

PHILLIP CHIPFUMBU
versus
ZIMBABWE MUSIC RIGHTS ASSOCIATION
and
ALBERT NYATHI N.O.
and
REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MANZUNZU J
HARARE, 19 & 24 October 2023

COURT APPLICATION

F Chinwawadzimba, for the applicant
J Dondo, for the 1st and 2nd respondents

MANZUNZU J This is an opposed court application in which the applicant seeks the suspension of the council of the 1st respondent pending a forensic audit and that during such suspension the affairs of the 1st respondent be managed by the board appointed on 22 June 2023. The 1st and 2nd respondents opposed the application and raised some preliminary points. Likewise, the applicant has also raised some preliminary points.

BACKGROUND

This application is brought in terms of section 223 of the Companies and Other Business Entities Act, Chapter 24:31 which provides that;

“A member of a company may apply to the court for an order in terms of section 225 (“Powers of High Court in applications under sections 223 to 224”) on the ground that the company’s affairs are being or have been conducted in a manner which is oppressive or unfairly prejudicial to the interests of some part of the members, including himself or herself, or that any actual or proposed act or omission of the company, including an act or omission on its behalf, is or would be so oppressive or prejudicial.”

This means that for one to bring an application under section 223 of the Act, one has to be a member.

The chronology of events is that this application was filed on 14 July 2023. The application, according to the certificate of service filed on 1 August 2023, was served on the 1st and 2nd respondents on 17 July 2023. On 20 July 2023 the 1st and 2nd respondents filed their notice of opposition. On 30 August 2023 the 1st and 2nd respondents filed heads of argument. The applicant filed answering affidavit on 6 September 2023 and

served on the respondents on 8 September 2023. The applicant then filed and served heads of argument on the respondents on 8 September 2023.

The 1st and 2nd respondents raised two preliminary points, that the applicant has no *locus standi* and that the answering affidavit is improperly before the court it having been filed way out of the *dies induciae*.

The applicant's preliminary points are that, the deponent to the opposing affidavit has no authority and that the notice of opposition was defective and irregular in that it was not served on the applicant as required by the rules and its lay out offence rule 26 (1) (b)..

Locus standi

This preliminary point must be determined first. It is so because its outcome informs whether or not the application is properly before the court.

The term *locus standi* has two contexts, the first being the capacity to litigate and the second refers to the interest which a party has in the relief or the right to claim the relief. See Herbstein and Van Winsen *The Civil Practice of the High Courts and the Supreme Courts of Appeal of South Africa* 5th Ed p 143.

In *Makarudze & Anor v Bungu & Ors* 2015 (1) ZLR 15 (H) the court pointed out that *locus standi in judicio* refers to one's right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a direct and substantial interest in the outcome of the litigation.

In *Sibanda and Others v Apostolic Faith Mission, SC 49/18* the court had this to say; "It is trite that *locus standi* is the capacity of a party to bring a matter before a court of law. The law is clear on the point that to establish *locus standi*, a party must show a direct and substantial interest in the matter. See *United Watch & Diamond Company (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (c) at 415 A-C and *Matambanadzo v Goven* SC 23-04."

Section 223 of the Act allows a member to bring an application in terms of that section. It was argued for the respondents that the applicant is not a member hence has no *locus standi*.

In his founding affidavit the applicant says that he brings the application in his capacity as a member of 1st respondent. No other evidence is attached in support of that averment.

The issue is whether or not the applicant is a member of the 1st respondent. If he is a member, then he has direct and substantial interest to clothe him with the necessary *locus standi*.

The 1st and 2nd respondents opposed that he is a member. In support of that assertion, they attached a letter dated 22 May 2023 which they say terminated his membership. The letter which is attached as annexure “C” to the opposing affidavit, signed by the Board chairperson, reads in part:

“RE: DISMISSAL FROM MEMBERSHIP

I write this letter informing you that with effect from 22 May 2023 your membership with ZIMURA has been terminated...” The letter goes on to give reasons giving rise to the termination of the membership.

In his answering affidavit the applicant denies that his membership was terminated. He said termination of one’s membership is procedurally done in terms of section 9 (d) of the articles and memorandum of association. He further stated, *“The fact that council has failed to adhere to this provision renders any of the purported act to terminate my membership a nullity.”*

It may well be so, but the fact remains that there is an extant decision by council in which the applicant’s membership was terminated. Until such time the decision is set aside, it remains valid for all intents and purposes. There is merit in this preliminary point. The application is not properly before the court and it is not necessary to deal with the rest of the preliminary points.

DISPOSITION

The application be and is hereby dismissed with costs.

*Hamunakwadi and Nyandoro, applicant’s legal practitioners
Dondo and Partners, 1st and 2nd respondents’ legal practitioners*