SOLOMON ZAWE
and
JUNIAS MUTARAMUSWA
and
MAHOHOMA MAMUTSE
and
FARAI SHONIWA
and
MORGAN MUNDANDA
and
JOSEPH MATYORAI
and
SIMBARASHE MUFI
versus
THE CITY OF HARARE
and
ZIM-JAPAN MOTOR SPARES (PVT) LTD
and
GATEWAY INVESTMENTS

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 18 October 2019 & 11 November 2020

Court Application

Ms *Tongoona*, for the applicants
R Zinhema., for the 1st respondent
F Nyangaru, for the 2nd respondent
No appearance, for the 3rd respondent

MUSHORE J: All seven applicants are currently in occupation of a certain property described as 17476 Workington, Harare as subtenants of the 3rd Respondent. The first applicant states that he had been subleasing the property for 22 years and was paying rentals in the amount of US$280.00 *per* month and had made improvements to the property over the years. The other six applicants were sub-leasing sections of the same property. This application has been filed by the tenants who face being evicted from the property by the first respondent (City of Harare)

because the 2nd respondent requires to take occupation of the property. The applicants believe that the second respondent has no right to such occupation arising from their sub tenancy agreements with the 3rd respondent, and that through those sub-tenancy agreements their occupation on the property is lawful. The applicants also believe that the first respondent leased the property to the second respondent unprocedurally, and in so stating they submit that because section 152 (2) of the Urban Councils Act [*Chapter 29:15*] provides that in the event that the first respondent wishes to lease out a stand, it is a requirement that the first respondent should first advertise its intention to do so, by way of a publication in the newspaper. The applicants' state that had the first respondent published its intention, then that would have allowed the applicants as interested parties to make their representations to remain on the property. The applicants also submitted that they did their researches into how the second respondent was awarded a tenancy and that they found no public record to show that such procedures had been followed by the first respondent. The applicants are of the opinion that because of that award process being flawed, they have a legitimate expectation to be afforded the opportunity to rent the premises directly from the first respondent. In the light of their submissions the order being sought by the applicants in the present application as it appears in their draft order is as follows:-

(1) That the lease agreement between the first and second respondents be declared void *ab initio*; and

(2) That the court should give an order compelling the first respondent to advertise its intention to lease the property out and invite expressions of interest.

The first respondent filed a notice of opposition defending their actions in wanting to evict the applicants from the stand. In his answering affidavit, the first applicant took a procedural point *in limine* the effect of which was to invite the court to deal with the matter on an uncontested basis in accordance with O32 r236(1) which states the following: -

Order 32 r 236 (1) provides as follows: -

"***236. Set down of applications***

(1) Where the respondent is barred in terms of sub rule (3) of rule 233, the applicant may, without notice to him, set the matter down for hearing in terms of rule 223"

Order 32 r 223 provides the action which the steps which the applicant may make in setting the matter down for hearing: -

"***223. Set down of other matters on notice***

(1) Subject to sub rule (5)—

(*a*) uncontested cases for provisional sentence; and

(*b*) summonses for civil imprisonment; and

(*c*) uncontested actions for restitution of conjugal rights, divorce, judicial separation or nullity of marriage; and

(*d*) cases set down for judgment in terms of subrule (2) of rule 58 or subrule (1) of rule 59;

(*e*) applications in which a notice of opposition and opposing affidavit have not been filed;

may be set down for hearing—

(i) in Harare, on any Wednesday, by filing a notice of set-down with the registrar not later than the Thursday preceding the Wednesday of set down;

(ii) in Bulawayo, on any Friday, by filing a notice of set-down with the registrar not later than the Tuesday preceding the Friday of set down."

Whilst the rule clearly provides a party to an action in such instances to proceed to cause it to be enrolled for a hearing on an unopposed basis; it is apparent from a perusal of the record; that the applicants abandoned that option, and instead filed an answering affidavit in which the applicant went at length to deal with and to reply to each and every averment made by the first respondent in his affidavit. It is therefore necessary for the court to deal with all the issues contained in the respective affidavits, especially bearing in mind that the contentious issues found in both the first respondent's opposing affidavit and the applicant's answering affidavit have been debated by the parties in their respective heads of argument. Accordingly, my decision will rest **upon all** of the pleadings on record.

The first respondent contends that it never leased the property to the second respondent but "granted *the second respondent authority to use the property*" in terms of the Urban Councils Act and that such authority to use property is an entirely different type of an agreement distinguishable from a lease agreement.

The second respondent confirms that it was granted a temporary authority to use the property by the first respondent and that its intended occupation of the property is lawful. The second respondent agrees with the first respondent that there was no need for the first respondent to publish a notice of intention to lease; because the arrangement which it entered into with the first respondent falls within the exception found within the Act, which dispenses with the need for the first respondent to have advertised its intent.

The first and second respondents aver that the applicants cannot be granted their order because the applicants are illegally occupying the property due to the fact that the lease agreement between the first respondent and the third respondent specifically prohibited the third

respondent from sub-leasing the property. The first and second respondent also aver that because of the third respondent having materially breached the contract; then the third respondent or his assigns are prohibited from remaining in occupation of the property.

The issues which I am to tackle in this matter are thus:-

(a) Whether or not the applicants have a legitimate interest in the property;

(b) Whether or not the terms of the lease agreement legally justifies the second respondent's claim to future occupation, and

(c) Whether or not the applicants are entitled to a *mandamus* to compel the first respondent to advertise its intention to lease out the property; and

(d) The issue of costs.

Do the applicants have a legitimate interest in the property?

A litigant must establish a legitimate interest in a right as a precursor to being granted such a right by way of a declaration.

In Adbro *Investments Co Ltd v Zimbabwe Broadcasting Corporation* 1995 (4) SA 675 (ZS) at page 680A-B, a legitimate interest is described aptly as being: -

> "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."

Section 14 of the High Court Act [*Chapter 7:06*] provides that a determination for declaratory relief must be motivated by an interested party when it states: -

> "**14 High Court may determine future or contingent rights**
> 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 applicants are not challenging the fact that their landlord breached the contract. They simply express dismay that the money they were paying to the third respondent as rentals did not make its way to the first respondent. The second respondent stated in paragraph 9 of his opposing affidavit (Record, page 41) that the third respondent had neglected or refused to pay the money due and owing to the first respondent in the amount of US39 598.23. The first applicants reply to this fact was to try and gloss over it by stating:-

> *"This is irrelevant to the nature of the application before the court. The application is not about proving that, I clearly stated that."*

The first applicant is wrong in stating that the rental arrears issue is irrelevant to the application where in fact and law it is most important to the applicants demonstrating that they have a tangible and justifiable advantage to a legal right. The applicants' failure to address the breach of contract by the third respondent; or to at least prove that there was no such breach is fatal to the applicants' claim of right upon which such rights can be declared by the court. The third respondent who it is alleged breached the lease agreement with the first respondent has remained silent. Thus the basis of their legitimate interest if it is founded on the payment of rentals or improvements by them of the property is unfounded.

In the circumstances of the applicants' lack of claim of a legal interest, it is my view that the application for part one of the draft order is without merit.

Whether or not the second respondents intended occupation of the property is lawful.

The applicants are alleging that the procedures required for the first respondent to have leased out the property to the second respondent were not followed and therefore the intended lease is not lawful.

Second respondent refuted the allegation that he entered into a lease agreement with the first respondent and submits that it was granted a temporary permit to lease the property by the first respondent and that because the temporary lease was to be for six months, then the lease falls within the exception to the requirement that the advertising procedures be adopted in terms of section 152 of the Urban Councils Act. As proof that the second respondent's submission, it attached a letter addressed to it by the first respondent dated 17th March 2018 to its papers and the letter clearly affirms the second respondent's submission. In that letter the first respondent wrote:-

> "Dear Sir/madam
> RE TEMPORARY AUTHORITY TO LEASE STAND 17476 HARARE TOWNSHIP TO ZIM-JAPAN MOTOR SPARES (PVT) LTD.
> Reference is made to your application regarding the above premises.
> Please be advised that I am offering your company ZIM-JAPAN MOTOR SPARES (PVT) LTD temporary authority to occupy and use stand 17476 Harare Township measuring 1700m2 for car sales and ancillary uses only for an initial period of six (six) months. Thereafter the authority shall continue on a month to month basis. Council will consider granting you a formal lease subject to satisfactory performance in discharging your obligations in terms of the authority. This authority will be subject to the following conditions: -
> 1. This authority which does not constitute a Lease Agreement and shall be deemed to be valid from the 1st May 2018.
> 2. …

3. ….
4. This is not a lease agreement and should not be considered as such but a temporary authority to use and occupy the above premises and any change in tenancy (i.e. the granting of a formal lease) shall be subject to approval by Council
(Signed by all parties)"

It is true that section 152 (1) provides that certain procedures be followed by the first respondent when leasing a stand etc. Section 152 states as follows: -

"**152 Alienation of council land and reservation of land for State purposes**
(1) Subject to any rights which have been acquired by a miner of a registered mining location in terms of section 178 of the Mines and Minerals Act [*Chapter 21:05*], a council may, subject to section *one hundred and fifty-three*, sell, exchange, lease, donate or otherwise dispose of or permit the use of any land owned by the council after compliance has been made with this section.
(2) Before selling, exchanging, leasing, donating or otherwise disposing of or permitting the use of any land owned by it the council shall, by notice published in two issues of a newspaper and posted at the office of the council, give notice—

(*a*) of its intention to do so, describing the land concerned and stating the object, terms and conditions of the proposed sale, exchange, lease, donation, disposition or grant of permission of use; and

(*b*) that a copy of the proposal is open for inspection during office hours at the office of the council for a period of twenty-one days from the date of the last publication of the notice in a newspaper; and

(*c*) that any person who objects to the proposal may lodge his objection with the town clerk within the period of twenty-one days referred to in paragraph (*b*).

(3) The council shall submit a copy of the notice referred to in subsection (2) to the Minister not later than the date of the first publication of that notice in a newspaper.
(4) A council may not, subject to section *one hundred and fifty-three*, sell, exchange, lease, donate or otherwise dispose of or permit the use of any land owned by the council which lies within an area for which—

(*a*) there is no approved town planning scheme, unless—

(i) a copy of the proposal and of the notice published in terms of subsection (2), together with any objections which have been lodged and the comments of the council on such objections, have been transmitted to the Minister; and

(ii) the Minister has consented to the sale, exchange, lease, donation or other disposition or permission to use, as the case may b :

Provided that the Minister shall not consent unless he is satisfied that an adequate area of land, suitable for the purpose, has, where necessary, been reserved for State purposes or for postal and telecommunication services;

or

(*b*) there is an approved town planning scheme, unless—

(i) the period of twenty-one days referred to in subsection (2) has expired; and

(ii) if any objections have been lodged they have been considered by the council."

However, it is equally true that the first respondent was exempted from following the strict procedures which are outlined in section 152 due to the brevity of the arrangement which falls under s 153 as follows: -

> "**153 Exclusion of certain leases from section 152**
> (1) Subject to subsection (2), a council may lease or permit the use of any land owned by it for a period garage referred not exceeding twelve months without compliance with section *one hundred and fifty-two"*

It is my view that the proviso avails the first respondent with a choice to not strictly adhere to the procedures adverted to by the applicant; and thereby excludes the possibility of the second paragraph of the draft order being granted in the applicants' favour.

The third part of the prayer as it appears in applicants' draft order is for costs. In this case the applicants are seeking an order for costs in the event that the respondents oppose the matter. This unacceptable but unfortunately popular request for an award of costs to be awarded to the one party IF the other party opposes the matter is unfair play; because a party wishing to defend themselves (rightly or wrongly) would be inclined to desist from defending a case because such language sounds threatening. Parties should be discouraged from making such ominous overtures because such behaviour can potentially put a litigant off exercising their constitutional rights to a fair hearing in defiance of the rules of natural justice. The purpose behind approaching the court involves a request for an adjudicated outcome. It is not appropriate for one litigant to attempt to intimidate the opposing side from pleading their case to determine whether or not the other party deserves to fight his or her cause. That latter decision is obviously reserved for the adjudicator. Litigants are required by adjudicators not to be so presumptuous about where the merits of their cases lie from one point of view. In actuality it could very well turn out that the party making such a request never had a good case on the merits in the first place; and as matters stand the present matter falls within that category of cases.

Accordingly the application must fail.

In the result I order as follows:

"The application is dismissed with costs."

Mapondera& Company, applicants' legal practitioners
Gambe Law Group, 1st respondent's legal practitioners
Nyangani Law Chambers, 2nd respondent's legal practitioners