ZIMBABWE HOMELESS PEOPLE FEDERATION
and
KNOWLEDGE TINASHE KWAMBANA
and
WARSHIP DUMBA
versus
THE CITY OF HARARE
and
AUGUR INVESTMENTS OU
and
THE MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS
and
KENNETH RAYDON SHARPE
and
TATIANA ALESHINA
and
MICHAEL VAN BLERK
and
SUNSHINE DEVELOPMENT (PVT) LTD
and
REGISTRAR OF DEEDS
and
REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 9 & 15 July 2022

Opposed Application

ET Matinenga, for the applicants
C Kwaramba, for the 1st respondent
T Zhuwarara, for the 2nd, 4th, 5th, 6th & 7th respondents'
LT Muradzikwa, for the 3rd respondent

MANGOTA J: Zimbabwe Homeless People Federation, an universitas, Knowledge Tinashe Kwambana and Warship Dumba, natural persons, ("the applicant") sued the City of Harare and Augur Investments OU ("Augur"), which are the first and second respondents respectively, among other respondents. It moves me to:

(i) declare as a nullity and set aside the Memorandum of Understanding and the Shareholders Agreement which the first and the second respondents ("the parties") concluded between them on 21 June, 2007 and 4 September, 2007 respectively.

(ii) set aside all transfer of land from the City of Harare to Sunshine Development (Private) Limited, the seventh respondent herein, which transfer was effected pursuant to the abovementioned two agreements as well as cancel all title deeds arising from the same.

The seventh respondent is a product of the two agreements which the first and second respondents concluded. It is a joint venture company which the parties gave birth to on a 30% and 70% shareholding structure respectively. Augur, it was agreed, would provide funding to the joint venture company to the tune of USD20 million to USD 30 million. The City of Harare, the agreement of the parties' states, would provide pieces of land which is reflected in Annexure A to the Shareholders Agreement.

The aims and objects of the joint venture company were/are to:

a) build middle income houses and a hotel at Mabelreign Golf Course, develop a commercial center at Hopley and Mukuvisi phase one incorporating the Airport Road;
b) obtain the requisite regulatory approval licences and consent to implement the project;
c) acquire the necessary land or property for the operations of the joint venture company and for construction of the said houses;
d) establish necessary organizational structure and employ the necessary human resources for implementing the policies;
e) procure all necessary material for the project;
f) procure the necessary funding for the project – and
g) market, sell and confer the houses.

It is the applicant's contention that, whilst 99.4197 hectares were to be transferred to the seventh respondent in terms of the Shareholders Agreement, more than 239.3823 hectares of land found their way to the seventh respondent. It posed such questions as the following: on what basis was additional land outside the agreement allocated? Why was land allocated without following due process which is defined in section 151 of the Urban Councils Act? It averred that notwithstanding the transfer of huge amounts of land to the seventh respondent, Augur failed to honour its part of the agreement. It failed, the allegation goes, to inject the capital sum of USD 30

million as was envisaged in the Shareholders Agreement. It did not, the applicant argues, develop the land for the purposes which the parties agreed between themselves. It is for the mentioned reason that the applicant moves for a declaratur nullifying the two agreements and cancelling all the deeds of transfer of land to the seventh respondent. It rests its cause of action on the allegation that:

(i) the City of Harare's officials who signed the two agreements did not have the authority from the City of Harare to act as they did;
(ii) Augur violated Zimbabwe's investment laws;
(iii) City of Harare violated the country's procurement laws;
(iv) the agreements were/are a fraud and are contracts which are against public policy-and
(v) the agreements should be set aside on the ground of unjust enrichment.

The agreements, the applicant asserts, represent a fraudulent vehicle of extracting land from the City of Harare. This, it avers, is against decency. It contends that the share structure and the valuation of the land in a currency, Zimbabwe dollars, that was malcited by hyperinflation were meant to defraud the citizens of Zimbabwe. The seventh respondent, the applicant claims, with the collusion of the City of Harare and the fourth respondent herein, has fraudulently and corruptly acquired land outside the shareholders agreement.

The above, in a nutshell, is the case of the applicant.

Save for the eighth and ninth respondents who are respectively the Registrar of Deeds and the Registrar of Companies both of whom were cited in their official capacities and who did not oppose the application, the rest of the respondents filed their respective notices of opposition to the same. They, in substance, sang from the same hymn-book, so to speak. They raised three *in limine* matters and proceeded to deal with the merits of the application. The preliminary matters which they raised are that:

a) the applicant's claim has prescribed;
b) the applicant does not have the requisite *locus* to sue them - and
c) the case of the applicant suffers from material disputes of fact.

Prescription is a defence which the defendant or respondent, in convention or reconvention, employs extensively to ward off the claim of the plaintiff or the applicant, in convention or reconvention. In this jurisdiction, the defence is provided for under the Prescription Act,

[*Chapter 8:11*] ("the Act"). Its aim and object are to, *inter alia*, provide for the extinction of debts by extinctive prescription. The Act defines a debt to include anything which may be sued for or claimed by reason of an obligation which arises from statute, contract, delict or otherwise.

Prescription, according to the Act, commences to run as soon as a debt is due and a debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises. The Act states that the prescriptive period of any debt which falls under para (d) of s 15 of the Act shall be three years.

The respondents, it has been observed, raise the defence of prescription to the claim of the applicant. They describe its claim as a debt as defined in s 2 of the Act. They insist that the applicant's prayer is to set aside the Memorandum of Agreement and the Shareholders Agreement ("the agreements") which, according to them, is predicated upon obligations of breach of statute, fraud and contract which is inimical to the public policy of Zimbabwe as well as unjust enrichment. They claim that the application which aims at setting aside of the agreements is steeped in statute, delict and contract. They insist that the claim of the applicant falls under the purview of a debt as defined in s 2 of the Act. They insist that the claim of the applicant was filed after three years which are reckoned from the date that the debt became due. It, according to them, suffers from extinctive prescription.

The applicant states to the contrary. It claims that its motion is one for a declaratur. It insists that a declaratur does not prescribe. Prescription, it contends, is inapplicable to its case. It argues on the strength of *Ndhlovu* v *Ndhlovu & Anor*, 2013 (1) ZLR 110 (H) and alleges that a declaratur is a remedy which secures the public interest of certainty or correct legal position. Such a remedy, claims the applicant, cannot prescribe.

The case of the applicant would have held if its motion was for a declaratur only. Its draft order which appears at page 133 of the record is relevant. It shows that the applicant is moving for a declaratur as well as for the setting aside of the agreements. It shows further that it also moves for the cancellation of all deeds of transfer which the seventh respondent holds pursuant to the agreements. The setting aside of the agreements and the cancellation of the seventh respondent's title deeds take the case of the applicant outside the parameters of a declaratur. It places it squarely under the definition of debt as described in s 2 of the Act: A claim which is couched in a manner which seeks to alter or reverse a position or right which has accrued in favour

of the other party cannot escape a finding by the court that it is a "*debt*' for purposes of the Prescription Act - *Fumia & Anor* v *Mtshiya N.O. & Anor* HH 31/16.

The agreements which the applicant seeks to impugn were signed in June and September, 2007. They are, as the first respondent correctly states, a matter of public record. The applicant which claims to have a keen interest in the affairs of good governance in Harare cannot suggest that it was unaware of the agreements which the parties signed in 2007 up until 2021 when it filed the current application. Given its interest in the affairs of the City of Harare as supported by the land audit which one Warship Dumba, the third applicant *in casu*, conducted in his capacity as the Chairperson of the Special Investigations Committee which the City of Harare set up between 2008 and 2013 to inquire into the City of Harare's land sales, leases and exchanges from 2004 to 2009, the applicant cannot be said not to have been unaware of the agreements from 2010 to 2021. It is, in fact, deemed to have been aware of the agreements during the period which extends from 2010 to 2021.

The respondents state, correctly in my view, that the applicant does not deny their allegation which is to the effect that the applicant was aware of the alleged breaches of statute, delict and contract from as far back as 2010. It is trite that what is not denied in affidavits is taken to be admitted: *Fawcett Security Operations (Pvt) Ltd* v *Director of Customs & Excise* 1993 (2) ZLR 121 (S). The applicant, in fact, states in its papers that it was aware of the transactions as far back as 2010 when the issue was raised in the land audit which the City of Harare conducted.

Going by the above-stated matter, the applicant does not explain why it did not apply as it is doing now within three years of its knowledge of the identity of the parties as well as the facts from which its claim arises. That it did not sue for more than three years which are reckoned from 2010 requires little, if any, debate. The respondents cannot be faulted when they insist, as they are doing, that the claim of the applicant is prescribed.

Once it is accepted, as it should, that the claim is prescribed, the applicant cannot take its application further than where it left it. It cannot, in short, bring the claim after three years. As the respondents correctly submit, where, as *in casu*, a claim is shown to have prescribed, the court has no choice but to bring the matter to an end. The Act does not give the court a discretion. If the requirements for a plea of prescription have been established by the party taking the point, then that party is entitled, as a matter of right, to have that plea upheld. ……Extinctive prescription

renders unenforceable a right by the lapse of time: *Police & Prison Civil Rights Union* v *Commissioner of SA Police & Others* (2009) 30 ILJ 1309 (LC) at para 44.

The respondents' first *in limine* matter of prescription is not without merit. It is, accordingly, upheld.

The respondents' second preliminary issue relates to the applicant's *locus*. They insist that the applicant does not have such. It does not, according to them, have a direct and substantial interest in the contract of the parties. They relate to s 14 of the High Court Act under which the remedy of a declaratur falls. They insist that the Legislature's intention, when it crafted s 14 of the High Court Act, was not to create an absurdity where anyone in the abstract would seek a declaratur. They state that the first applicant on whose affidavit the present application is premised is suing on behalf of its unnamed members who will subsequently seek land from the City of Harare after the land has been returned to it. They argue that such interest is remote and tenuous. The first applicant, they observe, does not claim that it has its own interest outside that of its members.

The applicant's position on the matter is that *locus* is concerned with the relationship which exists between the pleaded cause of action and the relief sought. It asserts that, once a party establishes such a relationship, *locus* is established. It insists that it has a direct interest in the subject of the transaction-being the land which the City of Harare exists to obtain for the shelter of its poor members. It alleges that there is just nowhere on earth that residents of a municipal authority can be found to have no interest in matters which concern the affairs of a local authority which is funded by the rates that they pay. It argued, through counsel, that its *locus* rests on s 85 of the country's constitution.

It is unconscionable for the applicant to suggest that it derives its *locus* from the rates that it pays to the City of Harare. If its statement were to be allowed to remain in the form and substance that it states it, then all public entities which hold assets in trust for persons who are in their communities would be subjected to one suit after another by any person(s) who remains of the view that the assets which these entities hold in trust for them have not been properly accounted for. *Locus* which is premised on the applicant's assertion would make the work of judicial, and quasi-judicial, officers not only tedious but also unmanageable as well as untenable. Untenable because the concept of *locus* would have been allowed to stretch to meaningless levels wherein

anyone who thinks that a suit against this or that authority or entity is warranted would behave in the manner that the applicant is doing *in casu*.

The question which begs the answer is whether or not the applicant established the relationship which must, according to it, exist between the pleaded cause of action and the relief which it is seeking. It, in my view, did not. *Locus* relates to the applicant's standing to sue for the invalidation of the agreements. To have *locus*, the applicant must, at least, show that it has an interest in the sense of being personally adversely affected by the alleged wrong: *Patz* v *Greene & Co*, 1907 T S 427 at 433-5; *Dalrymple & Ors* v *Colonial Treasurer*, 1910 T S 372 at 386.

The applicant, it is mentioned, does not state that it had been personally adversely affected by the alleged wrong of the parties. As the respondents correctly state, a person seeking a declaration of rights must set forth his contention as to what the alleged right is. The applicant's claim which is to the effect that it has the right to the land which the parties transferred to the seventh respondent is not only remote. It is so far-fetched that it cannot hold. The applicant has neither an existing, future or contingent right in that land. It, as it were, is shooting in the dark in the vein hope that it may get at its intended target which remains undescribed and undefined.

The applicant's inclination to grope in the dark to establish *locus* which it does not have compelled it to stray into s 85 of the Constitution of Zimbabwe. It became so excited by its discovery in the mentioned regard that it failed to realize that, the same which relates to the enforcement of fundamental human rights and freedoms is not, in any way, related to the rights which are mentioned in s 14 of the High Court Act.

On an effortless reading of the case of the respondents on the issue of the applicant's *locus*, I remain satisfied that the respondents' *in limine* matter is unassailable. It is, accordingly, upheld as prayed.

The law which relates to material disputes of fact is clear and straightforward. A litigant is entitled to seek relief by way of notice of motion. However, if he has reason to believe that facts which are essential to the success of his claim will probably be disputed, he chooses that procedure at his peril for the court, in the exercise of its discretion, might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application: *Tamarillo (Pty) Ltd* v *BN Aitken (Pty) Ltd*, 1982 (1) SA 398 (A); *Masukusa* v *National Foods Ltd & Anor*, 1983 (1) ZLR 323 (H). Courts will only order that a matter brought by way of

motion proceedings be dealt with by way of trial proceedings or be dismissed if there is a real dispute of fact between the parties: *Herbestein and van Winsen*, The Civil Practice of the Supreme Courts of South Africa, 3rd edition (1979). A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence: *Supa Plant Investments* v *Edgar Chidavaenzi* HH 92/09.

The crucial question which calls for consideration is whether there is a real dispute of fact which requires determination in order to decide whether the relief claimed should be granted or not. The respondents state that there are such material disputes of fact. They insist that the application cannot be resolved on the papers which the parties placed before me. They allege that the facts which the applicant alleged are not common cause. They deny that they acted in a fraudulent, corrupt or collusion manner when the parties concluded the agreements. The allegations, they insist, are serious and they require *viva voce* evidence for their resolution.

The applicant's statement is that parties take opposing sides on the facts all the time. A dispute of fact, it asserts, must be substantive and it must concern a material issue. It must, the applicant stresses, be such that it leaves the court unable to resolve the dispute of the parties. The dispute of the case, in its view, is whether or not the transaction is valid. It urged me to take what the court in *Zimbabwe Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (SC) referred to as a robust and common – sense approach and not an over-fastidious one.

It is clear that, to the extent of the applicant's allegation which is to the effect that the respondents violated the laws of this country is concerned, such matters do not constitute disputes of fact at all. I need not take a common-sense approach to ascertain if the respondents violated Zimbabwe's investment, or its procurement, laws. Such matters are easily resolvable on the papers which are before me. Issues which relate to the parties' compliance or non-compliance with the law require no *viva voce* evidence. Evidence which is filed of record together with the submissions of the parties on such issues suffices.

The challenge arises when the applicant alleges fraud, corruption and/or collusion against the respondents. Such issues as relate to the alleged misconduct of the respondents cannot be resolved on the papers. They require *viva voce* evidence and cross-examination of witnesses before the court makes findings of fact which support the cause of the applicant. For instance, whilst the

applicant alleges that the transaction which brought about the agreements is prejudicial to the public, the first respondent states, in the same breadth, that the same is beneficial to the public. I cannot, under the stated set of circumstances, sing with the applicant or with the first respondent. *Viva voce* evidence and cross examination of witnesses are required for me to sing with the one or the other party. Similarly, whether or not Augur was unjustly enriched is a factual matter which the applicant alleges and the respondents deny.

The applicant should have foreseen that its allegations of fraud, corruption and collusion would be seriously disputed by the respondents. It, notwithstanding, made up its mind to file this application instead of proceeding by way of an action. It cannot escape the sins of its own conduct. It shall not be accorded a second bite of the cherry. Its case on the respondents' last preliminary point stands on no leg.

The respondents proved their three preliminary issues on a balance of probabilities. The *in limine* matters are, therefore, upheld. The application is, in the result, dismissed with costs.

Tendai Bit Law Chambers, applicants' legal practitioners
Mbidzo, Muchadehama & Makoni, first respondent's legal practitioners
Scanlen & Holderness, second, fourth, fifth, sixth & seventh respondents' legal practitioners
Civil Division of the Attorney General's Office, third respondent's legal practitioners