

THE TRUSTEES OF THE UNITED MUTARE
RESIDENTS AND RATEPAYERS TRUST
(UMRRT)

APPLICANT

versus

CITY OF MUTARE
and
THE MINISTER OF LOCAL GOVERNMENT,
PUBLIC WORKS & NATIONAL HOUSING

1ST RESPONDENT

2ND RESPONDENT

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 24 January 2019

Opposed Application

P Nyakureba, for the applicant
Ms F Chinwawadzimba, with J Zviyaya, for the respondent
No appearance for 2nd respondent

MUZENDA J: On the 23rd March 2015 Mr Sebastian Bakare, Mr Terrance Moody, Ms Natsai Nyamuwanza, Mr Cephass Sagwete, Ms Poshier Magada, Ms Maraidza Elizabeth Mutambara joined together to form United Mutare Residents And Ratepayers Trust. Mr *Passmore Nyakureba* the legal practitioner for the applicant appears on the copy of the Resolution dated 3rd July 2018 which was prepared just a day before the current application was filed at Court was added to the list of Trustees. Clause 6 of the Deed of Trust specifies the applicant's Core Business thus:

“The provision of a comprehensive platform for residents’ participation in local governance, service delivery, local democracy and policy formulation, accountability and transparency.”

Article 2, captioned “LEGAL STATUS” provides *inter alia*:

“The Trust shall be a body corporate and as such.....”

It is not clear as whether it can sue or be sued in its name, however it can acquire, own and is

limited to its property in as far as liability is concerned.

On the 4th July 2018, the applicant filed an application seeking the following relief:

“It is declared that

1st Respondent has failed to comply with its Constitutional mandate to “ensure good governance by being effective, transparent, accountable and institutionally coherent” in exercising its right to govern the local affairs of the Community of Mutare by not carrying out an external audit of books, balance sheet and accounts for the financial years ending 30 June 2014, 30 June 2015, 30 June 2016 and 30 June 2017.

2. And it is ordered that:

- (a) 1st Respondent appoints a reputable firm of registered public auditors within 30 days of the granting of this order to carry out an audit of its books, balance sheets and accounts referred in s 286 of the Urban Councils Act (Chapter 29:15) for the financial years ending 30th June 2014-2017.
- (b) Further that, 1st Respondent produce to the auditors for the purpose of audit, accounts, balance sheets, all relevant books, papers, writings and minutes books in its possession for the financial years ending 30 June 2014-2017 within 30 days of the granting of this order.
- (c) Further that, 1st Respondent prepare and present before this court a comprehensive report within the first 90 days of the granting of this order, detailing how it has complied with this order and at 180 days mark, an audit report for the financial years ending 30th June 2014-2017 as provided under s 306 (3) of the Urban Councils Act (Chapter 29:15) failure which 1st Respondent shall be in contempt of court.

3. 1st Respondent will pay costs of suit on a legal practitioner-client scale.”

Facts

From 10 to 19 December 2015 the 2nd respondent embarked on an institutional special investigative audit report at the 1st respondent’s institution following complaints that 1st respondent’s, the City Council employees were being owed salary arrears of eighteen months. Obviously the report by the Ministry was adverse and revealed anomalies committed by Mutare City Council. The applicant accessed the investigative report and offered to assist the City Council. The City Council refused and the applicant wrote threatening letters to 1st respondent and indicated to Municipality of Mutare that it was going to advise residents to boycott payment of utility bills until the City Council met their demands.

The City Council responded encouraging dialogue and further letters were exchanged and the letter of 16 April 2018 written by the applicant’s legal practitioners proposed a tripartite meeting between the applicants, the City Council officials and the residents and ratepayers on the other side. No meeting was held. The City Council supplied some information in June 2018 availing to the applicant schedules of Zinara funds, education levy

and outstanding debts due to the Council per ward. The applicant was not amused by the conduct of the City Council and on the 4th July 2018 this application was filed at the court.

The 1st respondent, the City Council is opposing the application. The 1st respondent raised three points *in limine*, the first one being that of *locus standi in judicio*, the second one is that the relief sought is vague, imprecise and unusual and the third and final one is that the applicant did not exhaust domestic remedies.

On the other hand after receiving the 1st respondent's opposing papers, applicant in its replying affidavit also introduced the fourth point *in limine* before this court, challenging the authority of Mr Joshua Maligwa in preparing the opposing affidavit without a resolution of the City Council. On that note the applicant proposed to the court that there is no valid opposition and the application has to be granted.

On the date of hearing of the application I granted the 1st respondent an opportunity to address the court first focusing on all the points *in limine* including that raised by the applicant. After the 1st respondent had addressed the court, applicant was given the opportunity to reply and address the court on the question of Mr Maligwa's lack of authority. I will start with the issue of the 1st respondent's opposing affidavit.

Joshua Maligwa's Opposing Affidavit

The applicant submitted that the deponent of 1st respondent's opposing affidavit, has no authority from the City Council to depose to the affidavit. Joshua Maligwa is only but an employee and can only respond to the application on behalf of the 1st respondent through specific authorisation acquired through a resolution of the Council. The absence of a resolution by the 1st respondent's councillors means the notice of opposition is but a nullity.

The 1st respondent on the other hand contends that the applicant cited the 1st respondent as a party to the proceedings and having done that the applicant then chases away such a party from the proceedings. According to the 1st respondent the mere mentioning of the authorised agent of the 1st respondent in his affidavit that he is authorised to state facts on behalf of the City Council is adequate unless the contrary is proved. The mere absence of a resolution by the City Council does not show that the deponent had no authority. The 1st respondent cited the case of *Tianze Tobacco Co. (Pvt) Ltd v Muntuyedwa* HH 626/15, where His Lordship MATHONSI J remarked as follows:-

“It is how fashionable for the respondents who have nothing to say in opposition to question the authority of the deponent of a founding affidavit in order to appear to have a

defence/ stand by what I stated in *African Banking Corporation of Zimbabwe Ltd t/a Banc ABC v PWC Motors (Pvt) Ltd and others* HH 123/13 that the production of a company resolution as proof that the deponent has authority is not necessary in every case as each case must be considered on its merits; *Mall (Cape) (Pty) Ltd v Merumo Ko-opraise* BPK 1957 (2) SA 345 (C). All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not an authorised person.

Indeed where the deponent of an affidavit has said that she has the authority of the company to represent it there is no reason for the court to disbelieve her unless it is shown evidence to the contrary and where no such contrary evidence is produced, the omission of a company resolution cannot be fatal to the application. That is as it should be because an affidavit is evidence acceptable in court as it is a statement sworn before a Commissioner of Oaths. Where it states that the deponent has authority, it can only be disbelieved where there exists evidence to the contrary. It is not enough for one to just challenge the existence of authority without more as the respondent has done.

I conclude therefore that there is no merit in the respondent's first line of defence relating to lack of authority."

The same approach and conclusion was made in the matter of *Trustees of the Makomo E Chimanimani v Minister of Lands and Anor* 2016 (2) ZLR 324 (H) where Her Ladyship MUNANGATI MANONGWA J stated the following on page 328 C-E:

"On whether the deponent had authority to aver to the affidavit, *Mr Uriri* submitted that the deposition to the statement that "I am a trustee of Makomo E Chimanimani Share Ownership Community Trust and am duly authorised by the applicant to depose to this affidavit on behalf of the applicants" is sufficient. There is no legal requirement to attach resolutions to prove authority. I agree with *Mr Uriri*, that statement in itself established the deponent's authority. It is worth noting that in *Willoughby's Investments (Pvt) Ltd v Peruke Investments (Pvt) Ltd & Anor* 2014 (1) ZLR 501 (H) ZHOU J in dealing with the issue of authority made a finding that a deponent is qualified to swear to an affidavit as long as he or she had knowledge of the facts and can swear to these facts. He does not need authority to do that and this is provided in Order 32 R 227 (4) of the Rules. It is the institution of the proceedings and the prosecution thereof which must be authorised." (My emphasis).

Mr *P Nyakureba* for the applicant admitted during the hearing that Mr Joshua Maligwa is the Town Clerk and Chief Executive of the 1st respondent, Mutare City Council and invariably always acts for the City Council. Mr Maligwa is not a stranger to the proceedings for and on behalf of the 1st respondent. Given all the above I find that Mr Joshua Maligwa is authorised to depose affidavits on behalf of the 1st respondent and the notice of opposition filed on behalf of the 1st respondent is beyond reproach and valid, I will dismiss the applicant's point *in limine*.

Whether Applicant has Locus Standi

The 1st respondent submitted that applicant does not have *locus standi* to institute proceedings in a representative capacity in terms of s 85 of the Constitution. Section 85 of the Constitution states that a certain class of persons may approach a court directly for the vindication of a fundamental right allegedly infringed or likely to be infringed. The 1st respondent further contends that the applicant did not prove that it has been authorised to represent the rate payers let alone that it has a mandate to represent the ratepayers. The 1st respondent added in its submission that the applicant does not specifically allege the nature of a right allegedly wronged upon and the already paid rates do not fall in the genre of rights enshrined in Chapter 4 of the Constitution. Hence an approach in terms of s 85 to vindicate the alleged infringement of the rights of general public is not available to the applicant.

Section 85 is only applicable where there is a potential threat of rights as contained in the bill of rights. In any case the applicant belatedly raised the issue of property rights in its heads of argument. In its affidavit, applicant did not raise nor show that any right has been infringed.

The applicant submitted that it is acting under the auspices of s 85 of the Constitution. What the applicant is asking the court is to hold the 1st respondent accountable to the applicant and its members as well as the general public from Mutare who are parting with the money which 1st respondent has not accounted for in five years due to failure to have external audits of 1st respondent's accounts and books. The applicant further argues that the money paid to the 1st respondent is personal property and went on to cite s 71 of the Constitution all in a bid to define the word money under the rubric of "property". The applicant believes that it has the appropriate mandate to represent Mutare residents and rate payers and hence has a direct interest in the matter.

In the matter of *Trustees of the Makomo E Chimanimani v Minister of Lands and Anor (supra)* the court on p 328 A concluded thus:-

"I further identify with *Mr Uriri's* argument on the applicant's *locus standi* arising from s 85 of the substitutions. The Constitution has widened the group of persons who can take action where there are allegations of infringement of Constitutional rights or a threat thereto. The provisions of s 85 are very clear, anyone can literally and practically take action. "In their own interest, on behalf of another person who cannot act for themselves, in the public interest, etc as long as the issue pertains to Constitutional rights." (My emphasis).

I am not satisfied that the money paid by the applicant or ratepayers or Mutare residents once accepted by 1st respondent still belongs to the payee. The money would become the local authority's and not the resident. The applicant did not meet the requirements set out by s 85, more particularly where the section relates to "allegations of infringement of Constitutional rights or a threat thereto." Granted the applicant can sue in its name as per the objectives of the Deed of Trust but applicant failed to establish the existence of the infringement of constitutional rights or threat thereto so as to qualify to bring proceedings under s 85 of the Constitution. Accordingly, this point *in limine* raised by the 1st respondent is upheld for it has merit.

Whether the sought relief is vague, imprecise and unusual

The 1st respondent submitted that the relief being sought is incompetent and cannot be granted in the circumstances. The applicant seeks an interdict in the form of a *mandamus* and structural interdict, in addition applicant seeks a declaratur. The cover of the court application reads "**Court application for an order of Declaratur, Mandamus, Structural Interdict and Ancillary Relief,**" according to the 1st respondent this clearly demonstrates the ineptitude and the irrationality of the relief that is being sought.

The 1st respondent submitted that the applicant has not proved the requirements of an interdict nor does the affidavit outline the allegations or facts which establish such pre-requisites. Applicant has not demonstrated that it has a clear right to compel the 1st respondent to do an audit. The applicant falsely believes that by forming a trust it grants it an automatic right to compel the 1st respondent to abide by its demands, there is no contract of such a right to compel the 1st respondent.

The applicant must aver or adduce evidence to establish such a right and it has failed. The 1st respondent further added that the applicant has dismally failed to demonstrate on its papers any potential harm may suffer or its beneficiaries may suffer if the relief it seeks is not granted. The 1st respondent added that the application should also fail on the basis that there are other remedies available to the applicant, applicant has not approached the Minister the 1st respondent, to exhaust domestic remedies. Where there is an alternative remedy there is no basis for seeking the interdict.

The 1st respondent also impugned the applicant for failing to demonstrate the requirements of a structural interdict, that is by proving that there is inefficiency in the system and as such there will be need to be controlled. The applicant did not manage to prove that

there is incompetence or gross inefficiency which warrants the imposition of structural interdict. The 1st respondent cited the case of *Kenton on Sea Ratepayers Association & Ors v Ndlambe Local Municipality* 2017 (2) SA 86 (ECG). The City Council also pointed out the dangers associated with structural interdicts moreso in that it violates the concept of separation of powers.

The court would end up treading into institutional spheres of control and result into undue interference with other spheres of governance. The final point hammered by the 1st respondent is that even for a declaratur the applicant failed to meet the requirements of s 14 of the High Court Act by failing to demonstrate the existing future right which will be affected if the court does not give judgment. It prayed for the dismissal of the application. 1st respondent cited the matter of *Johnson HFC* 1995 (1) ZLR 65 (S) at p 72 E-F GUBBAY CJ held:

“The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 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. The interest must concern an existing, future or contingent right. The Court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a prerequisite to the exercise of jurisdiction.”

This point *in limine* lies on the border line of law and fact. In my view these issues dealt with herein would have been appropriately dealt with in the main that is on the merits. However, the 1st respondent’s submission is that the applicant did not crisply in its founding papers exhaustively encapsulate these ingredients in order to achieve its intended purpose. Such a failure should putatively paralyse the application and this court should uphold the preliminary point and dismiss the application.

Apparently the face of the court application is a mixed bag of separate reliefs, “God’s plenty” and like a hunter’s arrow any pray can be caught and the hunter, will attain his purpose of a catch. I agree with the 1st respondent that the relief being sought is vague and embarrassing. An examination of the affidavit in conjunction with the draft order indeed causes concern and the applicant ought to have crisply tabulated its facts and the draft sealing clearly the relief sought. The basis upon which the ultimate relief is premised was not established and I accordingly uphold this preliminary point.

Exhaustion of Domestic Remedies

This preliminary point is but secondary to the other points in *limine* raised by the 1st respondent. It is this court's view that the applicant's relief or recourse lies with the 2nd respondent, the Minister of Local Government, Public Works and National Housing (the Ministry has since changed its name but for convenience, I will cite the party as cited on the papers).

The 2nd respondent unearthed the irregularities that triggered a reaction from the applicant and if the applicant intends to pursue the matter it ought to engage the 2nd respondent who had powers to regulate and administer the 1st respondent. Section 311 of the Urban Councils Act can be resorted to by the applicant and achieve the very relief it wants this court to grant to it. Section 311 should be read in tandem with the s 315 of the same Act which can direct the 1st respondent to comply with certain actions to be done by 1st respondent to iron out any creases in how the finances of the City Council are being handled.

The 2nd respondent has both administrative and regulatory powers to uphold good governance of 1st respondent in the interests of the residents and rate payers. Negotiations of all the stakeholders should be for the interests of all of them. I further agree with the 1st respondent that it is generally accepted that if the administration machinery is working well and effective internal remedies are provided for, the administration is in the best position to rectify its own mistakes and should be given chance to do so. To permit ill-timed access to the courts before the administration has been given the space to rectify the perceived mistakes will undermine the functioning of the administration.

(See Guide to Administrative Law by Professor G Feltoe. *Olivine Industries (Pvt) Ltd v Gwekwerere* 2005 (2) ZLR 421 (H) and *Djordjevic v Chairman Practice Control Committee, Medical & Dental Practitioner Council of Zimbabwe* 2009 (2) ZLR 221 (H).

The applicant does not state on its founding papers that internal remedies had failed nor does it show that efforts were made by it but bore no fruits to justify its logic of approaching the court. The decision to go to courts was hurried and not justified. The applicant is urged to liaise with the 2nd respondent and reserve the impasse with minimum friction and costs.

All the three points *in limine* raised by the 1st respondent have merit and the court has found sense in all three of them and regard being made to the foregoing, the following order is made:

1. The three points *in limine* raised by the 1st respondent are upheld.
2. The point *in limine* by the applicant is dismissed.
3. The application is dismissed with costs on attorney-client scale.

Maunga, Maanda & Associated, applicant's legal practitioners
Bere Brothers, 1st respondents' legal practitioners