CHARLIE'S COLLEGE PRIVATE LIMITED
versus
PEDRO SHRENI
and
ANEPHEN DEVELOPMENT PRIVATE LIMITED
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 11 May, 2023

Opposed Application

Adv *E T Matinenga*, for the applicant.
Adv *T Zhuwarara*, for the 1st and 2nd respondents.
Adv *A Moyo*, for the 3rd respondent.

DEME J: On 11 May 2023, I delivered an *ex tempore* judgment striking the application from the roll with no order as to costs. The applicant subsequently requested for the reasons for the 11 May order. The reasons therefor are as supplied below.

The applicant approached this court seeking a declarator. In particular, the relief sought by the applicant is couched in the following way:

> "1. The applicant is declared the lawful and sole lessee of stand number 4792 Budiriro Township Harare.
>
> 2. The respondents and or any parties working through them are barred to (sic) claim possession or to carry out any activities on the property namely stand number 4792 Budiriro Township Harare.
>
> 3. The Respondent pays costs of this application."

The applicant and the second respondent are companies duly registered in terms of the laws of Zimbabwe. The first respondent is the operator of the construction machinery and was

contracted by the second respondent to do some construction works on its behalf. The third respondent is the owner of the disputed property being number 4792, Budiriro Township, Harare, measuring 96 363 square metres, (hereinafter called "the property").

It is the applicant's case that on 4 February 2016 it entered into the lease agreement with the third respondent in respect of the disputed property in terms of which the applicant had to build the school for the community. This lease agreement was concluded following the resolution made by the Finance and Development Committee. Members of the public, by way of an advertisement, were invited to lodge objections in terms of Section 152 of the Urban Councils Act [*Chapter 29:15*] (Hereinafter called "the Urban Councils Act").

According to the applicant, the first and second respondents occupied the property and have now since started pegging the property. The applicant further alleged that the first and second respondents destroyed some of the developments that the Applicant did at the property. The applicant also affirmed that the first and second respondents started claiming that the property belonged to them. Consequently, the applicant prayed for relief in terms of the draft order.

The application was opposed by all the respondents. The first respondent averred that he is the operator of the construction machinery and that when he arrived at the property he commenced some construction works upon the instructions from the second respondent. According to the first respondent, at the time when he started some construction works, the property in dispute was vacant. The first respondent also affirmed that the applicant has no cause of action against him and his involvement in the matter is only related to the construction at the property. Resultantly, he prayed that the applicant must withdraw its application against him.

The second respondent opposed the present application on the basis that at the time when it concluded the lease agreement, it was made to understand that there was no lease agreement, in respect of the property in dispute, which was extant. The second respondent claimed that it was advised that the lease agreement between the third respondent and the applicant had been cancelled in 2018 on the basis that the applicant had breached the lease agreement. The second respondent also affirmed that the Finance Committee endorsed the cancellation of the lease agreement in 2020. The second respondent also asserted that at the time it occupied the property, the property was vacant and there was nothing at the property which suggested that there were some students at the property. The second respondent further

affirmed that the applicant breached the lease agreement by failing to construct some works of specific value in accordance with the lease agreement. The second respondent, additionally, claimed that the Applicant had also failed to pay rentals and rates to the third respondent.

The second respondent further maintained that its lease agreement was procedurally concluded. The second respondent stated that the third respondent granted vacant occupation of the property to it and that there was no security personnel at the time of its occupation of the property. The Finance and Development committee, according to the second respondent, resolved that the lease agreement between the second and the third respondents be concluded and that the procedure in terms of Section 152 of the Urban Councils Act be conducted.

The second respondent asserted that a valid lease agreement was subsequently concluded between itself and third respondent in February 2022.

The third respondent alleged that the applicant has no basis for seeking the present relief as it has no legal interest in the property. According to the third respondent, the lease agreement concerned was cancelled in 2018 and that the applicant was served with the notice of cancellation in 2018. The third respondent also affirmed that the applicant breached the lease agreement in many respects by failing to pay the rentals and the rates. Further, the third respondent claimed that the applicant was not able to build the structures according to the terms of the lease agreement which was a material breach of the lease agreement. The third respondent maintained that the applicant is fully aware that the lease agreement between the third respondent and the applicant was cancelled. Hence, according to the third respondent, the present application is an attempt to enforce the lease agreement which was duly cancelled. The third respondent asserted that it concluded the lease agreement with the second respondent and that the lease agreement is still valid.

In the answering affidavit, the applicant asserted that the second respondent is not an innocent purchaser as it occupied the property fully knowing that there are some structures at the property. On this basis, the applicant is of the view that the lease agreement between the second respondent and the third respondents is null and void. Further, the applicant denied having breached the lease agreement. It also alleged that it was never served with the notice of termination of lease agreement. The applicant asserted that the purported notice of termination of lease agreement is not a valid termination as it sought to terminate the lease agreement on a future date. The applicant further alleged that the third respondent ought to

have observed the principles of administrative justice before termination of the lease agreement.

The first to third respondents raised the point *in limine* to the effect that the applicant ought to have approached the court by way of application for review as it seeks to challenge an administrative decision which was done by the third respondent through cancelling the lease agreement. The respondents further argued that the application for a declarator is inappropriate under such circumstances. According to the respondents, the effect of the application, if granted in its entirety, will reverse the administrative decision made by the third respondent which has since concluded a fresh lease agreement with the second respondent.

On the other hand, the Applicant asserted that the point *in limine* is meritless. The Applicant, through Adv *Matinenga*, argued that the letter which purported to terminate the lease agreement is not on the letter head of the third respondent. Adv *Matinenga* referred the court to pp 68 and 92 of the record. It was argued on behalf of the applicant that the letter did not formally terminate the lease agreement. The appropriate provisions of the letter are as follows:

> "……. The non-payment of rentals constitutes a material breach of contract.
>
> I therefore formally serve you with one month notice to clear your outstanding rent arrears. Failure to comply with this order within one month from the date of this notification will result in the summary termination of your lease and legal action will be instituted against you / your company with resultant litigation costs being borne by yourself……."

Adv *Matinenga* further argued that the third respondent ought to have demanded specific performance from the applicant before proceeding to cancel the lease agreement. Adv *Matinenga* further submitted that the documents on the record suggest that after 2018, the third respondent was still recommending the cancellation of the lease agreement. He referred the court to p 93 up to p 94. At pp 93 and 94 of the record, the Town Clerk generated a report to the Finance and Development Committee where he recommended the cancellation of lease agreement between the applicant and the third respondent. This report was prepared on 10 March 2020. The Finance and Development committee resolved to cancel the lease agreement concerned. Reference is made to the minutes of the Finance and Development Committee which are at pp 95-6 of the record. In light of this, it was submitted

on behalf of the applicant that the cancellation was not properly done. The applicant's counsel further argued that the whole record does not have the letter that seeks to cancel the lease agreement between the applicant and the third respondent. Adv *Matinenga* further contended that as there is no evidence of cancellation that the lease agreement was cancelled, the present application is a proper one as the applicant is an interested person in the matter with rights that may be prejudicially affected by the judgment. The applicant's counsel also submitted that the matter before the court presents a scenario of double sale and submitted that the second respondent is not an innocent purchaser under such circumstances as it was fully aware that the property in dispute had other occupants.

The matter that arises for determination is whether the present application is properly before the court.

It is apparent in our jurisdiction that the litigant who complains of administrative decisions must approach the court by way of the application for review. In the case of *Chingombe and Another* v *City of Harare and others*[1], the Supreme Court held that:

> "The fact that they clothed the application as a declarator is not material. The result they sought is what guides the court."

In *casu*, the effect of the relief sought will have the effect of setting aside the decision of the third respondent and the Finance and Development Committee. Thus, it is important to assess whether the court, under such circumstances, may exercise its discretion in terms of S 14 of the High Court Act [*Chapter 7:06*]. MANZUNZU J, in the case of *Robbert Samaya* v *Commissioner General of Police N.O and Others*[2] quoted with approval the case of *Johnson* v *Afc*[3], where GUBBAY CJ commented as follows:

> "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… At the second stage of the enquiry, the court is obliged to decide whether the case before it is a proper one for the exercise of its discretion under s 14 of the Act. It must take account of all the circumstances of the matter."

[1] SC177-20.
[2] HH272-21
[3] 1995 (1) ZLR 65 (S) at p 72E.

The third respondent, being a city council, is an administrative authority as defined in terms of S 2 of the Administrative Justice Act [*Chapter 10:28*] (hereinafter called "the Administrative Justice Act"). Similarly, the Finance and Development Committee also squarely falls within the designation of the administrative authority. Administrative authority is defined in the following way:

> "administrative authority means any person who is—
> (a) An officer, employee, member, committee, council, or board of the State or a local authority or parastatal; or
> (b) An (sic) committee, or board appointed by or in terms of any enactment; or
> (c) A Minister or Deputy Minister of the State; or
> (d) Any other person or board authorised by any enactment to exercise or perform any administrative power or duty;
> And who has the lawful authority to carry out the administrative action concerned;"

The third respondent and the Finance and Development committee are entities capable of making administrative actions. By terminating the lease agreement between itself and the Applicant, the third respondent performed an administrative action. Further, the Finance and Development Committee made an administrative action by resolving to cancel the lease agreement concerned. Reference is made to the minutes of Finance and Development Committee which are at pp 95-6 of the record.

Administrative action is defined in Section 2 of the Administrative Justice Act as follows:

> "administrative action means any action taken or decision made by an administrative authority and the words "act", "acting" and "actions" shall be construed and applied accordingly;"

The Finance Committee is established in terms of S 96(2) of the Urban Councils Act which provides as follows:

> "Every council shall appoint a finance committee which shall be responsible for regulating the financial affairs of the council in accordance with the standing orders and by-laws of the council."

I am sure that the third respondent had its own reasons to restructure the Finance Committee to make it the Finance and Development Committee. Be that as it may, the Finance and Development Committee remains a statutory committee and an administrative authority capable of performing administrative actions.

At this juncture, it is not pertinent to examine whether or not the summary termination or cancellation of the lease agreement was done properly as the purpose of the present application is not to impugn the administrative action conducted by an administrative authority. Once a finding has been made that the third respondent and Finance and Development Committee are administrative authorities which made administrative actions being complained of by the applicant, it is inescapable to reach a conclusion that the applicant used a wrong forum to challenge the administrative actions. The purpose of the declarator is to declare rights of the party or parties seeking such a declaration. The declaratory order has no objective of setting aside a decision made by the administrative authorities. According to the case of *Johnson* v *A.F.C.* (*supra),* it is apparent that the court should satisfy itself whether it can exercise its discretion in terms of Section 14 of the High Court Act [*Chapter 7:06.*] In the present application, I see no merit in this court exercising its discretion in this matter as doing so would have the effect of setting aside the decisions of the administrative authorities which ought to be challenged through appropriate means. Such decisions made by the administrative authorities can only be impugned by way of application for review.

The applicant, after being advised that the lease agreement was cancelled through opposing papers, was now fully aware that the matter before the court involves administrative justice principles enunciated by the Administrative Justice Act. In para 25 of its answering affidavit, the applicant averred as follows:

> "in any event, the applicant would have been required to comply with the administrative justice act [*Chapter 10:28*] for any termination of a lease agreement to be valid."

The arguments advanced by Adv *Matinenga,* on behalf of the applicant, to challenge the legality of the termination of lease agreement may not be appropriate at this moment. They can only become relevant if the applicant had followed the correct avenue in impugning the administrative actions of the third respondent and the Finance and Development Committee.

Since this court did not venture into the merits of the matter as the Applicant had used the wrong medium to seek remedy, the appropriate decision for this court to make was to have the matter struck from the roll. Dismissal of the present application would be inappropriate under such circumstances. Reference is made to the case of *Stanley Nhari* v *Robert Gabriel Mugabe and Others*[4], where, in para 45, the Supreme Court opined as follows:

> "[45] I am inclined to agree with the appellant that the order dismissing the entire claim was, in the circumstances, improper. The court had found that it had no jurisdiction to entertain the claims because such claims lay in the province of labour. Having so determined, there was therefore nothing that remained before the court. There was nothing further to dismiss. In *Edward Tawanda Madza & Others* v *(1) The Reformed Church in Zimbabwe Daisyfield Trust (2) The Reformed Church of Zimbabwe (3) Naison Tirivavi (4) The Dutch Reformed Church* SC 71/14 this Court remarked as follows:-
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> "It is a contradiction in terms to dismiss a matter on the twin bases that it not urgent and that the applicant has no *locus standi* for the latter basis indicates that a decision on the merits of the application has been made in which event the applicant is barred from placing the matter on the ordinary roll for determination. The effect of the dismissal on the latter basis is that the applicant is put out of court and is deprived of his right to have the matter properly ventilated in a court application or trial. Where, however, the matter is struck off the roll for lack of urgency, the applicant, if so advised, may place the matter on the ordinary roll for hearing." (at pp 8 – 9 of the judgment)"

In *casu*, the decision for the dismissal would bar the applicant from approaching this court using the appropriate channel. As it was not clear whether the applicant had knowledge of termination or cancellation of the lease agreement at the time of filing the present application, the court saw no reason in punishing the applicant by an order of costs under such circumstances. Accordingly, an order striking the matter from the roll with no order as to costs is just under such conditions.

Thus, the aforesaid rationales have motivated the court to make the order in the manner it did.

Guwuriro and Associates, applicant's legal practitioners.
Tendai Bit Law, first and second respondents' legal practitioners.
Gambe Law Group, third respondent's legal practitioners.

[4] SC151/20.