

ITAI DORINE NGWERUME  
versus  
CITY OF HARARE  
and  
MINISTER OF LOCAL GOVERNMENT,  
PUBLIC WORKS AND NATIONAL HOUSING

HIGH COURT OF ZIMBABWE  
**DUBE-BANDA J**  
HARARE; 11 October 2024 & 22 November 2024

**Application for a declaratur**

*S T Mutema*, for the applicant  
*S Kwaramba*, for the respondent

**DUBE-BANDA J:**

[1] This is a chamber application for a declaratory order. The applicant sought this court to declare that:

- i. Application for a declaratory order be and is hereby granted.
  - a. The Harare (Clamping and Tow Away By-Laws) 1983, subsequent amendments and any other bylaws that allow for the clamping of motor vehicles being subsidiary legislation that ultra vires the parent Act which is the Municipality Traffic Laws Enforcement Act [*Chapter 29:10*] be and are hereby declared illegal and void *ab origin*.
  - b. The issuance of a traffic laws violation notice that does not conform to the requirements of s 8 of the Municipality Traffic Laws Enforcement Act [*Chapter 29:10*] be and is hereby declared illegal.
  - c. The notice issued by the first respondent to the applicant being of a form contrary to s 8 of the Municipality Traffic Laws Enforcement Act [*Chapter 29:10*] be and is hereby declared a nullity.
  - d. The clamping of the applicant's vehicle being an act contrary to the Municipality Traffic Laws Enforcement Act [*Chapter 29:10*] be and is hereby declared to be illegal.

- ii. The first respondent be and is hereby ordered to pay costs of suit on an attorney client scale.

[2] The application is opposed by the first respondent. The second respondent neither filed opposing papers nor sought to participate in these proceedings, I take it has taken a position to abide by the decision of this court.

### **BACKGROUND FACTS**

[3] On 29 August 2023 the applicant parked her vehicle in the Central Business District of Harare. A company called City Parking (Pvt) Ltd clamped the vehicle and attached a notice showing that it was issued in terms of the Municipality Traffic Laws Enforcement Act and Harare (Clamping and Tow Away By-Laws). According to the notice the applicant contravened the law in that she failed to display a valid prepaid parking disc. The notice specified that the applicant must pay a prescribed penalty fee inclusive of VAT in the sum of US\$57.00, and warned that failure to pay the penalty, the vehicle would be towed away and extra charges levied on the applicant. The notice specified that should the applicant have any queries or complaints; she had to contact customer care at City Parking (Pvt) Ltd on the toll-free numbers provided in the notice. To secure the release of her vehicle, the applicant paid the prescribed penalty in local currency in the amount RTGS 302 100.00. The payment was made to City Parking (Pvt) Ltd and the company issued a receipt bearing its name.

[4] In the opposing papers, the first respondent raised what qualifies to be a preliminary objection to the applicant's claim. The first respondent disputed that it is its agents who clamped the applicant's vehicle. It was contended that there is a material non-joinder in that the clamping was done by City Parking (Pvt) Ltd or its workers or agents, and the payments were made to that company, and the company was not joined in these proceedings. I deal with the issue of non-joinder which, because of the view I take of this case, is dispositive of this application at this stage.

### **MATERIAL NON-JOINDER**

[5] The first respondent argued that there is a material non-joinder of City Parking (Pvt) Ltd. It contended that it was apparent from the founding papers that the vehicle was allegedly clamped by City Parking (Pvt) Ltd, and only it can answer to the factual allegations made by the applicant. It is the one accused of wrongdoing and therefore has a right to be heard. It was further submitted that granting the declarator sought would result in City Parking being permanently interdicted from enforcing the city bylaws which in itself would pose a threat to

its very existence. It would also interfere with the contractual relationship between it and the City of Harare. It was submitted further that this matter should not proceed without City Parking being joined to the proceedings.

[6] Per *contra*, the applicant argued that there was no material non-joinder. It was submitted that City Parking (Pvt) Ltd is merely an agent of the City of Harare, and its actions are attributable to its principal. It was argued further that it is first respondent which has the statutory power to enforce traffic laws and regulations in the City, not City Parking (Pvt) Ltd. It was contended that even if City Parking is an independent unit, its actions in respect of traffic laws are emanating from delegated power by the Municipality. The effect of which the actions of the agent are that of the principal. It was argued further that there would be no need to join an agent, and citing the delegating authority is sufficient. It was submitted that the preliminary point has no merit and ought to be dismissed.

[7] In *Tour Operators Business Association of Zimbabwe v Motor Insurance Pool & Ors* 2015 (1) ZLR 965 (CC) the court said that, as a matter of procedure, it is trite that a party instituting legal proceedings must cite every person who has a direct and substantial interest in the matter or who is likely to be prejudicially affected by the relief sought therein. See *Rodger & Ors v Muller & Ors* 2010 (1) ZLR 49 (H); *Henry Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (T).

[8] In *casu*, it is City Parking (Pvt) Ltd that directly clamped the applicant's vehicle, issued a notice and received the prescribed penalty fee. In the event this application succeeds, it would be City Parking that would have to refund the applicant the fee she paid. In addition, the order sought would result in City Parking being permanently interdicted from enforcing the City Bylaws which in itself would pause a threat to its income generation and its very existence. I agree with the submission that if the order sought is granted it will interfere with the contractual relationship between City Parking and the City of Harare. It is clear that City Parking has a direct and substantial interest in this matter and will be prejudicially affected by the relief sought therein.

[9] The argument that City Parking is a business unit of the City of Harare, even if it is correct, it is of no moment. It is of no consequence. I say so because upon the issuance of a certificate of incorporation, a company becomes a body corporate. In the eyes of the law, a company is a person distinct from its members and shareholders, a metaphysical entity or fiction of law, with legal but no physical existence. It is, as Lord Selborne observed in *Great Eastern Railway v Turner* (1872) LR 8 Ch App 149 at 152 "... a mere abstraction of law," and, as said by Lord

MacNaghten in *Salomon v Salomon & Co Ltd* [1897] AC 22 at 51 “at law a different person altogether from the subscribers to the memorandum of association.” In this jurisdiction the common law principle of corporate personality finds legislative sanction in the law. See *de Beers Consolidated Mines Ltd v Howe* [1906] AC 455; *Modcraft Engineering (Pvt) Ltd Tenda Buses (Pvt) Ltd & Anor* HH-207-13 at 7; *Zimbabwe Tourism Authority v Ringsilver Enterprises (Pvt) Ltd & Ors* 2019 (3) ZLR 1205 (H). In the circumstances, City Parking being a stand-alone company must have been cited in this application, it has a right to be heard.

[10] The question that arises is what is the effect of the non-joinder of City Parking in this application? Rule 32 (11) of the High Court Rules, 2021 provides that:

“No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.”

[11] The jurisprudence developed shows that non-joinder of a party with a direct and substantial interest in a matter cannot be disregarded under the guise of r 32 (11) of the High Court Rules, 2021. The court can, in an appropriate case may hold the non-joinder to be fatal and dismiss the case on that point alone. See *Rose v Arnold & Ors* 1995 (2) ZLR 17 (H); *Chabata v Charamba* HH-789-19; *Abrahamse & Ors v Cape Town City Council* 1954 (2) SA 178 (C) at 182-3; *Capital Alliance (Pvt) Ltd Renaissance Merchant Bank Ltd & Ors* 2006 (2) ZLR 232 (H). Further, a court may in the exercise of its discretion stay the proceedings and direct that the party with a direct and substantial interest be joined.

[12] In *Anabas Services (Pvt) Ltd v Ministry of Health & Ors* 2003 (1) ZLR 247 (H), the applicant had concluded a contract with the State for the cleaning of a State hospital. The hospital Superintendent had signed the contract on behalf of the State and that contract had been tacitly renewed by her. When the State terminated the contract, the applicant filed an urgent application contesting the termination. The Superintendent was not cited. The court held that it was essential to join the Superintendent as a party because she had a direct and substantial interest in the proceedings. The court could not allow the matter to proceed without such joinder or notice of the proceedings being given to the Superintendent. The proceedings were accordingly stayed to allow the Superintendent to be joined.

[13] I take the view that a determination of this application on the merits would invariably result in a serious violation of the rights of City Parking. It matters not that it has been contracted by the first respondent, the more reason it has to be heard. If this application is determined on the merits, City Parking’s right to be heard will be violated to the core. See

*Zimbabwe Combined Residents' & Ratepayers' Association & Ors v City of Harare & Ors* 2020 (1) ZLR 1082 (H). This matter cannot be debated without notice to City Parking (Pvt) Ltd. I accept that r 32 (11) gives the court a discretion to determine the issues or questions in dispute to the extent that they affect the rights and interests of the persons who are parties before it. I am unable to determine the merits of the dispute without the citation or notice of this application having been brought to the attention of City Parking (Pvt) Ltd. The matter must then end here. I have no intention of considering the merits of this application. Neither do I intend to dismiss this application because of non-joinder. I intend to follow the option or route taken in *Anabas Services (Pvt) Ltd v Ministry of Health & Ors (supra)* to stay these proceedings and direct that City Parking (Pvt) Ltd be joined. It is for these reasons that this application must be struck off the roll.

[14] There remains to be considered the costs of the present application. no grounds exist for a departure from the general rule that costs follow the event. The first respondent as the successful party is clearly entitled to its costs of the application at this stage.

In the result, I order as follows:

The application is accordingly struck off the roll with costs.

*Stancilous & Associates Law Firm*, applicant's legal practitioners

*Mbidzo Muchadehama & Makoni*, first respondent's legal practitioners