BIGGIE MOYOWESHUMBA
and
SHAPPYSTONE MUTASA
and
GODFREY CHINHOYI
and
PHILIP GARDNER
versus
CITY OF HARARE
and
NATIONAL SOCIAL SECURITY AUTHORITY

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE; 17 February 2025 & 13 May 2025

Application for a declaratur and interdict

E. Mubaiwa for the applicants
Ms. C. M. Mushayi for the 1st respondent

DUBE-BANDA J:

[1] This is an application for, *inter alia*, a *declaratur* and an interdict. The relief sought is couched as follows:

i. That the first and second respondents together with any persons acting or purporting to act on their behalf and / or acting in common purpose with them be and are hereby interdicted from proceeding with the construction of the Glaudina and Kuwadzana Extension Junction along Bulawayo Road based on the Draft Plan Number TPY/WR/1/24.

ii. It is hereby declared that certain immovable property, known as Stand number 2224 to 2296 Glaudina Township depicted on General Plan CT 2670 (SR 28532) as duly allocated to applicants and other members of Gillingham Pay Scheme.

[2] The application is opposed by the first respondent. The second respondent has neither filed a notice of opposition nor participated in this hearing. I take it that it has taken a decision to abide by the decision of the court.

[3] At the commencement of the hearing, the applicant raised a preliminary point that the application is not opposed. It was contended that the opposing papers have not been authorized by the Council. It was argued that the Urban Councils Act [*Chapter 29:15*] does not give the deponent, i.e., the Town Clerk authority to litigate without a Council resolution. It was submitted that without a council resolution the application is unopposed, and it must be treated as an unopposed matter.

[4] *Per contra*, the first respondent argued that the deponent is the Town Clerk and in terms of s 36 of the Urban Councils Act he is authorized to depose to the opposing affidavit on behalf of the Council. It was submitted that the preliminary point has no merit and ought to be refused.

[5] My view is that the applicant is conflating two distinct issues, i.e., the authority to litigate and being a witness. The Town Clerk is not litigating; it is Council that is litigating. The Town Clerk is a witness. He is competent, in the reading of r 58 (4)(a) of the High Court Rules, 2021 to swear to the opposing affidavit on the basis that he can swear to the facts or averments set out therein. As a witness to deposing to an opposing affidavit, he does not require a resolution. See W*illoughby's Investments (Pvt) Ltd v Peruke Investments (Pvt) Ltd & Anor* 2014 (1) ZLR 501 (H). He is responsible for the administration of Council. See *Home of Angels Housing Co-Operative Society Limited and 5 Others v City of Harare* [2022] ZWHHC 800; Trustees*, United Mutare Residents and Ratepayers Trust v City of Mutare & Anor* [2019] ZWMTHC 3. This preliminary point is ill-advised and has no merit, it is accordingly refused.

[6] The first respondent took a preliminary point that the applicants have no *locus standi* in this matter. It was argued that the applicants allege that they are members of *"Gillingham Pay Scheme",* however, they have not described what this pay scheme is and why they have decided to institute the present application on its behalf without the Scheme's authority or involvement. It was argued further that the applicants have not even shown how they are members of the said pay scheme.

[7] To counter the contention that they have no *locus standi* in this matter, the applicants argued that they have *locus standi* as members of the Scheme and as beneficiaries of the stands. They contend that they were allocated stands, and together with other members of the Scheme undertook water reticulation and road construction with the knowledge and approval of the Council. They argued that in these circumstances, they have a direct and substantial interest in this matter.

[8] *Locus standi* relates to whether a particular applicant is entitled to seek redress from the courts in respect of a particular issue. The applicants have a direct and substantial interest necessary to satisfy the requirement of *locus standi* in these proceedings. Their interest stems from the fact that they contend that they were allocated stands and have together with other members of the Scheme undertook water reticulation and road construction with the knowledge and approval of the Council. The fact that they have decided to institute the present application outside the Scheme is inconsequential. The applicant has *locus standi* only in relation to the stand they claim they were allocated. In the circumstances, the preliminary point that the applicants have no *locus standi* has no merit and is refused.

[9] I now turn to the merits. In summary, the applicants' case is that they are members of what is called Gillingham Pay Scheme ("Scheme"). They allege that in March 2014, as members of the Scheme applied for stands Glaudina. It is averred that the City of Harare ("Council") on 14 November 2014, allocated the applicants a block of unserviced residential stands known as stand numbers 2234 to 2296 in Glaudina Township, Harare. It is alleged that the applicants and others complied with the conditions of the allocation letter and have undertaken and completed the following: established and approval of Lay Out Plan; surveying the land and approval of Survey Diagrams by the Surveyor General, in terms of General Plan CT2670 (SR 28532); drawing and getting approval of Water Reticulation Designs by Council; and drawing and getting approval of Road Designs. The applicants contend further that they, and other members of the Scheme, have been in peaceful possession of the stands and have been finalizing the servicing of the land.

[10] The applicants contend that this application has been necessitated by the following: that on 19 March 2024 the National Social Security Authority ("NASSA") started mobilizing equipment to construct a junction along Bulawayo Road, identified as Glaudina and Kuwadzana Extension Junction ("Junction"). The applicant allege that Council allowed NASSA to construct the Junction in line with a draft layout plan number TPY/WR/1/24. The applicants contend that the layout plan interferes with their rights and interests as depicted on General Plan CT2670 (SR 28532). It is averred that should the respondents continue constructing the Junction based on the draft layout plan TPY/WR/1/24, the road from the Junction will encroach into the applicant's stands and destroy the pegs and water pipes. The applicants argue that in general they are not

opposed to the development of the Junction, they are opposed to it being done in terms of a draft layout plan TPY/WR/1/24.

[11] In summary, it was argued that the applicants were never allocated the land and therefore have no rights on the land in question. It was contended that the attached survey diagram is unclear and missing necessary columns to enable it to sufficiently comment from an informed position. It was argued that notably the records do not show that the Council made an application to subdivide the land for residential purposes on behalf of the applicants leading to approval of the survey diagram. Further, it was contended that a survey diagram, whether approved or unapproved is not proof of allocation of stands to the applicants and therefore irrelevant in these proceedings.

[12] It was argued that the documents attached in support of the application, being an application for residential stands in Glaudina Township; a letter from Council acknowledging receipt of the application, and a letter from Council advising that the members of the Scheme have been allocated a block of unserviced residential stands numbers 2224 to 2296 Glaudina Township, under certain conditions are all fraudulent and fake because the Scheme did not apply for land, and it was never allocated any land.

[13] It was argued that Council allocates stands to individuals who are on its housing waiting list. It was submitted further that no such Scheme answering to the name Gillingham Pay Scheme exist. Further, Council does not allocate land to pay schemes which have no legal capacity. Block allocations are only applied to registered cooperatives with members verifiable with the Registrar of Cooperatives. There is no council resolution confirming such allocation or offer, which is a prerequisite before Council allocates land. Because the Council never resolved to allocate the land, it never published the said allocation as mandated by law to publish any alienation of land in terms of section 152 of the Urban Councils Act to enable members of the public to make objections or representations having inspected the resolutions, terms and conditions of such alienation.

[14] Further it was argued that they cannot seek to rely on the approvals for the water designs as they used fake documents to have the inspections done. It was submitted that the land was never allocated to the Scheme, and the applicants have no legal interest on the land to enable them to make an application of this nature. It was submitted that the applicants instituted this application aware that the Scheme they seek to rely on has

fake documents. It was submitted that the application be dismissed with costs on a legal practitioner and client scale.

[15] The burden or *onus* is on the applicant who applies for a remedy, and he must prove that he is entitled to the remedy sought. In *Pillay* v *Krishna* 1946 AD 946 at 946 the court held that if one person claims something from another in a court of law, then he must satisfy the court that he is entitled to it; and he who asserts must prove and not he who denies. See *Tendayi* v *Twenty Third Century Systems (Pvt) Ltd* 2020 (2) ZLR 834 (S) at 837. In *casu,* the *onus* is on the applicants, to prove on a balance of probabilities, that they are entitled to the relief they seek.

[16] It is important to restate the basic principles applicable in the resolution of cases in motion proceedings. Motion proceedings are about the resolution of legal issues based on common cause facts. This is so because they are not designed to determine probabilities. The courts have accepted, though, that in certain instances a robust and common-sense approach, can lead to a resolution of the matter on the papers without causing an injustice to either party. See *Muzanenhamo* v *Officer In Charge CID Law and Order* CCZ 3/13; *Room Hire CC (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 11633 -1163. However, a robust and common-sense approach is underpinned by the following principles; the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. It is called the *Plascon* rule. See *Plascon Evans Paints Ltd* v *Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E - 635C; *National Director of Public Prosecutions* v *Zuma* 2009 (2) SA 279 SCA [26]. This is what a litigant approaching the court for a final relief by way of motion must contend with in the event the opposing litigant comes up with a different version of the facts.

[17] In *casu,* Council's defence is that no land was allocated to the Scheme nor its members. Can it be said that Council's allegations do not such raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers? I do not think so. The applicants have not shown that they are on the Council housing waiting list. They have not shown that the Scheme answering to the name "Gillingham Pay Scheme" exist. In addition,

Council says it does not allocate land to pay schemes which have no legal capacity, and that block allocations are only made to registered cooperatives with members verifiable with the Registrar of Cooperatives. This assertion cannot be controverted.

[18] Briefly the law, the applicants seek a *declaratur* and an interdict. Regarding a *declaratur,* s 14 of the High Court Act provides that the High Court may, in its discretion at the instance of any interested person, inquire into and determine any existing, future and contingent or obligations notwithstanding that such person cannot claim relief upon such determination. Section 14 is the empowering provision, which gives this court jurisdiction to hear an application for a declaratory order. A declaratory order is an order by which a dispute over the existence of some legal right or obligation is resolved. Declaratory orders may be accompanied by other forms of relief, such as interdicts, but they may also stand on their own. See *Rail Commuter's Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 17; *Zvomatsayi & Ors v Chitekwe No & Anor* 2019 (3) ZLR 990 (H). Turning to an interdict, at this stage I record the trite statement that the requirements for the grant of a final relief are, *viz*: a clear right; an injury committed or reasonably apprehended; and an absence of similar or adequate protection by any other ordinary remedy.

[19] According to council the documents sought to be relied upon by the applicants are fraudulent and fake. There are no records to show that Council made an application to subdivide the land for residential purposes on behalf of the applicants leading to approval of the survey diagram. There is no council resolution confirming such allocation or offer, which is a prerequisite before Council allocates land. Council did not publish the said allocation as mandated by law in terms of section 152 of the Urban Councils Act. Council has disowned the letters filed in support of this application. It was contended that they are all fraudulent and fake. In essence, the applicants are seeking this court to find that the questioned documents are authentic. On the facts of this case, this court cannot on the papers make such a finding. On the facts, the applicants' case cannot succeed. In the circumstances, the applicants have not placed facts before court on which this court can exercise its discretion to grant a declaratory order. In addition, the applicants have not proved a clear right to the order they are seeking.

[20] The court cannot, on these papers reject the Council's version, because it cannot be said to be so far-fetched or clearly untenable that the court is justified in rejecting it

merely on the papers. An applicant in such a case cannot obtain a final relief from the court. The applicants have not proved on a balance of probabilities, that they are entitled to the relief they seek. It is for these reasons that this application must fail.

[21] The applicants have failed to obtain the relief they sought from this court. There are no special reasons warranting a departure from the general rule that costs should follow the result. The respondent is entitled to its costs. The first respondent sought costs on a legal practitioner and client scale. It contends that:

> "Given the clear background in this matter, the applicants have instituted the present proceedings aware that the pay scheme they seek to rely on has fake documents as clear from the background detailed above. The 1st respondent which relies on public funding is being forced to defend such a frivolous claim and other consequential litigation as already shown above. The application is therefore an abuse of court process, and the applicants ought to be punished with an award of costs on a higher scale because of such conduct."

[22] I agree with the above synopsis. The applicants ought to have known that they were relying on documents whose authenticity was questioned. Notwithstanding this awareness, the applicants proceeded by motion proceedings. How on earth they expected the court to make a finding that such documents are authentic defeats me. The letter dated 21 November 2023 from the Contractor bears it all. Even their own developer, the contractor knows that the documents are fraudulent and fake. How the applicants hoped to overcome these clearly insurmountable huddles in motion proceedings is difficult to comprehend. This is just one of the thoughtless applications crowding the corridors of this court for no good measure. It is frivolous and vexatious and amounts to an unacceptable abuse of the process of this court. See *Railings Enterprises (Pvt) v Luwo & Ors* 2020 (2) ZLR 51 (H); *Kangai v Netone Cellular (Pvt) Ltd* 2020 (1) ZLR 660 (H). It is for these reasons that costs on a legal practitioner and client scale are warranted.

In the circumstances, the application is dismissed with costs on a legal practitioner and client scale.

DUBE BANDA J: ……..

Muzangaza Mandaza & Tomana, applicants' legal practitioners
Gambe Law Group, 1st respondent's legal practitioners