

MNONDO RESIDENTS ASSOCIATION
versus
RAYMOND MOYO AND OTHERS

PATEL J
HARARE, 5 October 2006 and 24 September 2007

Opposed Application

Mr. Kawonde, for the applicant
Adv. Matinenga, for the respondents

PATEL J: The applicant in this matter is an association comprised by the tenants of various properties owned by the 13th respondent, Mnondo Properties (Pvt) Ltd (the Landlord). The 1st to the 11th respondents are partners within the firm of legal practitioners (the Firm) representing the respondents herein. The 12th respondent is the Rent Board (the Board).

Background

The background to this matter is as follows. The Firm initially acted on behalf of the applicant as against the Landlord in two ejectment cases that arose in November 2002. These cases were subsequently finalised several years ago in 2003 and 2004. On the 1st of December 2005, the Landlord served upon the applicant's members a fresh ejectment notice for renovation purposes. The firm was now acting on behalf of the Landlord. At the hearing before the Board, held on the 10th of March 2006, the applicant sought the recusal of the firm on the ground of conflict of interests. The Board rejected the application for recusal and proceeded to determine the substantive matter before it.

On the 17th of March 2006, the applicant filed an urgent application for an interim order interdicting the Firm from acting on behalf of the Landlord. The Court ruled that this application was not urgent and the matter was then converted to an ordinary application through a chamber application filed on the 25th of April 2006 in Case No. HC 2293/06. The chamber application was granted

on the 9th of May 2006 and the costs thereof were reserved for determination in the main application. In the interim, on the 26th of April 2006, the Board ruled in favour of the applicant and declined to issue the certificate of ejection sought by the Landlord.

The applicant initially sought a final order setting aside the preliminary determination made by the Board and restraining the Firm from acting for the Landlord in any dispute with the applicant. The applicant also sought costs on a higher scale as against the 1st respondent. At the hearing of this matter, however, the applicant sought an amended order declaring that the Firm's conduct "constitutes an irregularity and an unethical practice".

Supplementary Heads of Argument

At the end of the hearing, both counsel were directed to file supplementary Heads of Argument on the necessity for the declaratory relief sought by the applicant in terms of section 14 of the High Court Act [*Chapter 7:06*]. The Respondents duly filed their additional Heads with the Registrar on the 19th of October 2006 and served them on the applicant's legal practitioners on the same date. However, applicant's counsel has hitherto failed to file his additional Heads as directed, despite several telephonic reminders by the Registrar.

Issues and Arguments

The principal issue for determination herein is whether or not the present application has been overtaken by events rendering academic the relief sought by the applicant. The secondary issue relates to the scale of costs to be awarded in this matter and the related chamber application in Case No. HC 2293/06.

Mr. Kawonde for the applicant argues that the conduct of the Firm in switching sides is irregular and unethical, particularly as the relief sought by the Landlord was the same as before. The matter is not academic as it is necessary for the Court to declare, for the

benefit of all legal practitioners, that such conduct is unacceptable and deplorable.

Adv. Matinenga for the respondents submits that the original relief sought by the applicant was overtaken by events. Once the Board had ruled in favour of the applicant in April 2006 there was no need for the matter to be proceeded with. As for the declaratory relief now sought by the applicant, the question of ethical conduct is a matter that is properly within the domain of the Law Society. Moreover, although the Court may grant a declaratory order on any matter, there must be need for such an order and it should not be academic or in vain.

Grant of Declaratur

Section 14 of the High Court Act [*Chapter 7:06*] provides that:

“The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

The application of section 14 was fully canvassed in *Munn Publishing (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 (S) at 343-344, where GUBBAY CJ held as follows:

“The condition precedent to the grant of a declaratory order is that the applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. See *United Watch & Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C) at 415 *in fine*; *Milani & Anor v South African Medical & Dental Council & Anor* 1990 (1) SA 899 (T) at 902G-H. The interest must relate to an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. See *Anglo-Transvaal Collieries Ltd v S A Mutual Life Assurance Soc* 1977 (3) SA 631 (T) at 635G-H. But the existence of an actual dispute between persons interested is not a statutory requirement to an exercise by the court of jurisdiction. See *Ex p Nell* 1963 (1) SA 754 (A) at 759H-760A. Nor does the availability of another remedy render the grant of a declaratory order incompetent. See *Gelcon Investments (Pvt) Ltd v Adair Properties (Pvt) Ltd*

1969 (2) RLR 120 (G) at 128A-B; 1969 (3) SA 142 (R) at 144D-F.

This, then, is the first stage in the determination by the court.

At the second stage of the enquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s 14. What constitutes a proper case was considered by Williamson J in *Adbro Investment Co Ltd v Minister of the Interior & Ors* 1961 (3) SA 283 (T) at 285B-C, to be one which, generally speaking, showed that —

‘...despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation said to be due by a respondent. I think that a proper case for a purely declaratory order is not made out if the result is merely a decision on a matter which is really of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant’s position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought.’

See also *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 93D-H.”

On the facts before me, it is clear that the applicant does not have a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgement of this Court. The applicant’s interest herein does not relate to an existing, future or contingent right that it might properly claim. Once the Board ruled in favour of the applicant on the 26th of April 2006, the issues raised in this case became purely abstract and academic and unrelated to any previous interest that the applicant had in the matter.

Proceeding to the next stage of the enquiry, is this a case where the Court should exercise its discretion on the grounds of justice or convenience to make a declaration as to the existence of a legal obligation due by the respondents? The question of unethical conduct on the part of a lawyer is undoubtedly a matter of

paramount importance not only for the benefit of legal practitioners but also for the edification of the public at large. However, insofar as the applicant itself is concerned, the decision that it seeks *in casu* is really of mere academic interest to the applicant. I am unable to discern any tangible and justifiable advantage that will flow in relation to the applicant's position from the grant of the declaratory order sought herein with reference to any existing, future or contingent legal right or obligation.

Moreover, I perceive two further reasons for not exercising the Court's discretionary jurisdiction in this matter. The scope of the declaratory order sought herein embraces all of the partners in the Firm and is not confined to the individual partner, the 1st respondent, who is said to have acted irregularly and unethically. Additionally, I fully agree with *Adv. Matinenga* that the unethical conduct imputed to the Firm is a matter which should in the first instance be fully investigated and properly determined by the Law Society as it is statutorily empowered to do under Part V of the Legal Practitioners Act [*Chapter 27:07*]. Although the Law Society's statutory powers do not preclude the Court's intervention in an appropriate case, their existence is a factor that weighs against the exercise of the Court's discretion in this particular case.

In the premises, on both juridical and practical grounds, I am satisfied that the applicant is not entitled to the *declaratur* that it seeks herein. The application is accordingly dismissed with costs in respect of the present application as well as the chamber application in Case No. HC 2293/06.

As for *Mr. Kawonde's* failure to file or furnish supplementary Heads of Argument as directed by the Court, the Registrar is ordered to inquire into the matter and submit a report thereon to the Court for such action as may be deemed appropriate.

Kawonde & Company, applicant's legal practitioners
Gill, Godlonton & Gerrans, respondents' legal practitioners