REPORTABLE: (50)

(1) BDO ZIMBABWE CHARTERED ACCOUNTANTS
V
ROBIN VELA
AND
(2) THE AUDITOR GENERAL OF ZIMBABWE
V
ROBIN VELA
AND
BDO ZIMBABWE CHARTERED ACCOUNTANTS

SUPREME COURT OF ZIMBABWE
BHUNU JA, MATHONSI JA & CHIWESHE JA
HARARE 14 JUNE 2021 & 10 JUNE 2022

E Matinenga, for the appellants

T Mpofu, for the first respondent

T Magwaliba, for the second respondent

BHUNU JA:

INTRODUCTION.

[1] This judgment involves two consolidated appeals from the High Court *(the court a quo)* being case numbers SC 258/20 and SC 285/20. The court issued a consolidation order dated 29 March 2021 by consent of the parties. Both appeals are based on the same record of proceedings and issues in the court *a quo* under Case No. HC 6503/19. It was therefore convenient to consolidate the two appeals because the matter was determined by the same judge *a quo* on the same facts and issues. The two appeals arise from the same judgement. Each appellant lodged its own appeal against the same judgment in which they were contesting parties.

[2] Both appeals bring into question the judgment of the court *a quo* which determined that the forensic audit conducted by the appellant at the behest of the second respondent was an administrative action subject to review by the court *a quo*. In consequence thereof the court *a quo* reviewed and set aside the forensic audit for irregularity coupled with costs at the higher scale.

CITATION OF THE PARTIES

[3] In this judgment the parties are cited as they appear in case number SC 258/20 notwithstanding that in the second appeal they are cited in reverse order. BDO CHARTERED ACCOUNTANTS shall therefore be called the appellant. ROBIN VELA the first respondent and the AUDITOR GENERAL the second respondent.

[4] The appellant, BDO CHARTERED ACCOUNTANTS, is a firm of accountants conducting business under the partnership of Ngoni Kudenga, Gladman Sabarauta, Martin Makaya, Gilbert Gwatiringa and Jonas Jonga.

[5] The first respondent is the erstwhile board chairman of the National Social Security (NSSA), a body corporate established in terms of s 4 of the National Social Security Authority Act [*Chapter 17:04*]

[6] The second Respondent is the Auditor General of Zimbabwe appointed in terms of s 310 of the Constitution.

POINTS *IN LIMINE*

[7] At the commencement of the hearing, counsel for the first respondent raised two preliminary points for determination. After hearing arguments from counsel, the court ruled that the two preliminary points be determined in tandem with the main appeal.

[8] The first point of objection *in limine* is that there is no appellant before the court in this case. The second is that BDO ZIMBABWE CHARTERED ACCOUNTANTS (BDO) the appellant in case number SC 258/20 has no right of appeal because it is not the party against whom judgment was issued. I proceed to determine the two preliminary points in turn before delving into the merits of the case.

WHETHER THERE IS A PROPER APPELLANT BEFORE THIS COURT.

[9] Counsel for the first respondent Mr *Mpofu's* first contention is that BDO, being a partnership, cannot sue or be sued in its own name because it has no legal personality. It therefore has no *locus standi* in any court of law. For that proposition of law he placed reliance on the case of *Gariya Safaris (Private) Limited v Van Wyk*[1] in which MALABA J, as he then was, observed that:

> "A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names written on the summons as being those of the defendant, the summons is null and void *ab initio*."

[1] 1996 (2) ZLR 246 (H)

[10] On that score he submitted that BDO was improperly before the court because it was a non-existent legal entity lacking the requisite legal capacity to sue and be sued in its own name. Mr *Matinenga*, counsel for BDO, on the other hand countered that a partnership being an association can sue or be sued in its own name in terms of Order 2A of the High Court Rules, 1971.

[11] I now proceed to resolve the two conflicting propositions of law submitted by opposing counsel respectively.

[12] The facts in the *Gariya* case *(supra)* are diametrically different from the facts of this case. In that case the applicant had sued and obtained judgment against a non-existent fictitious entity called *Con and Son (Private) Limited* in the mistaken belief that it was a registered company. When it turned out that it was in fact a fictitious unregistered company, the applicant applied for its substitution with a natural person, one *Van Wyk*, for purposes of execution alleging that he had acted fraudulently as managing director of the fictitious company.

[13] The court found no evidence of fraud and held as appears from the headnote that:

> "…in the present case the proceedings and judgment following the issuing of summons were null and void because the proceedings had been brought before a non-existing defendant. Therefore there could be no question of the substitution of a new judgment debtor."

[14] The main distinguishing feature in this case is that the appellant is not a non-existent party lacking the capacity to sue or be sued in its own name. While at common law in the distant past partnerships, unregistered associations, and clubs had no *locus standi* to sue or be sued in their own names except through the

names of their individual membership, the law has since changed. The development and change of the archaic common law in this respect was a progressive endeavour to facilitate easier citation of the parties in a partnership without being bogged down in unnecessary cumbersome citation technicalities.

[15] The applicable law is to be found under Order 2A of the High Court Rules, 1971 which rules were in force when the litigation commenced. They have since been repealed and substituted by S.I 202 of 2021. Order 2A is now r 11 of the Supreme Court Rules 2018. It regulated the citation of partnerships, trusts, syndicates, clubs or any other association which is not a body corporate. Mr *Matinenga*'s reliance on that Rule was therefore apposite.

[16] The capacitation of partnerships, associations and clubs to sue and be sued in their own names without the cumbersome need to cite each and every member of the unincorporated entities in court proceedings has been a welcome development both at home and in South Africa which has similar jurisprudence as ours.

[17] At home r 7 of the High Court Rules 1971 provided the definition of an association as follows:

> "In this Order—
>
> "associate", in relation to—
>
> (*a*) a trust, means a trustee;
>
> **(*b*) an association other than a trust, means a member of the association;**
>
> **"association" includes—** (Emphasis provided)
>
> (*a*) a trust; and

(*b*) a partnership, a syndicate, a club or any other association of persons which is not a body corporate."(Emphasis provided)

[18] Undoubtedly r 7 defines an association as including a partnership, a syndicate, a club or any other association of persons which is not a body corporate. Rule 8 goes on to clothe members of such entities with *locus standi* to sue or be sued in the name of the association as defined in the Rules. It provides as follows:

> ***"8. Proceedings by or against associations,* Subject to this Order, associates may sue and be sued in the name of their association."** (Emphasis provided).

[19] Having conferred members of unregistered associations with *locus standi*, the law maker was careful to render members of an association accountable for their rights and obligations without hiding behind the association's name. To that end r 8A obliges an association engaged in legal proceedings to provide the other party upon written request within 5 days with the names and addresses of its associates at the material time when the cause of action arose. The rule shields the other party against any prejudice that may arise from the association's lack of legal or corporate status. Thereafter it proceeds to provide an elaborate procedure for obtaining the relevant information. It provides as follows:

"*8A. Naming of associates*

(1) In any proceedings to which an association is a party, any other party may, by written notice to the association, require a statement of the names and places of residence of the persons who were the association's associates at the time the cause of action accrued.

(2) A person who receives a notice in terms of subrule (1) shall, within five days after receiving it—

(*a*) furnish the party concerned with a written statement containing the required information; and

(*b*) file a copy of the written statement with the registrar; and the proceedings shall continue in the same manner, and the same consequences shall follow, as if the associates had been named in the summons or notice commencing the proceedings:

Provided that the proceedings shall continue in the name of the association except where a writ of civil imprisonment is sought against an associate, in which event the associate shall be specifically named in the civil imprisonment proceedings."

[20] In interpreting the South African r 14 which is similar to our r 2A the learned authors Herbstein & van Winsen[2] articulate the mischief behind the change as follows:

> "Rule 14 facilitates the citation of partnerships, firms and associations as defendants, as well as allowing those entities to sue in their own names. It has been held by the Supreme Court of Appeal that this Rule enables members of an association to assert rights which they hold by virtue of their membership in the name of the association."

[21] From the foregoing, it is plain that the primary distinguishing feature between the *Gariya Safaris* case *supra* and this case is that a partnership is covered by order 2A of the High Court rules whereas an unregistered company is not. Since the legislature has not altered the common law in respect of the citation of unregistered companies the position remains the same. The *Gariya Safaris* case *supra* was therefore correctly decided because it dealt with the citation of a non-existent fictitious and unregistered company which is not the case here. The decision in that case is therefore irrelevant to the determination of the issues at hand in this case.

[2] The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th ed vol 1 p 150

[22] Having said that, I find it ironic that it is the first respondent who sued the appellant in case number HC 60503/19 citing it in the manner it now objects to. I therefore find no merit in the first point *in limine*. It is accordingly dismissed without any further consideration.

[23] I now turn to consider the second part of the objection *in limine.*

Whether BDO has no locus standi because it is not the party against whom judgment was issued.

[24] It is common cause that it is the first respondent who sued the appellant to kick start the proceedings in this matter. In his founding affidavit which appears at p 3 of the record of proceedings he cited the appellant as follows:

> **"BDO ZIMBABWE CHARTERED ACCOUNTANTS**
> (A firm of Accountants whose partners are Ngoni Kudenga, Gladman Sabarauta, Martin Makaya, Gilbert Gwatiringa and Jonas Jonga."

[25] In developing his argument Mr *Matinenga* submitted that r 8 of the High Court Rules 1971 provides for the citation in legal proceedings of associations which are not body corporates. Rule 8C allows a person to be sued in his/her trade name. BDO CHARTERED ACCOUNTANTS being the trade name of the appellant it may sue or be sued in that name. The rule provides as follows:

> ***"8C. Proceedings by or against persons under their trade name***
>
> Subject to this Order, a person carrying on business in a name or style other than his own name may sue or be sued in that name or style as if it were the name of an association, and rules 8A and 8B shall apply, *mutatis mutandis*, to any such proceedings."

[26] The Appellant responded to the first respondent's suit in that name. The first respondent went on to obtain judgment against both the appellant and the second respondent with costs at the punitive scale. He has not abandoned the order he obtained against the appellant although he is now claiming that he obtained the judgment against a non-existent party with no *locus standi*.

[27] Having regard to the clear provisions of the law there can be no denying that **BDO ZIMBABWE CHARTERED ACCOUNTANTS,** being the Appellant's trade name, may sue or be sued in that name in terms of r 8C.

[28] I therefore hold that the first respondent Robin Vella having sued and obtained judgment with costs at the punitive scale against the second respondent and the appellant, **BDO ZIMBABWE CHARTERED ACCOUNTANTS**, has the *locus standi* to be heard on appeal to challenge the judgment against it, independent of the Auditor General. It would, in my view, be manifestly unjust for the Court to sanction a situation where the first respondent sues and obtains judgment against the (appellant) with costs at the punitive scale and then bar it from appealing the judgment on flimsy legal technicalities. I therefore find no merit in the respondent's second point *in limine*. Doing otherwise will offend against the dictates of reason and fundamental justice. The second point *in limine* is accordingly dismissed.

[29] I now proceed to consider the appeal on the merits.

FACTUAL BACKGROUND

[30] The synopses of both appeals are to a large extent common cause. The parties mainly differ on the interpretation and application of the law to the facts. The undisputed facts are that the first respondent, Robin Vela, was the board chairman of the National Social Security Authority (NSSA), during the period extending from July 2015 to March 2018.

[31] After he left employment with NSSA second respondent appointed the appellant to conduct a forensic audit for the duration of his employment with NSSA. In the exercise of its mandate the appellant questioned a number of people including the first respondent.

[32] At the conclusion of its investigations the appellant submitted an adverse report against the first respondent. Some of the adverse reports were that:

(a) He was responsible for the overpayment of board fees.
(b) He interfered in management issues.
(c) His dealings with Medbank investments were not above board as a result they yielded losses.

[33] Disgruntled by the adverse audit report the first respondent sought to impugn it on review. He thus filed an application in the court *a quo* in terms of s (3)(1) (a) as read with s 4 of the Administrative Justice Act [*Chapter 10:28*] on the grounds that:

(1) In carrying out the audit the appellant was exercising public power. Its conduct in this respect was therefore liable to judicial review.

(2) The appellant conducted the audit without the necessary jurisdiction.

(3) The audit report was biased, malicious, irrational, incompetent and unfair in contravention of s 3 (1) (a) of the AJA.

[34] The appellant and the second respondent countered that the appellant's conduct in compiling the audit report at the behest of the second respondent was not subject to review because it was not an administrative authority whose actions are subject to review. The appellant's conduct was therefore neither an administrative decision nor administrative action subject to review.

[35] The appellant further argued that its agreement with the second respondent to carry out the forensic audit was purely contractual grounded in private law.

[36] The allegations of bias, malice and incompetence were denied on the basis that the audit did not target the first respondent personally but NSSA in general. The allegations of unfairness, and irrationality were likewise denied.

DETERMINATION BY THE COURT *A QUO*

[37] The court *a quo* found that the forensic investigation and the audit report produced by the appellant were reviewable. It then proceeded to review the appellant's conduct when producing the forensic audit report.

[38] At the conclusion of the review process the court *a quo* held that the process leading up to the production of the audit report was fraught with bias because there was unequal treatment of the first respondent and two ministers of State allegedly involved in corrupt activities. The failure to mention the impugned ministers' names in the forensic report was held to amount to incompetence.

[39] The court *a quo* also found that the appellant failed to give proper consideration to the first respondent's answers. It then concluded that the first respondent was subjected to an unfair process in that he was denied the right to be heard which is guaranteed by s 3 of AJA.

[40] On that score the court *a quo* found that appellant in its exercise of public authority while conducting the forensic audit fell foul of the Administrative Justice Act as read with s 309 of the Constitution. Consequently it issued the following order:

"IT IS ORDERED THAT:

3. The forensic audit of the National Social Security [NSSA] for the period 1 January 2015 to 28 February 2018 produced by the Auditor General of Zimbabwe by BDO Chartered Accountants be reviewed and set aside in all those respects that pertain, whether directly and/or indirectly to the applicant

4. Costs of suit shall be borne by the second respondent on the higher scale of legal practitioner and client scale."

GROUNDS OF APPEAL

[41] Aggrieved by that order, the appellant lodged an appeal to this court on the following 5 grounds:

"1 The High court erred in finding that the appellant's carrying out of a forensic audit on the National Social Security Authority (NSSA) at the behest of the Auditor General (second respondent) constituted an administrative action which is subject to review at the first respondent's instance and on the alleged grounds.

2. The High Court erred in finding that the appellant in its report under consideration exhibited bias against the first respondent when there was no evidence supporting such finding.

3. The High court erred in concluding that the appellant did not apply its mind to the issues before it in the absence of any evidence controverting the findings made in the audit report.

4. The High court erred in concluding that the audit was unfair against the first respondent in circumstances where he had been given an opportunity to respond to the allegations against him and his responses had been taken into consideration before drawing any conclusions and which such conclusions are not only supported by the evidence availed to the appellant but were properly explained in the audit report.

5. The High court erred in setting aside the audit report in all aspects pertaining to the first respondent in the absence of evidence demonstrating bias or incompetence or unfair treatment or pointing to any irregularities in every such aspect."

RELIEF SOUGHT

[42] The appellant's prayer is that the order of the court *a quo* be set aside and replaced by an order dismissing the first respondent's application with costs at an attorney client scale.

ISSUES FOR DETERMINATION

[43] Although the 5 grounds of appeal raise various issues for determination, ground number one is capable of resolving the appeal without delving into the other remaining grounds. This is because it has to do with a challenge to the appellant's jurisdiction to exercise public authority when contracted by a public authority to perform specific tasks on its behalf.

[44] The simple issue that then arises from the first ground of appeal is whether the court *a quo* misdirected itself in holding that the appellant was exercising

public authority subject to judicial review when it carried out the forensic audit for and on behalf of the second respondent.

ANALYSIS OF THE FACTS AND THE LAW

[45] The facts of this case are by and large common cause. There are no material disputes of facts. It is common cause that the appellant is a private partnership carrying out business as a firm of Chartered Accountants under the style of **BDO CHARTERED ACCOUNTANTS**. In that capacity it was contracted by the second respondent to carry out the forensic audit in question for and on behalf of the Auditor General. It compiled the report, submitted it to the second respondent and moved out of the picture. The first respondent took umbrage with the report complaining that it put him in bad light. He then took the appellant's conduct and processes on review alleging various procedural irregularities arguing that the appellant's conduct amounted to the exercise of public power which is subject to review.

[46] The appellant's contention is that it was and is not an administrative authority. Accordingly, it did not take administrative action by compiling the forensic audit report. Its conduct was purely contractual. It conducted the forensic audit not as a public body but a private partnership contracted by the second respondent. As such it was not given authority to exercise administrative power or authority. Its processes and conduct as a private entity were therefore not subject to judicial review.

47] The first respondent accepted the factual position but contended that the appellant was the agent of the second respondent. It is the hand through which the second respondent acted, as such, the appellant's conduct could not be separated from that of its principal. For that reason it was exercising public authority when it conducted the forensic audit on behalf of the second respondent. Its conduct and processes were therefore subject to judicial review. So goes Mr M*pofu*'s argument on behalf of the first respondent.

[48] In countering the first respondent's appeal, Mr *Matinenga* submitted that in taking the matter for review the first respondent misconstrued and misunderstood the import and meaning of the term administrative authority as defined in s 2 (1) of AJA. The term is defined as follows:

> **"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) a committee or board appointed by or in terms of any enactment; or
> (c) a Minister or Deputy Minister 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;"

[49] The section is couched in clear and unambiguous language. Nowhere does it confer or suggest that a private entity not mentioned in the section falls within the ambit or definition of administrative authority. The non-mentioning of private entities as wielding administrative authority means that they are excluded from having such authority.

[50] In developing his argument Mr *Matinenga* placed reliance on the case of *Chirwa v Transet*[3] which illustrates the attributes and characteristics which are peculiar to an administrative authority through which it may be defined and identified. In that case the Constitutional Court of South Africa observed that:

> "Determining whether a power is "public" is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead it is a question that has to be answered with regard to all relevant factors including:
>
> (a) the relation of coercion or power that the actor has in its capacity as a public institution;
> (b) the impact of the decision on the public;
> (c) the source of the power; and
> (d) whether there is a need for the decision to be exercised in the public interest.
>
> None of these factors will be determinative; instead, a court must exercise its discretion considering their relative weight in the context."

[51] It is clear, as argued by Mr *Matinenga,* that the appellant does not fit anywhere within the statutory definition of 'administrative authority' or any of its attributes or characteristics laid down in the *Chirwa* case *supra*.

[52] With all due respect, Mr *Mpofu*'s argument that the mere fact that the second respondent hired the appellant as its agent, conferred administrative authority on the appellant is misplaced. This is for the simple reason that s 309 of the Constitution which creates the office of Auditor General does not confer him/her with the power to confer administrative authority on anyone. The section reads:

> "309 Auditor-General and his or her functions
>
> (1) There must be an Auditor-General, whose office is a public office but does not form part of the Public Service.

[3] 2008 (4) SA 367 (CC) at para 186

[Subsection amended by Act 2 of 2021]

(2) The functions of the Auditor-General are—

(*a*) to audit the accounts, financial systems and financial management of all departments, institutions and agencies of government, all provincial and metropolitan councils and all local authorities;

(*b*) at the request of the Government, to carry out special audits of the accounts of any statutory body or government-controlled entity;

(c) to order the taking of measures to rectify any defects in the management and safeguarding of public funds and public property; and

(d) to exercise other functions that may be conferred or imposed on him or her by or under an Act of Parliament.

(3) Public officers must comply with orders given to them by the (Auditor-General) in terms of subsection 2 (c).”

[53] It is plain that s 309 of the Constitution confers administrative authority on the second respondent and no one else. Had the law maker intended the Auditor General’s agents to also wield administrative power then, it would undoubtedly have said so. Its silence means that Parliament had no intention whatsoever to confer administrative authority on second respondent’s private agents.

[54] Section 9 of the Audit Office Act [*Chapter 22:18*] merely authorises the second respondent to hire private auditors to carryout audits and report to him/her in terms of the Act. The section does not authorise the second respondent to delegate his/her administrative authority to the hired auditors who remain mere functionaries or aids of the Auditor General without any power of substitution.

[55] In terms of the contract of service between the appellant and the second respondent it is clear that the appellant was merely hired as a vehicle to assist the second respondent to gather evidence in the course of executing its functions as a public administrative authority. That contract did not convert the appellant or confer administrative authority on it. By carrying out investigations and submitting a forensic audit report to the second respondent, the appellant was not rendering any decision. It was merely providing the second respondent with the means to help him/her to discharge his/her statutory functions.

DISPOSITION

[56] The appellant not being a public administrative authority and not having made any decision in that capacity the court *a quo* misdirected itself and fell into grave error by holding that the appellant was exercising public administrative authority when it carried out the forensic audit in question.

[57] The appellant not having made any public administrative decision when compiling the forensic audit report, its conduct and processes in that regard were not subject to judicial review.

[58] That being the case all the other issues raised and the entire review process carried out by the court *a quo* under case number HC 6503/19 fall away.

[59] Having regard to the complexity of the issues argued before us, it can hardly be said that the appellant's pursuit of this case amounts to an abuse of court process.

Both parties had an arguable case though the appellant emerged victorious. Costs follow the result at the normal scale.

[60] It is accordingly ordered that:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

"The application be and is hereby dismissed with costs."

MATHONSI JA : I Agree

CHIWESHE JA : I Agree

Sawyer & Mkushi, the appellant's legal practitioners.

Rubaya and Chatambudza, the respondent's legal practitioners