OBADIA TSHUMA
and
OPPAH DUBE
and
FARAI TICHAONA
and
MOSES N. NDLOVU
and
ALEXANDER SIBANDA
versus
JOSHUA NYAMPIMBI

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 12 AUGUST 2016 AND 18 AUGUST 2016

Urgent Chamber Application

B Sengweni for the applicants
K Ngwenya for the respondent

MATHONSI J: The applicants, who only say they are "teachers" employed by Youth Contact Centre, are seeking the following relief:

> "TERMS OF FINAL ORDER SOUGHT
> That (you) show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. That respondent be and is hereby permanently interdicted from interfering with the applicants and Youth Contact Centre.
>
> INTERIM RELIEF (GRANTED)
> That pending the determination of this matter, the applicant(s) are granted the following relief:
> 1. That the respondent be and is hereby ordered to stop interfering with the applicants in the conduct of their duties.
> 2. The respondent be and is hereby ordered to stop interfering with the business of Youth Contact Centre and to return all goods or stationery taken from Youth Contact Centre.
> 3. The applicant be and are hereby appointed as the Interim Management Board."

In his founding affidavit which is adopted by all the other applicants Obadia Tshuma, the first applicant, simply narrates that they are male or female adults (in the case of the third applicant) whose address is that of their legal practitioners and that they are teachers at Youth Contact Centre, a trust established in 1979. The constitution of the trust established a Board of Trustees which appoints executive members of a management board headed by a chairman. Tshuma goes on to say that on 17 June 2014 a new constitution of the trust was adopted by the Management Board but it was not authorized by the Minister of Finance and was not registered with the registrar of deeds. For those reasons it is a nullity given that clause 9 of the constitution requires all amendments to the constitution to be made by a two thirds majority at an Annual General Meeting or Special Meeting. It is stated that the new constitution created a position of a Director of Youth Contact Centre currently held by the respondent.

Since his appointment as a director the respondent has turned the trust into his private company and is solely running its affairs to the exclusion of the Management Board. He has failed to account for the funds of the trust and is currently trying to sell an immovable property belonging to the trust for his personal gain apart from looting movable property like computers and rentals due to the trust.

Owing to all those indiscretions, the applicants move for the appointment of an Interim Board. As they are "employees of the trust" they should be appointed as such interim board. As to how and indeed why an employee can be a board member at the same time the applicants do not say. They also do not elaborate on how they could be regarded as employees of the so called trust and the basis upon which they have a right to sue over issues involving Youth Contact Centre.

The respondent has opposed the application and stated in his opposing affidavit that Youth Contact Centre is not a trust but a private voluntary organization registered in terms of the Private Voluntary Organisations Act [Chapter 17:05]. He has submitted a copy of the certificate of registration. He is the Acting Director of the centre appointed by its Management Board by letter of 15 January 2016 which he has attached. The letter spells out his terms of reference.

The respondent has stated further that his employer mandated him by letter dated 3 February 2016 which he also attached to sell the immovable property belonging to his employer. In light of that and indeed the fact that the applicants are neither members nor trustees of Youth

Contact Centre and certainly do not represent the centre, they have no *locus standi in judicio* to make this application, which should fail on that score alone.

I must say that I have really struggled to appreciate why the applicants have seen it fit to approach the court the way they have done seeking the relief that they seek. If indeed the respondent is unlawfully or wrongfully interfering with the affairs of Youth Contact Centre or is threatening to unlawfully alienate its property, it is Youth Contact Centre which should be litigating in order to protect its interests. If the applicants are suing on its behalf they must establish some legal standing entitling them to do so, which legal standing regrettably is not apparent from the papers.

In the words of LICHTENBERG J in *SA Optometric Association* v *Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O) at 103I – 104 F:

> "To justify its participation in a suit or to bring proceedings for relief, a party must show that it has a direct and substantial interest in the right which is the subject-matter of the litigation and in the outcome of the litigation and not merely a financial interest which is only an indirect interest in such litigation. See *Henri Viljoen (Pty) Ltd* v *Awerbuch Brothers* 1953 (2) SA 151 (O) at 169H; *United Watch and Diamond Co (Pty) Ltd and Others* v *Disa Hotels Ltd and Another 1972 (4) SA 409 (C) at 415 E-H; PE: Bosman Transport Workers Committee and Others* v *Piet Bosman Transport (Pvt) Ltd* 1980 (4) SA 801I at 804 B – E and *Ahmadiyya Anjuman Ishaati – Islam Lahore (South Africa) and Another* v *Muslim Judicial Council (Cape) and Others* 1983 (4) SA 855 (C) at 863H – 844F."

The same proposition was made in our jurisdiction in the case of *Zimbabwe Teachers Association and Others* v *Minister of Education and Culture* 1990 (2) ZLR48 (H). "Direct and substantial interest" was explained in *Henri Viljoen (Pty) Ltd* v *Awerbuch Brothers, supra*, as connoting an interest in the right which is the subject matter of the litigation and not a financial interest which is only an indirect interest in such litigation.

In *United Watch and Diamond Co (Pty) Ltd and Others* v *Disa Hotels Ltd and Another*, supra at 415H CORBETT J said:

> "This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division ---- and it is generally accepted that what is required is a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the court."

In my view, it is that interest that the applicants in this matter do not have. Whether they are teachers employed by Youth Contact Centre or trespassers as alleged by Youth Contact

Centre in an application for a binding over order filed at the magistrates court as BOP68/16 nothing really changes. They have no legal standing to sue a director of Youth Contact Centre on the latter's behalf seeking to prevent the discharge of duties assigned to him by that institution.

Significantly, even if Youth Contact Centre was indeed a trust, they do not allege that they are trustees. Quite to the contrary they would want to be appointed as a management board. No legal basis is established firstly for this court to act as an appointing authority of a private entity and appoint its board and secondly for the applicants themselves to hold such positions. It is just a pipe dream which should end as such and cannot find endorsement in a court of law.

In my view this application is spectacular by its lack of merit. Legal practitioners engaged by litigants to represent them and draft court process on their behalf must always ask themselves the important questions; What is the cause of action? Does the litigant have a legal right to sue? These questions should be addressed before one attempts to put together a suit. It does not appear as if such interrogation was ever undertaken.

Mr Sengweni who appeared for the applicants submitted that the applicants are employees of Youth Contact Centre who are unhappy with the manner in which the centre is being run. After we had traded a few war stories, he conceded that the application was ill advised but refuted that for their troubles the applicants should be lambered with punitive costs which *Mr Ngwenya* for the respondent urged of me.

What the court has regards to in deciding whether to award costs on a punitive scale or not was set out by CHEDA J in *Mahembe* v *Matambo* 2003 (1) ZLR 149 (H) 150 B-D . Such costs may be awarded where there is dishonest conduct, malicious conduct, vexatious proceedings, reckless proceedings and frivolous proceedings. See also *Fuyana* v *Moyo and Others* 2005 (1) ZLR 302(H) 306B.

In my view this application is both frivolous and vexatious in that it is obviously unsustainable, manifestly groundless and utterly hopeless and without foundation. It should not have been made at all especially by people with the benefit of legal counsel. The respondent has been unnecessarily put out of pocket as a result and should be compensated. All his costs must be recovered.

In the result, the application is hereby dismissed with costs on the scale of legal practitioner and client.

Sengweni Legal Practice, applicants' legal practitioners
T. J. Mabhikwa and Partners, respondent's legal practitioners