SOUTHLEA PARK HOME OWNERS ASSOCIATION
versus
SENSENE INVESTMENTS (PRIVATE) LIMITED
and
THE MINISTER OF LOCAL GOVERNMRNT, PUBLIC WORKS AND NATIONAL HOUSING
and
THE ATTORNEY GENERAL
and
ODAR HOUSING DVELOPMENT CONSORTIUM

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 6 September 2018 & 6 February 2019

Opposed Application

G. Madzoka, for applicant
N. Mugandiwa, for first respondent
K. Warinda, for second and third respondents
Fourth Respondent barred

MUSAKWA J: The original draft of the relief sought by the applicant was to the effect that:

"i. Transfer of the Remainder of the-Farm Odar situate in the District of Salisbury measuring 605, 8092 hectares from the government of Zimbabwe to Sensene Investments (Private) Limited under Deed of Transfer No. 2807/2015 dated the 8th of July 2015 be and is hereby set aside.

ii. It is declared that the acquisition of the Remainder of the Farm Odar held under Deed of Transfer No. 5816/1985 was done for purposes of urban settlement for low income earners and hence the land should not be sold to the beneficiaries at market prices.

iii. 2nd Respondent be and is hereby ordered to cause an assessment of fair compensation of the Remainder of Farm Odar in terms of the Land Acquisition Act.

iv. The management committee of the 4th Respondent be and is hereby dissolved and the 4th Respondent be and is hereby ordered to hold elections for a new management committee.

v. 2nd Respondent be and is hereby ordered to issue title deeds to the 4th respondent with respect to the Remainder of Farm Odar to enable it to finalise the development of the land and thereafter issue individual title deeds to its members with respect to their individual stands.

vi. 1st Respondent be and is hereby ordered to pay the costs of this application on an attorney and client scale."

At the commencement of the hearing Mr *Madzoka* indicated that the applicant was dropping relief that was being sought in paragraphs ii, iii and v thereby remaining with paragraphs i, iv and vi. Although I did not see the returns of service, Mr *Manyani* (out of courtesy) appeared and indicated that the fourth respondent was barred and was not participating in the proceedings. Either the notice of opposition or the heads of argument might have been filed out of time.

The background to this application is that Odar Farm was compulsorily acquired by the Government of Zimbabwe in 2009 from Zimbabwe Tobacco Association. The acquisition was confirmed by the Administrative Court. An appeal to the Supreme Court was dismissed. In 2015 the land was transferred to the first respondent.

The applicant contends that in 2006 the Government entered into an agreement with the fourth respondent by way of a Joint Venture Agreement whereby the remainder of Odar Farm was allocated to the fourth respondent. The fourth respondent would in turn allocate the land to beneficiaries for residential purposes.

The Government undertook to give title to members of the fourth respondent who included the applicant. The fourth respondent was to obtain a subdivision permit and pay compensation to Zimbabwe Tobacco Association in terms of the Land Acquisition Act. The fourth respondent then embarked on developing the land.

In February 2015 the second respondent entered into an agreement with the first respondent the terms of which entailed that the land reverted to Zimbabwe Tobacco Association. The reason for this was that the first respondent is a wholly owned indigenous entity. The second respondent authorised the first respondent to develop the land and get compensation from the beneficiaries. This disregarded the developments that had already been made by the fourth respondent. Title in the land was passed in favour of the first respondent.

The fourth respondent instituted proceedings to set aside deed of transfer 2807/15 in HC 6583/15. The first respondent is said to have caused the arrest of members of the fourth respondent's management committee. As a result of the undue pressure, the management committee agreed to withdraw litigation in HC 6583/15 and also agreed to purchase the land. However, it is contended that the management committee had no such mandate since its mandate had lapsed in terms of the Joint Venture Agreement. It is further contended that compensation was not due without fair valuation.

In opposition, the first respondent raised some points in *limine*. The first point concerns the applicant's *locus standi* and authority to institute the proceedings. The second point concerns the non-joinder of the Ministry of Lands as a respondent in the current proceedings.

On the merits the first respondent contends that the Remainder of Odar farm was transferred to it by Zimbabwe Tobacco Association in 2001 as part of restructuring of its assets. Registration of the transfer was not effected then. Title deeds disappeared at the time of occupation of the land by the fourth respondent's members. Between 2001 and 2006 several attempts were made to compulsorily acquire the property without success.

Between 2008 and 2009 consultations were made and it was resolved that the fourth respondent should pay compensation of which the fourth respondent was reluctant. The land was compulsorily acquired in 2010. The state failed to pay compensation but an agreement was reached with the fourth respondent to pay compensation. In 2014 the first respondent engaged the Ministry of Lands to have the land restored to its owner. Hence the proposal of the 19 December 2014 which culminated in a memorandum of agreement between the Government of Zimbabwe and Zimbabwe Tobacco Association.

In his opposing affidavit the third respondent contends that the applicant has not demonstrated its *locus standi* to institute the present proceedings. In particular he points out that the applicant did not attach its constitution to the founding papers.

The third respondent also contends that the essence of the applicant's case is to challenge the transfer of land in favour of the first respondent. In such a case the challenge should have been by way of review. Consequently the application was filed way out of time. Assuming that it is an application for review, no grounds are apparent. The declarateur sought is incompetent as it is factual as it does not relate to existing or contingent rights. Essentially the third respondent confined his opposition to attacking the procedural flaws in the application, with a request to be granted leave to file another opposing affidavit addressing the merits. With respect, that is not how court applications are handled in our jurisdiction. An opposing affidavit should canvass both preliminary points and substantive issues.

I now proceed to deal with the issues

Non-Joinder

No submissions were made on this issue. In any event r 87 (1) of the Rules of The High Court provides that-

> "(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder 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."

It can also be noted that the real dispute, considering the relief sought is between the applicant and the first respondent which stands to be most affected by the order for cancellation of title deed number 2807/15. I cannot see how the non-citation of the acquiring authority is fatal to the proceedings.

Locus Standi

In *CT Bolts (Private) Limited* v *Workers Committee* SC 16-12 it was held that a body that has no constitution is not a *universitas* as it is the constitution that determines whether the body is a *universitas*.

The applicant annexed to its answering affidavit an undated copy of its constitution. The constitution provides that the applicant is a *universitas* with the capacity to sue or be sued in its name. The constitution also provides for objects of the applicant of which clause 2.4 provides one of the objects as to-

> "Engage relevant authorities and persons whether juristic persons or individuals in ensuring that ownership of Farm Odar is resolved including suing in the Courts of Law for assessment of fair compensation payable by Southlea Park Home owners to whomsoever is payable to in terms of Land Acquisition Act."

The third respondent, up to the time of filing heads of argument contended that he had not been served with a copy of the applicant's constitution. On the other hand Mr *Mugandiwa* submitted that the constitution availed by the applicant is undated. He further submitted that the applicant came into existence after the present proceedings had commenced and the decision to sue was made in January 2016. Reference was made to correspondence from the Combined Harare Residents Association dated 13 January 2016 in which the applicant's membership was acknowledged. The present application was filed on 12 January 2016.

It is curious that the applicant's constitution is undated. The matter is compounded by the fact that the document was produced in reply to the first respondent's opposing affidavit. It means there was no further opportunity to elucidate the issue. In light of the contention by the first respondent, it remains unclear when the applicant came into existence. If the applicant was formed on 13 January 2016, then it had no capacity to have filed the application on 12 January 2016. This uncertainty gives credence to the averment by the first respondent that the applicant

was hitherto unknown to it. It means therefore that the applicant's *locus standi* is not well established.

Another essential ingredient of *locus standi* is that a party who institutes legal proceedings must demonstrate some interest that requires legal protection. In the case of *Lottie Gertrude Bevier Stevenson* v *The Minister of Local Government and National Housing and Others* SC 38/02 it was held that there must be real and substantial interest or direct and substantial interest.

The applicant's gripe is the second respondent's donation of acquired land to the first respondent. This, it contends is unfair and unreasonable as it adversely affects the fourth respondent's members. The other complaint is that the fourth respondent succumbed to pressure and withdrew litigation in HC 6583/15. It is contended that the management committee of the fourth respondent had no authority to withdraw the litigation. Allied to the claim that the management committee had no authority to withdraw litigation is the claim that the term of office of the management committee had long lapsed.

The issue of interest will also be discussed under another head hereunder. It suffices to observe that assuming that the above averments ascribed to the applicant constitute interest for purposes of instituting the proceedings the essential question of the applicant's genesis and existence as a legal entity remains unanswered.

Whether On The Merits The Applicant Has Made A Case

Mr *Madzoka* for the applicant submitted that the donation of acquired land to the first respondent by the second respondent was improper. This is because the land did not revert to the original owner (Zimbabwe Tobacco Association) in terms of s 10 (a) (i) of the Land Acquisition Act [*Chapter 20:10*]. It may be noted that in the founding affidavit it is contended that in 2015 the second respondent returned the land to Zimbabwe Tobacco Association without consulting the fourth respondent. It was further averred that the ministerial decision to restore the land was expected to have been fair and reasonable, taking into account the fourth respondent's interests.

Counsels for the first and second respondents submitted that the application is one for review albeit filed out of time. Their contention was that one needs to consider the substance of the application as opposed to the relief sought. Reference is made in the third respondent's heads of argument to the case of *Edwin Mushoriwa* v *Zimbabwe Banking Corporation* HH-23-2008 in which GOWORA J as she then was said at p 5-

> "In determining the nature of the relief that is sought by a litigant a court is bound to examine the process by which the relief being sought can be achieved. A draft order cannot, on its own, per se be the determining factor of the nature of such relief as the draft order is achieved or arrived at through a process."

If one considers averments in the founding affidavit there is no doubt that the applicant is aggrieved by the manner in which the land was transferred to the first respondent. The applicant is also aggrieved by the amount members of the fourth respondent have to pay to the first respondent. The applicant contends that the open market value for the stands is onerous to the fourth respondent's members. In fact, this is an argument that should be made by the fourth respondent or its individual members and not the applicant. There is no doubt that the substance of the application is one for review, which review is well out of time. Even the quest to portray this application as one for a declarateur falls off as Mr *Madzoka* hived off that relief and others.

In light of the barring of the fourth respondent consideration has to be made whether the applicant is entitled to the order it seeks against the fourth respondent by way of default. The fourth respondent against whom an order is sought has fifty two members of which the applicant is not. Clause (g) of the Joint Venture Agreement provides that-

> "The duration of the term of office of the Management Committee shall be one (1) year but provided that the partners may remove and or dissolve the Management Committee as and when they wish."

In light of the fact that the applicant is not part of the Joint Venture Agreement, it has no cause to influence the reconstitution of the fourth respondent's Management Committee. In addition, clause eight of the Joint Venture Agreement provides for referral of any disputes to arbitration. Therefore the applicant is clearly offside in its suit against the fourth respondent.

In light of the foregoing, the application is dismissed with costs.

Madanhi, Mugadza & Co, applicant's legal practitioners
Kantor & Immerman, first respondent's legal practitioners
Civil Division of the Attorney General's Office, third respondent's legal practitioners