Act (No. 21) of 1986 for Livingstone District Council or indeed any other Council, to have two District Executive Secretaries, so that Mr. Machai was promoted and transferred to Livingstone it meant that Mr. Machai was effectively taking over from the applicant. And after Mr. Machai had come to Livingstone, what was the applicant's position? Was the applicant transferred to another Council or was he given another post? Going by the evidence on record, the Minister did not and he has not transferred the applicant anywhere but the Minister removed the applicant from the office even after the applicant had resisted the handing over of the office to Mr. Machai, as is demonstrated by the following circumstances:-

- (1) the applicant told the Court that soon after he had received a copy of the letter appointing Mr. Machai District Executive Secretary for Livingstone he had phoned the Permanent Secretary, Ministry of Local Government and Housing who had advised him to travel to Lusaka where as a meeting, the Permanent Secretary allegedly told the applicant that he would be transferred to Mongu. Thereafter the applicant wrote to the Minister pleading with the Minister not to send him to Mongu and the Minister had responded to the applicant on 4th December, 1991 and the relevant part of that letter reads:

"if you are a strong MMD supporter as you claim to be, one would have expected you to make an effort to come and discuss with me rather than writing such a long and boring letter when you do not even know where you are going."

- (2) that in an effort to resist being removed from office, the applicant had instructed Messrs Lisulo and Company to take up the matter with the Minister on his behalf. I have not seen the letter which Messrs Lisulo and company had written to the Minister on 24th December, 1991 but the Minister had responded to that letter on 3rd January, 1992 and the Minister's

The letter in part as follows:

"First and foremost, we wish to point that your office seems to be labouring under a mistaken belief that the Minister erred in law by transferring your client. As a matter of fact your client has not been transferred but merely instructed to handover office to the incoming District Executive Secretary. He is to continue receiving all benefits that go with his present status."

- (3) that after Messrs Lisulo and Company had received the letter referred to in (2) above, the applicant changed Advocates and through Messrs Silweya and Company applied for an Injunction by which he has hoped he could resist Mr. Machai's taking over his office and when that application was refused on the ground that an injunction could not issue against the State, the Permanent Secretary through a telex message dated 29th January, 1992 instructed Mr. Machai to ask the police to assist him in removing the applicant from the office.

The Telex message reads as follows:

"Kindly be advised that as Mr. Mushambatwa has not obtained any court injunction to remain in the office the Hon. Minister does not require any court order to remove him from the office. please advise the police and proceed to remove Mr. Mushambatwa accordingly."

From what I have reproduced above, it will be seen that the Minister of Local Government and Housing removed the applicant from the office of District Executive Secretary and that position was taken over by Mr. Machai although the applicant had heard a story to the effect that he was being transferred to Mongu, that fact was denied by the Minister in his letter to the applicant dated 4th December, 1991 in response to the Applicant's letter and the denial was repeated in another letter dated 3rd January, 1992 written by the Minister in response to the one which the Minister had received from Messrs Lisulo and Company, so that as at 3rd January, 1992, the applicant was transferred from Livingstone Municipal Council but not instructed the

applicant to handover the office to Mr. Machai and although not working, the applicant continued to receive and enjoy all the benefits that went with his office. And what transpired on offered antoehr post. On 20th January, 1992 the applicant received a telex message from the Permanent Secretary, Ministry of Local Government and Housing to the effect that the applicant was required to report to the Permanent Secretary's office of Wednesday 22nd January, 1992 in the capacity of Commissioner in order to meet the President. The Applicant was advised to treat the message as urgent and the applicant was told that he would first meet the permanent Secretary, Ministry of Local Government.

I have studied that telex message which is dated 20th January, 1992 nearly two months after Mr. Machai had taken over from the applicant and I noticed that the Permanent Secretary still referred to the applicant as the District Executive Secretary, Livingstone District Council, Livingstone, so that despite Mr. Machai's promotion and transfer to Livingstone, the applicant was still acknowledged as the District Executive Secretary for Livingstone District Council. In that message the applicant is said to be a commissioner without more because apart from that telex message on the subject of the applicant assuming the capacity of Commissioner the court has not been told what the capacity of commissioner was all about as neither the applicant nor the respondents have led evidence on the matter. It is therefore not known if the applicant has travelled to Lusaka and if he had a meeting with his Permanent Secretary and if he had met the President on 22nd January, 1992. However, on 20th February, 1992 the Permanent Secretary wrote to the applicant a letter headed "re: Appointment as a member of the Local Government Service Commission." In that letter the Permanent Secretary was telling the applicant that no person was qualified for appointment as a member of the Local Government Service Commission if that person was still employed in the Local Government Service or by one of the Councils. The Permanent Secretary was asking the applicant to make arrangements to retire from the date of the applicant's appointment as a member of the Local Government Service Commission. When the telex message dated 20th January, 1992 is read together with that letter, one gets the impression that the applicant had been offered the membership of the Local Government Service Commission but it is not known if the applicant had accepted the membership even though he had been invited to attend a meeting. It is also not known whether the applicant had travelled to Lusaka and whether it was there that it dawned upon the Permanent Secretary that the applicant who was still District Executive Secretary for Livingstone District Council could not take up membership without first having to retire from the Council. Despite lack of evidence on this issue, I am still satisfied that the applicant has not retired from the Livingstone District Council because of the vigour with which he has pursued this case and his insistence that he is still the Town Clerk of Livingstone and since the applicant did not retire, I have concluded that he had not accepted the appointment of being a member of the Local Government Service Commission and it follows therefore that since the applicant was disqualified to be appointed a member of the Local Government Service Commission because he is still an employee of the Livingstone Municipal Council, both the Permanent Secretary and the Minister were not competent to offer him the post of a member of the Local Government Service Commission. From what I have stated above the answer to the question of whether the applicant was offered an alternative post is that the applicant was not and has not been offered another post after Mr. Machai's transfer to Livingstone District Council. The position is that whereas the Minister has effectively removed the applicant from the office of the District Executive Secretary, the Minister did not transfer and did offer the applicant another post. This brings me to the important question of whether the Minister acted ultra vires the powers under the Local Government Act (No. 22) of 1991 as read with Regulations 2 of Statutory Instrument No. 137 and Regulation 5 of Statutory Instrument No. 138 of 1991. To answer this question I found it necessary to examine the law on staff matters prior to the commencement of the Local Government Act No. 22 of 1991 which became operational on 10th December 1991.

The letter transferring Mr. Machai on promotion to Livingstone District Council is dated 22nd November, 1991 and both the promotion and the transfer were made by the Minister under the provisions of Section 97(3) of the Local Administration (Amendment) Act No. 21 of 1986. In the letter transferring Mr. Machai the Section invoked by the writer of the letter is 97(3) which reads as follows:

'97(3) - The overall responsibility for the co-ordination of all matters relating to staffing generally in Councils shall remain with the Minister, and he may make such regulations or administrative arrangements relating to recruitment or transfer of officers as appear to him to be necessary in the interest of Local Administration.'

I have studied Section 97(3) and I have found it to have been part of Section 97 which dealt with the functions of the Provincial Service boards established under Section 92 of Act No. 21 of 1986. Section 97(1) was stating that although each Province would have a Provincial Service Board which would review disciplinary cases from Councils and would hear appeals from aggrieved officers, the overall responsibility for the coordination of all matters relating to

staffing generally in Councils remained with the Minister, who may make regulations or administrative arrangements relating to recruitment or transfer of officers as appeared to him to be necessary in the interest of Local Administration. This Section 97(3) has to be read with the provisions of Section 98 generally and in particular with subsection one when it comes to staff of Councils. Section 98(1) reads as follows:

"98(1) - With effect from 1st December, 1986 a Council shall have the power, subject to the other provisions of this part, to appoint, promote, transfer, second, dismiss, discharge or discipline its officers and employee, and any such power shall be exercised in accordance with the terms and conditions determined by the Council with the prior approval of the Minister."

I have understood Section 98(1) to mean that after 1st December, 1986 Councils had power to appoint, promote, transfer, second, dismiss, discharge and discipline its officers in accordance with the terms and conditions determined by the Councils with the prior approval of the Minister.

After taking into account the provisions of Sections 97(3), 98(1) and 99(2) of the Local Administration (Amendment) Act of 1986 I am satisfied that the Minister had power on 22nd November, 1991 to recruit and transfer officers if such recruitment and transfer appeared to him necessary in the interest of local administration. Accordingly, the Minister had power to promote and transfer Mr. Machai to Livingstone and it follows therefore that the Minister could remove the applicant from the office in order to create room for the incoming District Executive Secretary however, in the exercise of such powers, the Minister should have done so without prejudicing and embarrassing the applicant whose place was being taken over by Mr. Machai. For the Minister to exercise his powers over staff properly he was required to make appropriate arrangements for the posting of the outgoing employee in order to create room for the incoming officer. In the present case the Minister had transferred and promoted Mr. Machai before he had made adequate arrangements for the deployment of the applicant out of Livingstone District Council. The Minister should have made such arrangements before 10th December, 1991 when the Local Government Act No. 22 of 1991 came into effect because after that date the power to appoint officers and other employees of Councils lay in the Councils and became subject to confirmation by the Local Government Service Commission. Even the purported appointment of the Applicant to the Local Government Service Commission was null and void because neither the Permanent Secretary nor the Minister could make such an offer as appointments to the Commission can only be made by the President in terms of Section 94(2) of the Local Government Act No. 22 of 1991 and also because in terms of Section 94(3)(c) of that Act the applicant was not qualified for appointment as a member of the Local Government Service Commission on 20th January, 1992 when he was told to travel to Lusaka because the applicant was still employed by the Livingstone District Council. For the foregoing reasons, I will hold that the Minister of Local Government and Housing did not exercise his powers properly when he removed the applicant from the office of District Executive Secretary (now Town Clerk) in order to make room for Mr. Machai without first making employment arrangements for the deployment of the applicant elsewhere and after 10th December, 1991 the Minister ceased to have power to transfer, remove, replace and transfer the applicant either to another Council or Institution. The result is that the applicant though not doing actual work for Livingstone Municipal Council is still an employee of Livingstone Municipality and I so declare. The effect is that the Municipality had two Town Clerks and in all fairness to the applicant and the other Town Clerk, the Local Government Service Commission must stop in and sort out the embarrassing position created by the Minister.

The second issue is whether the Applicant's refusal to vacate the office of the District Executive Secretary of Livingstone District Council was legitimate. From what I have stated above in this judgment, on 22nd November, 1991 when the Minister promoted and transferred Mr. Machai to Livingstone, the Minister had power under Sections 97(3) of the Local Administration (Amendment) Act No. of 1986 and the Minister therefore had power to transfer, remove and replace the applicant as long as that was in the interest of Local Administration. This meant that when Mr. Machai's appointment was made, the applicant could not without justifiable reasons have opposed Mr. Machai's transfer and the Applicant should not have refused to vacate the office because Minister had power to redeploy him elsewhere. However, after 10th December, 1991 when the local Government Act of 1991 came into force and the Minister ceased to have power over Council staff matters and because the Minister had not yet redeployed him elsewhere, the applicant could justifiably refuse to vacate the office of the District Executive Secretary (now Town Clerk) of Livingstone Municipal Council because the Minister had not redeployed the applicant while he still had the power to do so and in the absence of an alternative post it was unfair to expect the applicant to stay without a posting. The answer to this question is that immediately after Mr. Machai was transferred to Livingstone, the applicant had no reason to resist leaving the office to Mr. Machai but after

reasonable time had lapsed without being deployed elsewhere, the applicant could legitimately refused to make room for Mr. Machai.

The third issue is if the Minister had no power to remove the applicant from office, whether the applicant's removal constituted maladministration; political harassment and victimization and was without just cause or excuse and if the Minister's action was devoid of both legal and administrative authority.

I have considered this issue and I have already stated above when dealing with the second issue of whether the applicant could justifiably refuse to vacate his office that the position is that initially when the Minister transferred Mr. Machai to Livingstone on 22 November, 1991 the Minister had power under Section 97(3) of the Local Administration (Amendment) Act of 1986 to remove the applicant from office provided arrangements for the deployment of the applicant had been put in place. So, up until 10th December, 1991 the Minister had power to remove the applicant from office and to redeploy the applicant however, after 10th December, 1991 the Minister ceased to have power to remove the applicant from office and the order to remove the applicant from office which order was conveyed to Mr. Machai through a telex dated 29th January, 1992 from the Office of the Permanent Secretary who must have acted on the Minister's directives was null and void because the applicant could not be removed from office by the Minister after 10th December, 1991 in terms of Section 91 as read with Section 100(2)(a) of the Local Government Act (No. 22) of 1991 when the power to remove staff vested in the Councils and the Local Government Service Commission and not in the Minister. So that on 29th January, 1992 when the Minister through his Permanent Secretary advised Mr. Machai to remove the applicant from office, such an order contravened the provisions of those Sections (91 and 10 of the Local Government Act of 1991). The order was therefore illegal and ultra vires the powers of the Minister. The order also amounts to maladministration because the applicant was being forced out of the office without having been given a posting elsewhere. Although it was suggested by Mr. Mundia that the move had also amounted to political harassment and victimization, no evidence has been led to show how the applicant was politically harassed and victimised by the Minister. The correspondence produced to this court does not show how the applicant was victimized and harassed politically. The only hint of a political nature was when the Minister wrote to the applicant on 4th December, 1991 in response to the applicant's letter which the applicant had written after the applicant had heard that the Minister planned to transfer him to Mongu. The Minister had responded in this fashion:-

"Thank you for your unnecessarily long letter. If you are a strong MMD supporter as you claim to be, one would have expected you to make an effort to come and discuss with me rather than writing such a long and boring letter when you do not even know where you are going."

It is clear to me that the applicant is the one who had brought politics into this matter while trying to persuade that Minister not to transfer to Mongu and by inference, the applicant must have written to the Minister telling him not to transfer him to Mongu on the ground that he was a strong MMD supporter. The applicant was hoping that by claiming to be a strong MMD supporter, the Minister would leave him alone. Apart from what the Minister had written in response to the applicant's claims of being a strong MMD supporter, the Minister's correspondence is free from political overtones and I fail to see how, in the absence of evidence pointing to political harassment and victimization, the Minister could be said to have harassed and victimised the applicant politically. I will not hold that the applicant was politically harassed and victimised but I will hold that the transfer of Mr. Machai to Livingstone before arrangement had been made to redeploy the applicant elsewhere amounted to maladministration.

The applicant has succeeded in the majority of his claims against the Respondents and I will declare that he is still a District Executive Secretary or Town Clerk for Livingstone Municipal Councils and that his refusal to vacate his office after 10th December, 1991 following the Minister's failure to redeploy him was legitimate and that the transfer of Mr. Machai to Livingstone by the Minister before making redeployment arrangements for the applicant constituted maladministration.

The applicant had applied for an Injunction which he was granted by this court of 28th February, 1992 by which the 1st respondent was restrained from evicting the applicant from his house. However, during the hearing of this case, the court was told that the official vehicle which had been snatched from him had been returned to the applicant but the applicant still complained that he suffered damage as he and his family were inconvenienced when the official vehicle was impounded by the police on Mr. Machai's instructions. The applicant further claimed that he suffered mental strain and anguish following the mix up over his employment.

I have accepted the fact that the applicant suffered from mental strain and anguish when his position was taken over by Mr. Machai and he was told to go and stay home and I have also found that he together with his family got inconvenienced after the police and impounded the official vehicle which he was using prior to Mr. Machai's transfer to Livingstone. I cannot however make any awards because these were general claims for which evidence has to be led and damages have to be assessed. It will therefore be necessary to have the claims for damages assessed after hearing evidence from the applicant and the respondents. The claims for damages are accordingly adjourned and referred to the Learned District Registrar for assessment.

The only issue remaining is one of costs. The applicant having succeeded in most of his claims against the respondents, I order that the cost of and those incidental to those proceedings be borne by the respondents, in default of agreement, such costs are to be taxed.

Application granted
