ALLAN NORMAN MARKHAM
and
TAVONGA SAVINGS SCHEME
and
JACOB PIKICHA
versus
AUGUR INVESTMENTS OU
and
KENNETH RAYDON SHARPE
and
TATIANA ALESHINA
and
MICHAEL JOHN VAN BLERK
and
CITY OF HARARE
and
THE MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING
and
DOOREX PROPERTIES (PVT) LTD
and
REGISTRAR OF DEEDS
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 2 February and 11 May 2022

Opposed Matter

E T Matinenga, for the applicants
T Zhuwarara, for the 1st, 2nd, 3rd, 4th and 7th respondents
C Kwaramba, for the 5th respondent

MANGOTA J: The synopsis of this case is pertinent. It places the *in limine* matters which the respondents raised into context. It, accordingly, assists in the determination of whether or not

the *in limine* matters which the parties argued before me have merits. The synopsis runs in this fashion:

1. On 30 May, 2008 the first respondent, Augur Investments ("Augur"), a foreign legal entity entered into a written contract with the City of Harare. In terms of the contract, Augur was to construct Harare Airport Road. 90% of the construction costs would be paid in the form of land and 10% of the construction costs would be paid in cash. Upon satisfaction of the consulting engineers, the City of Harare would instruct conveyancers to transfer land to Augur for work done.
2. Allegations which were/are to the effect that Augur failed to perform surfaced. This prompted the City of Harare to cancel the contract. When the cancellation occurred in 2013, some land had already been transferred to Augur by City of Harare.
3. At termination of the contract, Augur demanded a penalty payment of 35% of the value of the land supplied as a penalty fee. Augur's position was/is that it was/is entitled to a 35% termination fee. It sued under HC 598/17 demanding 35% termination fee. The 35% termination fee was identified as Stand 654 Pomona Township, Harare, measuring 40,665 hectares in extent.
4. Augur instituted arbitration proceedings before MTSHIYA J seeking, *inter alia*, that:
   a) it be declared the owner of Stand 654 Pomona Township, Harare – and
   b) the City of Harare and the Minister of Local Government, Public Works & National Housing be directed to sign all documents to enable transfer to Augur of Stand 654 Pomona Township, Harare. MTSHIYA J, it is pertinent, did not grant the Stand to Augur. He entered an award of $3 million in Augur's favour.
5. City of Harare successfully challenged the arbitral award before MUREMBA J. It did so on 10 August, 2018 and under HC 7445/17. Augur appealed MUREMBA J'S decision and, before the appeal could be heard, the parties settled the dispute which existed between them. They did so in the form of a deed of settlement.
6. It is this deed which constitutes the applicants' cause of action. They contest the same. They describe it as a fraud upon the people of Zimbabwe. They move that it be set aside on a number of allegations some of them being that:
   i) the agreement between the City of Harare and Augur was not subjected to tender;
   ii) the agreement did not comply with Zimbabwe's investment laws;

iii) the agreement never came into existence because suspensive conditions were never fulfilled;

iv) there was/is no reasonable explanation as to why the deed of settlement was signed other than corruption and an attempt to deceive the resident (*sic*) of Harare and the people of Zimbabwe;

v) neither the City of Harare nor the Minister of Local Government had the authority to execute the deed of settlement.

7. The applicants couched their draft order in the following terms:

"IT IS ORDERED THAT:

(i) The judgment of the High Court handed down by JUSTICE MUREMBA in the matter of *City of Harare* v *Auguar Investments Ou, The Minister of Local Government, Public Works and National Housing and Honourable JUSTICE NOVEMBER TAPFUMA MTSHIYA* (retired) being judgment number HH 727/18 handed down in case number HC 7445/17 be and is hereby declared extant and binding;

(ii) The Deed of settlement executed between the City of Harare and Augur Investments on 29 May, 2017 be and is hereby set aside;

(iii) The transfer of Stand 654 Pomona Township measuring 40, 5665 hectares held under Deed of Grant No.2884/2010 purportedly by the President of the Republic of Zimbabwe to Augur Investments under Deed of Transfer No.00350/2020 and/or its nominee be and is hereby set aside;

(iv) The Deed of Transfer No.00350/2020 in favour of Dorex (Pvt) Ltd in respect of its ownership of Stand 654 Pomona Township measuring 40, 5665 hectares be and is hereby cancelled."

In addition to their respective notices of opposition on the merits, Mr *Zhuwarara* for the first, second, third, fourth and seventh respondents and Mr *Kwaramba* for the fifth respondent raised three preliminary issues. The issues centered on the applicants' alleged violation of Rule 18 of the repealed High Court Rules, 1971, applicants' alleged lack of *locus standi in judicio* and the alleged existence of material disputes of fact in the application. Counsel therefore moved that the application be dismissed with costs on the basis of the one or the other or all of the abovementioned *in limines*.

The applicants, it is a fact, sued the President of Zimbabwe in violation of Rule 18 of the High Court Rules, 1971. The rule was in existence when the suit was filed. It read:

> "No summons or other civil process of the court may be issued out against the President or against any of the judges of the High Court without the leave of the court granted on a court application being made for that purpose."

The rule envisaged that, for a litigant to sue the President or any of the judges of this court, he or she must apply and seek leave of the court to sue any of those public officials. He or she could not therefore sue any of them without having sought and obtained leave of the court to sue them.

The applicants concede that they sued the President without having obtained leave of the court to do so. They submit orally that there is a difference between citing the President in his personal capacity and citing him in his nominal capacity. They place reliance on what PATEL JCC stated in *Mupungu* v *Minister of Justice, Legal & Parliamentary Affairs and 6 Ors*, CCZ 7/21 on the matter at hand.

The distinction is, in my considered opinion, one without a difference. Whatever PATEL JCC meant to convey to the parties who were then before him were his own views to which he was/is entitled. The rule, as quoted in the foregoing paragraphs, admits of no distinction. The meaning and import of the rule are as clear as night follows day. It prohibits persons from suing the President or judges of this court unless or until they have applied for, and obtained, leave of the court to sue those. The idea, as the respondents correctly state, is to protect the President and/or the judges from being lumped with frivolous and vexatious suits.

GUVAVA J (as she then was) clarified the issue which is under consideration when she stated in *National Constitutional Assembly v The President & Ors*, 2005 (2) ZLR 310 (H) at 314 that:

> "where no application for leave is obtained to sue a person protected by Order 3 Rule 18, then the attendant proceedings should be dismissed on account of such deficiency."

CHIDYAUSIKU CJ weighed in when he stated on the same matter in *The President & 10 Ors* v *Morgan Tsvangirai N.O.* SC 21/17 that:

> "whenever a litigant wishes to sue the President, he has to comply not only with section 4 of the State Liabilities Act but also with Rule 18 of the High Court rules. Section 4 of the State Liabilities Act and Rule 18 of the High Court rules provide that for the President to be sued, two requirements are necessary- (1) he has to be sued in his official capacity; and (2) if the suit is in the High Court, leave of the court has to be obtained first."

Mr *Zhuwarara* correctly submitted that the failure and refusal by the applicants to comply with r 18 render the present application still-born. The proceedings are, as he puts it, a nullity for want of leave. They are so fatally defective that they cannot be resuscitated at all.

Whether or not the applicants have the requisite *locus* to sue as they are doing does, in a large measure, depend on whether or not the one or the other or all of them have what is normally referred to as a direct and substantial interest in the application. This is a *fortifori* when regard is had to the fact that theirs is an application for a declaratur. An applicant for a declarator must have a direct and substantial interest in the application.

The first applicant, Norman Markham, states that his *locus* arises from the fact that he is a rate payer and a resident of the City of Harare and a member of parliament for the constituency of Harare North. He asserts that, between 2013 and 2018, he was a councillor for the City of Harare representing Ward 18. He alleges that he has a keen interest in ensuring the protection of the country's constitution as well as ensuring that there is no abuse.

The second applicant, Tavonga Savings Scheme, is a universitas which is registered as such with its own independent constitution. It is capable of suing and being sued in its own name. It is a savings club for extremely poor people who have been saving to purchase land for development. It is a member of the Homeless People's Federation.

The third applicant, Jacob Pikicha, is an unemployed housing and land activist who has been involved in major housing litigation in Zimbabwe. He is currently embroiled in serious litigation in respect of which certain land owners want to evict him from Haydon Farm under case numbers HC 11148/17 and HC 1148/17. He resides at Haydon where he is described as a squatter.

The abovementioned averments of the applicants compelled the respondents to argue that none of the applicants has the requisite *locus* to sue as they are doing. They submit that the applicants do not have direct and/or substantial interest in the subject – matter of the application. Their application for a declaratur, the respondents insist, is a far-fetched matter which should not detain the mind of the court. They have, it is submitted, no interest let alone a substantial one in Stand 654 Pomona Township, Harare. They do not state the harm which they will suffer from the actuation of the Deed of Settlement which caused the transfer of the Stand from the ninth to the seventh respondent. They have, it is submitted, no cause of action against any of the respondents.

The applicants' statement on the issue at hand is to the contrary. They insist that they have the requisite *locus* to sue as they are doing. They state that *locus* is concerned with the relationship which exists between the pleaded cause of action and the relief which they are seeking. They submit that, once a party establishes such relationship, *locus* is established. They, in the process,

place reliance on *Allied Bank Ltd* v *Dengu & Anor* SC 12/16 in which the issue of *locus* was discussed in the following words:

> "The principle of locus is concerned with the relationship between the cause of action and the relief sought. Once a party establishes that there is a cause of action and that he/she is entitled to the relief sought, he or she has locus. The plaintiff or applicant only has to show that he or she has direct and substantial interest in the right which is the subject-matter of the cause of action."

The second and third applicants, it is observed, do not plead any interest let alone a direct and/or substantial one in the application. They do not, in short, assert that they have *locus*. They leave that matter to be understood from the contents of their respective pleadings.

If the position which the second and third applicants adopted was *in sync* with the *dictum* which the court was pleased to enunciate in *Allied Bank Ltd* v *V. Dengu* (supra), their case would have properly thrived on the *res ipso loquitor* principle. They, unfortunately for themselves, failed to establish their cause of action against the respondents. They also failed to prove that they are entitled to the relief which they are moving me to grant to them. This is a *fortiori* the case *vis-à-vis* the respondents.

Locus is not established by argument as the first applicant is seeking to do. *Locus* manifests itself from an effortless reading of the founding papers of the plaintiff in an action, or the applicant in motion, proceedings. It is a logical consequence of the cause of action of the plaintiff or the applicant against the defendant or the respondent. R.H. Christie aptly puts it in *The Law of Contract in South Africa*, 5th ed. at p 260 wherein he states that:

> "The basic idea of contract is that people must be bound by the contracts they make with each other, it would obviously be ridiculous if total strangers could sue or be sued on contracts which they are in no way connected."

The long and short of the learned author's words of wisdom is that the applicants who have no privity of contract with the respondents remain total strangers to the latter. They have no l*ocus* to sue the respondents. For them to be able to sue as they want to do, they should have an interest in the sense of being personally adversely affected by the wrong alleged: *Patz* v *Greene & Co.* 1907 T.S.427 at 433. They should, in other words, have outlined how they were personally adversely affected by the transfer of land from the ninth to the seventh respondent.

It follows, from a reading of the above – analysed set of matters that, apart from the plaintiff or the applicant who sues under s 85(1)(b) or(c) or (d) and/or (e) of the Constitution of Zimbabwe, all litigants who sue another or others must have an interest wherein they are personally adversely

affected by the alleged wrong of their adversaries. It is in that set of circumstances that their cause remains clearly defined and therefore warranted. Outside the defined parameter, they sue as strangers to their adversary and their *locus* remains obscured if not totally absent from the set of papers which constitutes their cause of action against the defendants.

I am satisfied that applicants who are total strangers to the respondents do not have the requisite *locus* to sue the latter. Their suit was/is akin to a leap into the dark, so to speak. It hanged on nothing. It was therefore completely devoid of merit.

A litigant is not allowed to approach the court *via* motion proceedings in circumstances where he was aware or ought to have been aware that there are material disputes of fact which cannot be resolved on the papers: *Zimbabwe Power Company* v *Intratreck (Pvt) Ltd* SC 39/21. The abovementioned principle of law was enunciated to place litigants who want to sue others on their guard. It enjoins them to weigh the *pros* and *cons* of filing a suit in the form of an action or an application. It encourages them to weigh and adopt the course which is most suitable to their own cause. Where, for instance, they remain of the clear view that what they will plead will most likely be seriously contested as to leave the court with no ready answer to the allegations of the applicant as read with those of the respondent, the applicants adopt motion proceedings at their own peril, so to speak. Their best course would be to sue by way of action as opposed to motion under the stated set of circumstances.

The applicants, the respondents argue, are guilty of violating the principle which the court enunciated in *Zimbabwe Power Company v Intratreck (Pvt) Ltd*. They, it is submitted, failed to realize that there would be serious disputes of fact as regards their allegations of fraud, lack of authority and alleged breaches of public policy. Knowing that their whole cause would be seriously contested, the applicants, the respondents submit, gambled and proceeded by way of motion proceedings.

The applicants urged me to take what is normally referred to as a robust and common-sense approach. They moved me to resolve the issues which the parties placed before me on the basis of the papers which each side of the divide filed. They referred me to *Zimbabwe Banded Fireglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (SC) which, they submit, allows me to take the robust and common-sense approach. They urge me to take that approach.

The case upon which the applicants place reliance is good as far as it is allowed to go. It cannot, however, do away with allegations of a very serious magnitude which the applicants

levelled against the respondents. The allegations remain as the applicants stated them in their papers. They cannot be wished away. No amount of robust, or common-sense, approach would undo them. Nor can they be watered-down by anything when they remain *in sync* with what MAKARAU JP (as she then was) was pleased to enunciate when she defined the meaning and import of the phrase material disputes of fact in *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009(2) ZLR 132 (H) at 136 F-G.

The applicants should, in my view, have realized that the serious allegations which they levelled against the respondents would seriously be contested by the latter. They should, therefore, have proceeded by way of action and not motion. Action would have allowed the respondents to test the veracity or otherwise of their allegations. They have no one but themselves to blame for the course which they adopted. Corbett JA spells out their blame when he states in *Tamarillo (Pty) Ltd* v *BN Aitken (Pty) Ltd* 1982(1) SA 398 (A) that:

> "A litigant is entitled to seek relief by way of notice of motion. However, if he has reason to believe that facts essential to the success of his clam will probably be disputed, he chooses that procedure at his peril, for the court, in the exercise of its discretion, might decide neither to refer the matter to trial or to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application."

The respondents succeed in all the three *in limine* matters which they raised. They showed that the application which sued the President of Zimbabwe without leave of the court is fatally defective and cannot therefore stand. They showed further that the applicants lacked the *locus* to sue the respondents and that the suit which was brought against them was/is frought with material disputes of fact which cannot be resolved on the papers.

The application is, therefore, dismissed with costs.

Tendai Biti Law, applicants' legal practitioners
Scanlen & Holderness, first, second, third, fourth and seventh respondents' legal practitioners
Mbidzo, Muchadehama and Makoni, fifth respondent's legal practitioners