

N-FRAYS INFRASTRUCTURE (PVT) LTD
Versus
MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS
And
ATTORNEY GENERAL N.O

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 5 & 30 March and 29 June 2024

Chamber application

C.Duri for applicant
Respondents in default

CHILIMBE J

BACKGROUND

[1] This dispute traces its origin to the Land Reform Programme. For a recap on the purpose and background to that programme, see BHUNU JA`s concise treatise in *TBIC Investments (Private) Limited & Anor v Kennedy Mangenje & 5 Ors* SC 13-18.

[2] At stake herein is a one-hundred-hectare tract of state land located in the environs east of Harare. The applicant (“N-Frays”) is a land developer. Its objects in such capacity include securing vacant (farm) land and taking all necessary steps to establish thereon a residential township.

[3] First respondent (“the Minister”) is an administrative authority as defined by section 2 of the Administrative Justice Act [Chapter 10:28]. The second respondent (“AG”) is a constitutional appointee and principal legal advisor to government.

[4] N-Frays seeks herein an order in the following terms as against the first respondent Minister that; -

1. “The decision by the 1st respondent to withdraw the offer of one hundred (100) hectares of land in Chishawasha B Goromonzi Farm [which] it had offered the applicant be and is hereby set aside.

2. The offer of the 1st respondent to the applicant captured in a letter dated 16 May 2016 in respect of 100 (one hundred) hectares in Chishawasha B Goromonzi Farm be and is hereby revived with all terms still standing between the parties.
3. The 1st respondent to pay costs of suits on ordinary scale.”

[5] This order was sought in default. The respondents herein did not oppose an earlier application by N-Frays wherein it had approached the court (in its own words) “*seeking a judicial review in terms of [section] 4.1 as read with section 2.2 of the [Administrative Justice] Act.*”

BASIS OF THE APPLICATION

[6] The Administrative Justice Act [Chapter 10:28], (“the Act”) generates a number of considerations to guide the High Court in the exercise of its discretion in applications brought in terms of that Act. I will advert to these in the course of this judgment. I further considered the facts of the matter before me as read against the general guidance on the need for order and rationality in land administration processes¹.

[7] It is on account of those that I invited Mr. *Duri* for the applicant N-Frays to address me on a number of matters regarding the order sought. Counsel responded with commendable diligence. He filed insightful heads of argument that explored a diverse range of authorities on the subject in general, and matter before the court in particular. I am indebted to counsel in that regard.

[8] I may however, comment in passing on the default judgment application. The respondents were automatically barred in terms of r32(3) for failure to oppose the matter. In that regard, N-Frays`s application for default judgment need not have been fully fledged. There was no need to file an affidavit and annexures. The result was a pointless replication, in every respect, of the main application. The Commercial Court Rules provide, by rr 35 (1) and 38 (2) for a simple procedure as follows; -

- i. 35. (1) Where the respondent is barred for failure to file a notice of opposition in terms of Rule 32, the applicant may, without notice to him or her or it, set the matter down for a default judgment.

¹ See *TBIC Investments (Private) Limited & Anor v Kennedy Mangenje & 5 Ors* (supra); *Chitungwiza Municipality v United We stand Cooperative & Anor* HH 3-14; *Chikutu & 2 Ors v Minister of Lands & 2 Ors* HH 2-22;

- ii. 38.(2) Where a chamber application is for a default judgment in terms of Rule 25(2) or for other relief where the facts are evident from the record, it shall not be necessary to annex a supporting affidavit.

[9] I return to the dispute. Mr. *Duri* recounted the basis of the dispute as set out in both the main and default applications. N-Frays applied for a parcel of land from the Minister sometime in 2016. Like so many other “land developers” around Zimbabwe’s urban centres, the purpose was to divide the land into smaller units called “stands”. The stands would be sold to prospective homeowners as well those intending to set up commercial and other institutions. The entire purpose being, as per *TBIC v Mangenje (supra)*, to ease the demand for land for housing and institutional needs.

[10] N-Frays’s application was favoured by the Minister. By letter dated 16 May 2016, the Minister “offered” N-Frays the hundred hectares on Chishawasha Attached to the offer were a number of conditions. Principally, the land size was to be excised from Chishawasha B before the establishment of the township could progress. Secondly, N-Frays was instructed to “merge with other developers” who had also been allocated land on the same farm.

[11] The purpose behind such collaboration being to attain a coordinated approach in resourcing, implementation and fulfilment of formalities pre-requisite to delivering the project. Thereafter, the Minister indicated that a “Memorandum of Understanding” would be concluded between the parties setting out further implementation details including timelines.

[12] N-Frays averred that it was charged an amount of US\$2,000,000 or equivalent in local currency for the intrinsic value of land. It duly paid this in the form of ZWL\$2,019,150. Apparently, the Minister then reneged on his undertaking to instruct the Department of Physical Planning to carve out the 100 hectares from Chishawasha B Farm. This was so despite countless pleas from N-Frays between 2016 and 2023.

[13] On 11 May 2023, N-Frays’s legal practitioners of record addressed a demand to the Minister. They called him in that letter, under threat of legal action, to honour his 16 May 2016 offer and demarcate the 100 hectares of land. The Minister responded a month later on 14 June 2023 withdrawing its 2016 offer. The withdrawal was, according to the letter; - “.... *due to offsite infrastructural constraints particularly the absence of bulk water supplies.*”

BASIS FOR IMPUGNING THE MINISTER’S ACTION

[14] N-Frays was aggrieved by this decision. The Minister's decision was offended the standards and obligations placed on administrative authority in terms of the Act. Counsel cited the remarks of this court per MAKARAU JP (as she then was) in *U-Tow Trailers (Pvt) Ltd v City of Harare & Anor* 2009 (2) ZLR 259. In that decision, the learned Judge President described the pivotal nature of the Act in prescribing requirements of good administrative conduct at 267 F-G; -

“That the promulgation of the Act brings in a new era in administrative law in this jurisdiction cannot be disputed. It can no longer be business as usual for all administrative authorities as there has been a seismic shift in this branch of the law. The shift that has occurred is in my view profound as it brings under the judicial microscope all decisions of administrative authorities save where the provisions of section 3 (3) of the Act applies.”

[15] This decision was followed in *Nyathi & Ors v Lupane State University* HB 104-18 where MATHONSI J (as he then was) held as follows [at page 7]; -

“Now, in terms of section 68 (1) of the Constitution every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. It has been stated that ever since the advent of the Administrative Justice Act [Chapter 10:28], which embodies the constitutional rights contained in section 68 of the Constitution in section 3, that it is no longer business as usual for administrative authorities. They have to make decisions which, when they affect the rights, interests or legitimate expectations of others, are lawful, reasonable and fair. See *U-Tow Trailers (Pvt) Ltd v City of Harare and Another* 2009 (2) ZLR 259 (H) at 267 F-G; *Mabuto v Women's University in Africa and Others* 2015 (2) ZLR 355 (H) at 356 A-C.”

[16] N-Frays raised similar complaints herein. The Minister's decision was impugned in an array of colourful mal-administrative epithets. Apart from being unlawful and unwarranted, it was attacked in the founding affidavit as being irrational, unfair, arbitrary, predicated on mischief and was a decision so flawed that; -

“...it goes beyond mere faultiness and incorrectness and it constitutes a palpable inequity that is so far reaching in its defiance of logic or accepted standards that a

sensible or fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the decision”

[17] This impressive borrowing from an assortment of dicta failed to move the Minister. That non-response fortified Mr. *Duri* in his prayer that remitting this matter back to the Minister to remedy his actions would be fruitless. It exemplified the attitude of disdain that characterised the Minister`s decision and conduct, so argued counsel.

[18] It made no sense at all for the Minister to withdraw the offer on the basis on non-availability of bulk water supplies. The very reason why N-Frays and other developers were banding together was to deliver such services including roads, drainage, public lighting, bulk water supply and sewerage systems.

[19] What particularly aggravated N-Frays was that the Minister proceeded to collect the payment for the intrinsic value of land only to turn around and revoke the offer. No attempt was made to engage N-Frays over the matter. Persistent requests for an audience were spurned. Clearly, the Minister proceeded on a business-as-usual mode of the type prohibited by the Act. It is necessary at this stage to advert to the relevant provisions of the Act itself.

THE PROVISIONS OF THE ACT

[20] As noted above, the present application is based on section 4 of the Act. This section creates the right of a party aggrieved by “administrative action” by an “administrative authority” to approach the High Court for recourse set out in the Act. Section 2 of the Act defines both administrative authority and its applicable action.

[21] Section 3 of the Act outlines the standards to govern discharge of administrative action by the relevant authority. As a general axiom, where an authority fails to meet the prescribed duty and standard, the remedy usually lies in directing the authority to address the service failures. In that respect, section 3 itself automatically guides the court on the intervention that might be necessary to resolve the administrative authority`s default. I set out section 3 hereunder; -

3 Duty of administrative authority

(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or *legitimate expectations* of any person shall—

(a) act lawfully, reasonably and in a fair manner; and

(b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and

(c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.

(2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1)—

(a) adequate notice of the nature and purpose of the proposed action; and

(b) *a reasonable opportunity to make adequate representations*; and

(c) adequate notice of any right of review or appeal where applicable.

(3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if—

(a) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or

(b) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including—

(i) the objects of the applicable enactment or rule of common law;

(ii) the likely effect of its action;

(iii) the urgency of the matter or the urgency of acting thereon;

(iv) the need to promote efficient administration and good governance;

(v) the need to promote the public interest.

[22] Section 3 provides as follows; -

4 Relief against administrative authorities

(1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section *three* may apply to the High Court for relief.

(2) Upon an application being made to it in terms of subsection (1), the High Court may, as may be appropriate—

(a) confirm or set aside the decision concerned;

(b) refer the matter back to the administrative authority concerned for consideration or reconsideration;

(c) direct the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;

(d) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;

(e) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section *three*.

(3) Directions given in terms of subsection (2) may include directions as to the manner or procedure which the administrative authority should adopt in arriving at its decision and directions to ensure compliance by the administrative authority with the relevant law or empowering provision.

(4) The High Court may at any time vary or revoke any order or direction given in terms of subsection (2).

[23] Before a court grants the relief set out in section 3 of the Act, it must have regard to the determining factors (17 of them) listed in section 5 of the Act. It is on the basis of the foregoing that I invited submissions from Mr. *Duri* on the relief available in terms of section 4 (2) (a) to (e) of the Act. Counsel submitted as follows; -

- i. The Minister`s default was both blatant and irrational. As such, his decision to withdraw an offer of land could not be confirmed in terms of section 4 (2) (a).

The most appropriate remedy was to set aside that flawed decision as per the alternative option set out in the same paragraph (a) of section 4 (2).

- ii. Remitting the matter back to the Minister per section 4 (2) (b), for consideration or reconsideration would, according to counsel, be an inappropriate option. The decision needed no reconsideration for to do so would be to endorse its unlawfulness. The withdrawal of the offer had to be simply set aside.
- iii. Paragraph 4 (2) (c) was again, according to Mr. *Duri*, inapplicable. This paragraph empowered the court to give specific directions to the administrative authority to take specific action within a specific period. Counsel's argument in discounting this option was riveted on his original position to the effect that the Minister's action was unlawful and had to be set aside.
- iv. In the same vein, 4(2) (d) [where the court could direct Minister to supply reasons] was inapplicable because he had done so already.
- v. Finally, Mr. *Duri* submitted that the court could issue no other guidance as per section 4(2) (e) other than set aside the decision.

THE ADMINISTRATIVE FAILURE

[24] I am in agreement with Mr. *Duri* that the Minister's decision to withdraw from an arrangement fell short of the standards prescribed in the Act. On the face of it, the reason tendered does not make sense. Without an elaboration, his decision manifests as irrational. He did not offer applicant an opportunity to make representations. He further ignored persistent requests for engagement, this being a most basic aspect of fair administrative conduct.

[25] What the Act requires is the identification of the breach by the administrative authority. Herein the question is; -was the decision to withdraw the offer unlawful, irrational and unfair? Mr. *Duri* argues that by because the decision was issued in violation of the standards defining proper administrative conduct, the decision became unlawful.

[26] The decision did not as such, issue from an act or conduct that was intrinsically unlawful. Put differently, the Minister's decision could have been based on valid grounds conduct but for the failure to engage or elaborate the basis of the decision. This distinction is important. The authorities relate to the need to identify unlawfulness of administrative action (see *Secretary for Transport & Anor v Makwavarara* 1991 (1) ZLR 18 (S); *Tsvangirai & Anor v Registrar*

General & Ors 2002 (1) ZLR 251 (H); Vorster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province, and Others 2006 (5) SA 291).

[27] That inquiry forms part of the 17 considerations to guide a court in identifying the most appropriate remedy per section 5 of the Act. The Act seeks to attain good, prompt, fair and progressive administrative conduct. In doing so, the Act intends to instil accountability in administrative conduct. It does not seek to take away the authority, powers, or discretion of administrative authorities.²

[28] In terms of section 3 (3) of the Act, an administrative authority may depart from the standards of administrative conduct set by section 3 (1). But in doing so, it must justify the basis of such departure on the grounds set in paragraphs (a) and (b) thereof. Subparagraphs (i) to (iv) of 3 (3) (b) state thus; -

- (i) the objects of the applicable enactment or rule of common law;
- (ii) the likely effect of its action;
- (iii) the urgency of the matter or the urgency of acting thereon;
- (iv) the need to promote efficient administration and good governance;
- (v) the need to promote the public interest.

[29] These exemptions, especially subparagraph (v) are critical to the exercise of administrative action. I draw attention to two important issues hereon. Firstly, administrative authorities should consider the grounds listed in section 3 (3) (b) as a spear to enable sound administrative conduct, rather than a mere shield to justify departure from offering good, prompt and fair service to the public.

[30] Secondly, administrative authorities ought, as far as such is feasible and non-self-defeating, account to those persons affected by its decisions. In the same vein, the Minister could have fully explained the reason behind his decision in response to this application. But no opposition was filed herein thus depriving the court of an opportunity to better interrogate the compliant before it.

² See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490,*

The Act merely exhorts them to exercise such powers responsibly. Herein, the issue is not to bar the Minister from withdrawing the offer, but to justify his decision to do so rather than proceeding arbitrarily and irrationally.

[31] Against that background I have taken into account the *causa* driving the applicant's claim. Whilst applicant's primary protest is that the Minister acted unfairly, the secondary issue is the disenfranchisement from opportunity caused by the Minister's actions. Aside from the Minister being an administrative authority, the two parties purported to enter into a contract.

[32] Whilst the application herein was brought on the basis of an administrative complaint-Frays's underlying motivation is the "legitimate expectation" of the fruits of the venture. Legitimate expectation is referred to in section 3 (1) of the Act and constitutes a well-established legal principle (see *Administrator, Transvaal v Traub* (1989) 10 ILJ 823 (A); *Tel One v Sengende*, SC 64-15 and Professor Madhuku L, Labour Law in Zimbabwe, Weaver Press, 2015 at page 101;).

[33] As noted, the Minister's decision is not being impugned on the basis of underlying unlawfulness. It has been attacked for his failure to act with requisite propriety. In that regard, what is required herein is to balance the applicant's perceived entitlement as legitimately expected, and the need to ensure that the administrative authority (and the through him the greater public) is not unduly fettered in the legitimate exercise of duty.

[34] It is therefore just and proper that the Minister's decision to withdraw N-Frays's offer of a hundred hectares of land on Chishawasha B Farm be set aside. This position will pave the way for both parties to proceed according to their respective rights. The second paragraph of the draft prayed for becomes superfluous and will be excised.

DISPOSITION

It is hereby ordered that; -

1. The decision by the 1st respondent to withdraw the offer of one hundred (100) hectares of land in Chishawasha B Goromonzi Farm which it had offered the applicant be and is hereby set aside.
2. Applicant to serve a copy of this judgment and Order on first and second respondents within seven (7) days hereof.

3. That there be no order as to costs.

Duri Law Chambers-applicant's legal practitioners

[CHILIMBE J____