ZIMBABWE COURT OWNERS ASSOCIATION

Versus

DEMEKECH SEYOUM

And

LULSEGED BELAINEH ALEMU

And

SHETAYE ENTERPRISES (PVT) LTD

And

SHETAYE ENTERPRISES (PVT) LTD

And

INDRA INVESTMENTS (PVT) LTD

And

RICHARD MATEWA

And

CITY OF HARARE

And

THE SURVEYOR GENERAL HARARE, N.O

And

THE REGISTRAR OF DEEDS HARARE, N.O

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE 21, September, 2022 -15 February 2023

Opposed application

Mr, M.C Mukome, for the applicant

Ms T.Kachara for the Respondents

BACHI MZAWAZI J; On the 21st of September 2022, I granted an extempore judgment dismissing applicant's claim on the basis of one of the *points limine* that had been raised. On the 14th of December ,2022 whilst on official vacation, the applicant's legal practitioner wrote to the Registrar of this court requesting for the written judgment. This is the judgment.

The common cause facts are that, Applicant is a registered Residence Association that represents owners of a block of flats called Zimbabwe Court, situate at stand 408 Avondale West of subdivision A of lot 22 of Block d of Avondale, Salisbury also known as stand 408 Avondale West Harare. The original registration documents of the property reflected that the property consisted of 16 undivided shares giving each of the 16 residents exclusive rights to their single share in residential space and carport.

As the association representatives, they approached this court seeking a declarator cancelling numerous title and notarial deeds belonging to the 1st to the 7th respondents that had been approved by the 8th respondent and registered by the 8th respondent. Apparently, there are two factions, one being represented by the applicant and the other by the 1st respondent, the former chair person of the applicant.

It is also not in dispute that after the fallout between the two opposing camps, the respondents applied for the subdivision of the said property from the Local Council which was given after complying with most of the requirements of the governing laws in that respect. All the surveyor general plans were applied for and obtained as well as the requisite advertisements in the local newspaper. What remained sticking out is the averment that the respondent's representative did not seek the consent from the rival co-owners' group which is said to have been deliberately withheld. This was done during the tenure of Chairmanship of the respondent's group representative, 1st Respondent.

The applicants then challenged this aspect resulting in the cancellation of the then issued subdivision permit number SD/CR/07/ 09 by the 7th Respondent herein. The reason for the cancellation where stated as the contravention of s40(1)(a) of the Town and Country Planning Act [Chapter 29:12] and section 27(3) of the Deeds Registry Act [Chapetr20;05]. Apparently, title deed had already been issued reflecting the subdivision.

A further term of the cancellation document was to the effect that the respondents represented by the 1st where given a chance to rectify their omission and t resubmit their papers for consideration. It is alleged that they again surreptitiously without seeking and obtaining the requisite consent made representations to the 7th respondent as if they had obtained the consent. Subsequently another permit resulting in the construction of a demarcating wall was granted by the 7th respondent. This led to an appeal to the Administrative court challenging the same. The second permit was set aside by that court in case T 2249/11 resulting in the ousting of the old management team led by the 1st respondent and the ushering in of the new committee.

Applicants claim that the cause of action then arose when they discovered two separate water bills indicating two separate structures. Upon search at the Deeds Registry they discovered the new Title Deeds based on a new Notarial Deed filed on the basis of the revoked sub-division permit SDCR/07/09. They argue that, the revocation was through a letter dated the 3rd of August 2010, as such, all the titles emanating therefrom are a legal nullity and were supposed to be cancelled. They also state that the effect of the registration of the Notarial Deed and certificate of registered title gave exclusive rights and title of a bigger portion of the flat block,3802 m2 to the six respondents which was communally owned by all members. It also led to the creation of a new stand 467 Avondale west of Subdivision A Lot 22 Block D of Avondale, Salisbury. Applicant pointed out other several procedural irregularities upon which most of the title deed where registered. They therefore seek for the reversal of all actions that emanated from the revoked permit as a legal nullity.

In response, the respondent states that the permits where obtained when the first respondent was in office as the lead person and all actions where above board and within the precincts of the law. The first respondent asserts that she obtained enough consent and approval from the occupants of the property who were not hostile after summoning several general meetings which were rebuffed by the opposing camp. In any event, they pinpointed that as a preliminary point the applicant was not authorised by the Constitution to institute any legal action without the approval of all members in a general meeting, other than that for the recovery of the debts due to the association and to defend any legal proceedings. On that basis they advert that the Management Committee which made a resolution sanctioning the deponent to bring this action acted ultra vires the specific and explicit clauses of the

governing constitution. It is their argument that had the framers of Constitution wanted the powers to sue to repose in the Management Committee it should have expressly provided for that. The respondents also assert that the applicant's claim has prescribed since the cause of action arose in 2008 when notices for the intention to subdivide where distributed to each respective resident of the 16 properties.

In evaluation the issues are whether or the applicant had the locus standi to bring this motion? Whether or not the applicant's case has prescribed and whether or not the applicant has made a case for the relief sought?

Upon perusal of the Constitution in question it is clear that there is no clause that empowers the Management committee to institute any legal action without a resolution obtained in a General Meeting. The applicant does not dispute this but urges the court to employ the purposive tool of interpretation so as to give effect to their action. They contend that it is absurd for the impugned clause 5 to limit their powers to institute legal action to disciplinary action against members and to the recovery of debts.

In *Tapedza v Zimbabwe Energy Workers Union* SC30/20if it was observed that it is a settled principle of law that the Golden rule is the first canon and the first port call in interpretation, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of words may be modified so as to avoid that absurdity and inconsistency, but no further, see *Chegutu Municipality v Manyor*a 1996(1) ZLR 262(S) , *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R. Barber (Pvt) Ltd & Anor* SC3-20 .

Clause 5. 1 of the constitution of the association reads;

"The Committee shall exercise all such powers and do all such acts and things as may be exercised or done by the Association, save and except such acts and things as are specially reserved by the Constitution to be done by the Association in General Meeting.

Clause 5.3,7 states;

"The Committee has the power to take disciplinary action against any member and institute legal proceedings for the recovery of any debt due to the association and to defend any legal proceedings."

The words in the above two clauses are clear and straight forward. There is no ambiguity. Therefore, *in casu*, there is no need to go beyond the literal meaning of the words

utilized in the Constitution of the Association. See, *Mukwereza v Minister of Home Affairs Anor* 2004(1) 445(S). Especially, given that the most intricate affairs of an association are resolved in a General Meeting were the majority of the members will participate in the resolutions.

The above find expression in, *Christian faith Tabernacle v Sparrows Nest Ministries HH69/09*, it was highlighted that,

"Under Common law, the locus standi of a voluntary association derives from the provisions of its Charter or constitution, either in express terms or by way of implication. For the power to sue to be implied, it must be incidental to the express powers as being absolutely requisite for the due carrying out of the express objects of the association"

Purposive approach in interpretation entails the use of the context, history or any other extraneous tools or materials to establish the intention of the legislature where there is ambiguity and absurdity. It is a tool of statutory interpretation advocated for in s46 of the Constitution of Zimbabwe, Amendment No. 20 of 2013, mainly but not restricted to the interpretation of the Bill of rights. This was thoroughly explored in the *Zambezi Gas Zimbabwe (Pvt) Ltd* case above.

Whilst it is noble in situations where the intention of the legislature is obscure in statutes then recourse is made to the history or other extraneous material on the subject in order to arrive at the true intention of the legislature. As already alluded to above the language of the Constitution in question is plain and ambiguous. Thus, I am not convinced by the applicant's line of argument in this respect.

I agree with the respondents that the principle of '*expressio uinis est exclusion alterius,* which translate to' an express reference to one matter or thing excludes the other,' See, *Tapedza v v Zimbabwe Energy Workers Union* SC30/20 above.

The right forum for the inclusion or increasing of any litigation powers or mandate to the Management Committee was the General Meeting or Extraordinary General Meeting convened for that purpose. The Management Committee was thus bound by the terms of the existing express provisions of the Constitution in the absence of any procedural amendments. The Constitution is the binding contract or document for all its stakeholders. In *Kundai*

Magodora & Ors v Care International Zimbabwe SC24/14 PATEL JA (as he then was) pronounced that,

> "In principle, it is not open to the courts to rewrite a contract entered onto between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous and oppressive. This is a matter of public policy, See, *Wells South African Alumenite Company* 1927 AD69 at 73(3rd ed) Christie: *The law of in in South Africa* (3rd ed) at pp 14-15 Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms." See, *South African Mutual Aid Society v Cape Town Chamber of Commerce* 1962(1) SA598.

Hence, the conclusion by this court that the *point in limine* raised by the respondents had merit and as the applicant lacked the requisite *locus standi* to bring this lawsuit. Due to this handicap, this court finds no reason to venture into the next preliminary objection or the merits.

Accordingly, the matter is dismissed with costs.

M.C. Mukome, Applicant's Legal Practitioners

Scanlen & Holderness, 1st, 3rd and 4th Respondent's Legal Practitioners.