SHEPHERD MUNDENGUMA

Versus

ESTATE LATE LEON GEOFFREY HEATHCOTE
(Being represented by David Wynn Rosser in his capacity as the Executor Dative)

And

TREVOR SHAW

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO 12, 26 March & 13 May 2020

ZISENGWE J: This is an application for summary judgment brought in terms of Order 10 rule 64 of the High Court rules, 1971 (the rules). It stems from a long running dispute over the continued occupation of a farm which has since been acquired by the state by its previous owner (or more accurately by those that claim through him). The applicant avers that the respondents have no bona fide defence to his claim for eviction in case number HC 379/2019 and that appearance to defend was entered only for purposes of delay.

The events which culminated in this application are largely common cause and are extensively captured in the applicant's founding affidavit. They are to the following effect: the farm in question (Lot 20 Umsungwe Block Gweru, Deed of transfer 1115/79) (hereinafter referred to as "the farm") was previously owned by Leon Geoffrey Heathcote the latter who has since passed away (he died on 17 July 2016). The farm was acquired by the state in the course of the land reform programme and subsequently allocated to the applicant. All the relevant documentation relating to its acquisition and subsequent allocation to the applicant were attached to this application. In respect of the former, the government gazettes showing the preliminary notice of intention to acquire land and confirmation of acquisition were attached. As for the latter, the offer government offer letter in favour of the applicant was attached.

The 1st respondent is the estate of the late Leon Geoffrey Heathcote (duly represented by the executor dative David Wynn Rosser). The 2nd respondent on the other hand is an

individual who is in occupation of the farm ostensibly deriving such right of occupation through the late Leon Geoffrey Heathcote.

The applicant in his founding affidavit chronicles the events that unfolded in the wake of the allocation of the farm to him, the sum total of which is that respondents have persistently and unjustifiably denied him full control of the farm. He avers that not even the intervention of the police at his behest has yielded any positive results as the respondents and one Texan J Muzika have repeatedly sought to frustrate his efforts at every turn. He further indicates that although he is now in occupation of the farm house, he has been denied access to the farming area.

More pertinently, the applicant avers that not even the High Court order in case number HC 430/18 which is a declaratory order confirming the validity of the offer letter has produced the desired effect of having the respondents vacate the farm. No doubt frustrated by the respondents' intransigence he then instituted summons in the High Court in case Number HC 379/2019 for the eviction of the respondents and all those claiming through them from the farm. It is the appearance to defend entered by the respondents against that claim that prompted this current application. The applicant claims in this regard that he has an unassailable claim against the respondents as evidenced not only by the offer letter but also the declaratory order referred to above and that the respondents' notice of appearance to defend is actuated by malice as they only seek to delay the inevitable.

Interestingly, this application was opposed not by the 1st respondent but by one Frederick Garth Heathcote (Mr Heathcote) the latter who claims to be the son of the late Leon Geoffrey Heathcote and beneficiary to his estate. The second respondent also filed an affidavit opposing the application. It is however pertinent to note that although the 2nd respondent filed the said opposing affidavit he never appeared on the set down date to argue the matter despite having been properly served with the notice of set down; Mr Heathcote did. This immediately prompted the applicant to challenge the latter's locus standi to participate in these proceedings.

Initially Mr Heathcote claimed to derive his locus standi from a power of attorney attested to by David Wynn Rosser (the executor dative and representative of the 1st

respondent) on 6 March 2018. However, when it was pointed out to him that the said power of attorney was a special one only granting him the mandate to appear in case number 285/2015, he immediately changed tact and claimed to derive his locus simply by virtue of him being a beneficiary of the estate of the late Leon Geoffrey Heathcote. Mr Heathcote who was unrepresented mumbled some vague reference to some correspondence from the law firm Honey and Blanckenberg wherein it was supposedly stated that the estate of the late Leon Geoffrey Heathcote had since been wound up and that he was one of the beneficiaries thereof. He then sought a postponement of the hearing of the application to afford him an opportunity to seek legal representation. In that regard he sought a postponement of two weeks and he also tendered wasted costs.

On the face of it, the application for postponement appeared reasonable and acting in terms of r237of the rules, I accordingly granted the same (something that appears not to have gone down well with the applicant judging from the cryptic if not sardonic remarks made by counsel when matter was heard on the 26th of March). Be that as it may, Mr Heathcote was placed on terms. He was directed by the court to inter alia secure counsel willing and able to argue the matter upon the resumption of the matter after weeks and to file all relevant papers at least five days before then.

It suffices to highlight that the application for postponement was granted on the basis of the assertions made by Mr Heathcote which assertions were they to be subsequently proved true and correct would indeed clothe him with the requisite locus standi. For a person to be said to have locus standi, it must be shown that he has direct, substantial and interest in a matter. In *Makaraudze & Anor v Bungu & Ors* HH 8-15 it was held 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 subject matter and outcome of litigation. Such an interest is a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the court."*

In this regard see also *Zimbabwe Teachers' Association & Ors v Minister of Education and Culture* 1990(2) ZLR 48, *Sibanda & NPSL v Mugabe &Anor* HH 102-94.

Notionally at least, were it to be proved that Mr Heathcote is indeed a son to the late Leon Geoffrey Heathcote and that he is a beneficiary to his estate he would, of course, have direct (i.e. not remote, fanciful or peripheral) and substantial (i.e. weighty and of real

substance) interest in the this legal contest. Further, there was some reference (though admittedly somewhat obscure) by Mr Heathcote that he has information to the effect that the said estate has since been wound up. Should that indeed be the true state of affairs it would impliedly mean that the first respondent has since ceased to exist and it would then be the beneficiaries of the same that have a direct and substantial interest in the assets of that estate. Thirdly, the court was of the view that in keeping with the constitutional right of a party to legal proceedings to be represented by a legal practitioner of his choice, it was in the interests of justice to grant the application for postponement. The court was of the view that it could not compel Mr Heathcote to argue his matter, including the very question of his locus standi or lack thereof, without his chosen counsel. The issue of his locus standi was as much an issue as any other and to compel him to argue the same without counsel would amount to a negation of his right to legal representation. Subject to a successful application for his joinder he would have a right to participate in these proceedings.

Where, however, Mr Heathcote ultimately came unstuck was his failure on the appointed date to do all the things that the court directed him and which he undertook to do. Firstly there was no legal practitioner who appeared to argue the matter on his behalf, secondly he did not file any documents supposedly indicating that the estate of the late Leon Geoffrey Heathcote has since been wound up. Regarding the latter, there was a repeat of the same vague reference to some communication from the law firm Honey and Blanckenberg. Further Mr Heathcote referred to a pending application for stay of these current proceedings pending an application for his joinder as a party. What obviously eluded him was the fact that before he could be permitted make any representations his locus standi needed to be established. By electing to return on the 26th of March 2020 and make whatever submissions he chose to make before establishing his locus standi he effectively put the cart before the horse. Without a proper application for joinder duly granted, Mr Heathcote remained non-suited and could not “gate-crash” into and participate in these proceedings.

The court cannot continue to bend over backwards and grant him audience in the absence of proof that he is entitled to the same. Mr Heathcote should have seized that window of opportunity availed to him to file proof in support of his claim to locus standi. As it stands, his claim that he has the requisite locus standi suffers from multiple deficiencies not least proof of the following; that he is indeed the son of the late Leon Geoffrey Heathcote and

that the estate in question has since been wound up and that he is a beneficiary to that estate and that the farm in question forms part of that estate.

Ultimately, therefore, in the absence of a notice of opposition from the 1st respondent and the failure by the 2nd respondent to appear on the day that the matter was set down for hearing this application the application is deemed unopposed.

DISPOSITION

It is ordered that the application for summary judgment be and hereby is deemed unopposed and is accordingly referred to the unopposed roll.

Gundu Dube & Pamacheche, Applicant's legal practitioners