BEATA EMELY CHIGWEDERE
and
WADZANAI COLLECTIVE FARMING COOPERATIVE SOCIETY LTD
versus
MINISTER OF LOCAL GOVERNMENT PUBLIC WORKS AND
NATIONAL HOUSING
and
THE MINISTER OF LANDS AGRICULTURE AND RURAL RESETTLEMENT
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 30 January 2019 & 25 March 2019

Opposed Matter

Advocate O. Ochieng, for the applicant
T. Shumba, for the 1st & 2nd respondents
No appearance, 3rd respondent

MUZOFA J: The applicant approached this court seeking a declaration in the following terms that,

> "1. The decision by first respondent contained in the letter dated 5 March 2018 from the Secretary for Local Government, Public Works and National Housing cancelling or withdrawing the right of second applicant to develop an urban housing scheme for its members on stand 48 Aspindale Park Township of sub division A of Aspindale Park of subdivisions A and B of Lochinvar be and it is hereby declared to be null and void and of no force and effect.
>
> 2. First respondent is ordered to pay costs of suit on the scale of client and legal practitioner."

The facts in this case are not in dispute. The first applicant is the chairperson of the second applicant. The second applicant is a duly registered cooperative in terms of the relevant laws. In June 2004 the first respondent allocated stands to the first applicant in her personal capacity and also allocated stands to the second applicant as a legal entity with a view to develop the stands and sell to its members. Sometime in March 2018 the first respondent advised the applicants of its decision to withdraw the authority granted to them to develop the said stands. The reason given for the withdrawal was that the first respondent later realized that

the land allocated to the applicants was not successfully acquired by the acquiring authority. The land was owned by a private company therefore it was not for allocation by the state.

The applicants through their legal representatives sought further clarifications for the cancellation; there was no response from the first respondent. In the absence of a response the applicant filed this application to have the decision declared null and void for the reasons that the manner in which the decision was made offends the principles of administrative justice. The applicants were not heard before the decision was made and no reasons were given for the decision.

The first respondent opposed the application. The second and third respondents did not file any opposition to the application. A point *in limine* was taken for the first respondent that the application was not properly before the court. It was submitted that the applicants' complaint was not on the merits but the manner in which the decision was made. The applicants should have filed an application for review in terms of Order 33 of this court's Rules. On the authority of *Jaydees* v *Chaonezvi* 2002 (1) ZLR it was submitted that the court should look to the grounds upon which the applicants rely on to impugn the decision that was made. That way the court should be able to decipher whether what is before it is a true application for a declaratory order or an application for review. On the merits, counsel for the respondent could neither deny nor admit that the applicants were not heard before the prejudicial decision was made. However it was submitted that the land in dispute was private land. Further to that, it was not denied that the land was offered to the applicants but that the applicants failed to comply with the terms of the offer letters.

In response to the point *in limine,* in their heads of arguments the applicants tried to do some mathematical calculations to demonstrate that, even if this application were to be said to be an application for review it was filed within the 8 weeks envisaged in r 259 of the High Court rules. This argument is devoid of merit, this is not an application for review in terms of Order 33 but an application for a declarator. It is inconceivable that the application can change to be an application for a review. In the oral submissions before this court counsel for the applicants submitted that this application is made in terms of the Administrative Justice Act [*Chapter 10:28*] 'the Act.' In terms of the Act an aggrieved person can approach the court on application. There is no requirement that the application should be by way of review. Further that Order 33 regulates common law applications for reviews as enunciated in *Star Africa* v *Civnet (Pvt) Ltd & Another* 2011 (2) ZLR 123. The applicants are therefore properly before the

court and need not approach the court by way of review, Order 33 of the rules is not inapplicable in this matter. On that basis the court was urged to dismiss the point *in limine.*

I agree with the applicants' submissions. On a proper reading of the applicants' founding affidavit, it is apparent that the applicants seek to enforce administrative justice which derives from the Act. Their complaint is that they were not heard before the decision was made and no reasons were given for the decision. Section 3 of the Act thereof sets out the duties of an administrative authority. Section 4 (1) provides for the relief in the event of non-compliance with s 3. An aggrieved party may apply to the High Court for relief. The form of application is not set out. It does not refer to an application for review in terms of Order 33.This is a statutory relief with no reference to a review. See *Gurta A G* v *Afasa M Gwaradzimba N.O* HH 353-13, *G J Petrow & Company (Pty) Ltd* v *Arafas M Gwaradzimba* HH 175/14. The Supreme Court confirmed this interpretation in *Gwaradzimba N.O* v *Gurta N.O* SC 10/15. The court considered the relief provided in s 4 of the Administrative Justice Act in relation to s 26 and 27 of the High Court Act [*Chapter 7:06*] and concluded:

> 'As correctly stated, s 4 (1) of the Administrative Court Act ('the Act') provides that the statutory relief referred to by the judge *a quo* may be sought by way of an application to the High Court. However no specific format for such application is prescribed. While a review in terms of the High Court Rules is a special form of application, there is nothing in s 4(1) to suggest that any other form of application for judicial review would in any way offend against that sub-section as long as it meets the requirements of an ordinary court application.'

I was referred to cases that relate to the proper grounds for review that if the complaint is on the procedure, the manner how the decision was made this should invariably be an application for review. That is the correct position of the law in so far as where the application is for review. The first respondent failed to appreciate that the Act provides statutory relief which can be sought from this Court by way of a court application and not necessarily a review in terms of Order 33. It was therefore within the applicants' rights to seek statutory relief in terms of the Act. The time frames for an application for review would then be inapplicable in the circumstances of the applicants. The point in limine should therefore be dismissed.

On the merit, the first respondent has no defence at all. It is not in dispute that the first respondent is an administrative authority and s 3 of the Act sets out the manner in which an administrative body should deal with members of the public and provides,

3 Duty of administrative authority

(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—

(*a*) act lawfully, reasonably and in a fair manner; and

(*b*) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and

(*c*) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.

(2) In order for an administrative action to be taken in a fair manner as required by paragraph (*a*) of subsection (1), an administrative authority shall give a person referred to in subsection (1)—

(*a*) adequate notice of the nature and purpose of the proposed action; and

(*b*) a reasonable opportunity to make adequate representations; and

(*c*) adequate notice of any right of review or appeal where applicable.

Entrenched in the fairness is the right to be heard which is an elementary notion of fairness and justice. It requires that before a decision affecting a person's rights, interests or legitimate expectations is made, the person should be heard. So fundamental are those rights that they are now part of our constitution in s 68. In a constitutional democracy, administrative authorities are required to adhere to s 3 of the Act which is couched in mandatory terms. There is no room for arbitrary decisions.

In this case, the applicants indicated that they were not given the reasons for the cancellation or withdrawal of the offer letter. However in their founding affidavit they allege that the withdrawal letter indicated that the land offered to them had not been acquired by the State for distribution. So the reason was given. Whether that reason was correct or not is not for this court to determine. However the non-compliance with s 3 of the Act by the first respondent is the failure to hear the applicants before the prejudicial decision was made. I must add that the applicants had done their research and attached to this application documentary proof that the land was actually acquired by the State. It is only fair for the first respondent to hear the applicants.

In its opposing affidavit the first respondent set out the reasons why the offer letters were withdrawn, of course adding one more reason not included in the withdrawal letter. Although it is not for this court to decide if the reason for the withdrawal was proper, what is telling is that, nowhere in the opposing affidavit or in the oral submissions did the first

respondent indicate that the applicants were heard. The closest response to this issue was made by counsel, that he was not aware whether the applicants were heard or not. The applicants' assertion that they were not heard was not specifically denied. I accept that they were not heard before the decision was made in violation of s 3 (2) of the Act.

In terms of s 4 (2) (a) of the Act, this court after hearing such an application may confirm or set aside the decision concerned. The applicants seek a declaration, which should be granted effectively setting aside the decision.

The applicants have requested for costs on a higher scale of legal practitioner client scale. No basis was laid for that scale. Generally courts award costs on an ordinary scale unless there is something peculiar in the case or conduct of the other party that requires censure. I find nothing to justify the elevated costs claimed.

From the foregoing the application is granted in the following terms;

1. The decision by first respondent contained in the letter dated 5 March 2018 from the Secretary for Local Government, Public Works and National Housing cancelling or withdrawing the right of second applicant to develop an urban housing scheme for its members on stand 48 Aspindale Park Township of sub division A of Aspindale Park of subdivisions A and B of Lochinvar be and it is hereby declared to be null and void and of no force and effect.
2. First respondent is ordered to pay costs of suit on the scale of client and legal practitioner.

Moyo & Jera, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st & 2nd respondents' legal practitioners