ZIMBABWE ANTI-CORRUPTION COMMISSION
versus
THE CLERK OF COURT HARARE
CRIMINAL MAGISTRATES COURT N.O
and
TAURAI MANUWERE N.O
and
MAREWANAZVO GOFA N.O
and
THE SENIOR REGIONAL MAGISTRATE HARARE N.O
and
THE CHIEF MAGISTRATE HARARE CRIMINAL
MAGISTRATES COURT
and
THE JUDICIAL SERVICE COMMISSION
and
NATIONAL PROSECUTING AUTHORITY
and
THE PROSECUTOR GENERAL N.O
and
MAXMORE NJANJI

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 14 & 26 October 2022

Urgent Chamber Application

M N Phiri, for the applicant
ABC Chinake, for the 1st – 6th respondents
J Chirambwe, for the 7th & 8th respondents
Ms Sande, for the 9th respondent

MANGOTA J: The applicant, Zimbabwe Anti-Corruption Commission, is a statutory body. It owes its existence to the Constitution of Zimbabwe. Its aim and object are to fight and, as its name suggests, eradicate corruption from within the lengths and breadths of the country. It deals with such other offences as theft, misappropriation of funds, abuse of power and other improper conduct in both the public and private sectors of Zimbabwe. It investigates and exposes cases of corruption and all crimes which are related to it.

It is in the spirit of its investigative function that it arrested the nineth respondent, a natural person, on 30 June, 2022 on charges of contravening s 173 of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*] and Money Laundering and Proceeds of Crime Act [*Chapter 9.24*]. It referred him to the seventh and eighth respondents for prosecution. These, both of whom owe their existence and authority from the Constitution of Zimbabwe, arraigned him before officers of the sixth respondent, another constitutional body, who formally informed him of the charges which had been preferred against him and placed him on remand subject to him paying a certain sum of money in the form of bail. One of the conditions of his admission to bail was that he surrender his passport to the first respondent, a natural person, who administratively fall under the general supervision of the sixth respondent.

The applicant's statement is that it, to its surprise, learnt from the Herald online publication of 9 September, 2022 that the nineth respondent appeared before the second respondent, a magistrate, to whom he applied for temporary release of his passport for the period which extended from the date of the application to 30 September, 2022 on the basis that he wanted to travel outside Zimbabwe during the mentioned period. It learnt further, from the same source, that the second respondent temporarily released the nineth respondent's passport to him. The release was, according to the source, pursuant to the application which the nineth respondent mounted on 8 September, 2022.

The applicant's further allegations are that, on its reading of the contents of the Herald online publication, it instructed its legal practitioners to write to the first and seventh respondents inquiring about the issue of the nineth respondent's application for variation of his conditions of bail. The respondents, it asserts, did not favour it with a response. It avers that it requested a transcribed record of the proceedings of 8 September, 2022. Its legal practitioners, it claims, received the transcribed record on 22 September, 2022. It states that, on 22 September 2022, its attention was drawn to another shocking Herald publication which, according to it, was to the effect that the nineth respondent did, on 21 September 2022, appear before the third respondent, another magistrate, complaining that the applicant blocked the temporary release of his passport and that it was, therefore, in contempt of court. The third respondent, it asserts, ordered the release of the passport to the nineth respondent.

The alleged proceedings of 21 September, 2022 constitute the applicant's cause of complaint. It filed the present application through the urgent chamber book. It insists that an allegation of contempt of court was made in terms of the Criminal Procedure and Evidence Act. It states that the court should institute proceedings for contempt of court against any person, *in casu* itself, who is alleged to have impaired its dignity, reputation or authority in the presence of the court. It couched its amended draft order in the following terms:

> "TERMS OF THE FINAL ORDER SOUGHT
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1.The order granted by the 3rd Respondent dated 21 September, 2022 be and is hereby declared a nullity.
>
> 2.The 7th and 8th Respondent (sic) be and are hereby directed to notify Applicant of any proceedings in relation to all matters brought by it to ensure fulfilment of the Applicant's constitutional mandate to combat corruption in terms of section254 of the constitution of Zimbabwe.
>
> INTERIM RELIEF GRANTED
>
> 1. The 1st Respondent be and is hereby ordered to funish Applicant with the record of proceedings conducted on the 21st September, 2022 under CRB No. 243/22 within 24 hours from the date of this order.
>
> 2. The 7th and 8th Respondent (sic) be and are hereby directed to notify applicant of any proceedings in relation to the prosecution of the 9th Respondent".

All the respondents filed notices of opposition to the application. All of them raised *in limine* matters and dealt with the substance of the application.

An effortless reading of the papers which the parties placed before me shows that the application cannot succeed. It cannot do so for the following reasons:

URGENCY:

Whether or not the application which the applicant mounted is urgent remains a matter of evidence. The question which begs the answer centers on whether the application is urgent in the sense that it should not be allowed to wait and that, if its hearing and determination are delayed, the purpose for which the applicant mounted it would be rendered nugatory. An urgent application is one where, if the court fails to act, the applicant may well be within his rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant: *Document Support Center (Pvt) Ltd* v *Mapuvire*, 2006 (1) ZLR 232 (H).

It is a fact of life that every person who files process with the court wants to have his matter heard yesterday. If proof be required for this statement, one need not look further than many applications which litigants file through the urgent chamber book only to be turned away by the court on the ground that the applications so filed do not meet the requirements of urgency. Further proof of the same is evident from many cases which the plaintiff or the applicant sets down only to be removed from, or struck off, the roll on the basis that the cases so set down have left out certain material which are a *sine qua non* aspect of the case which is intended to be prosecuted before the court. It follows, from the foregoing, therefore, that not every matter which a party places before the court meets the requirements of urgency. Yet every case, circumstances permitting, must be heard as soon as is reasonably practicable. Constraints which militate against this desired position are many and varied. They range from the law of practice and procedure which imposes rigid time-lines within which a case may be heard to the limit in resources-human and/or financial-which are at the disposal of the justice delivery system at any given point in time.

The views which I stated in the foregoing paragraphs were aptly elucidated in *Triple C Pigs & Anor* v *Commissioner-General, ZIMRA* HH 7/07 wherein it was stated that:

> "….., every litigant appearing before these courts wishes to have their matter heard on an urgent basis, because the longer it takes to obtain relief the more it seems that justice is being delayed and thus denied. Equally, court, in order to ensure delivery of justice would endeavor to hear matters as soon as is reasonably practicable. This is not always possible however and in order to then give effect to the intention of the courts to dispense justice fairly, a distinction is necessarily made between those matters that ought to be heard urgently and those to which some delay would not cause harm which would not be compensated by the relief eventually granted to such litigant. As courts, we therefore have to consider, in the exercise of our discretion, whether or not a litigant wishing to have the matter treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringement of such interest if not redressed immediately would not be the cause of harm to the litigant which any relief in the future would render a *brutum fulmen."*

It is trite that a party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance, where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it: *Dilwin Investments P/L T/A Formscaf* v *Jopa Engineering Company Ltd*, HH 116/98.

It is pertinent for me to consider the issue of the urgency of this application from its various perspectives. These are urgency in the context of (a) the certificate of urgency, (b) the ninenth respondent, (c) paragraph 2 of the final order and (d) paragraph 2 of the interim order sought. I deal with the various facets of the subject of urgency in the following manner:

a) Certificate of urgency.

Save for a few applications wherein the litigant remains unrepresented where an affidavit speaking to the issue of urgency is filed, practically all applications which are filed through the urgent chamber book must, and are, accompanied by a certificate of urgency which a legal practitioner prepares certifying that, from the founding papers of the applicant which he has been able to read, he remains of the single view that the matter is urgent and cannot wait to be dealt with through , and in the course of, the court's ordinary roll. The legal practitioner is an officer of the court. He is therefore expected to express his views in an as objective a manner as he reasonably may. He is assumed to be dispassionate except to express his honest and unbiased view of the application the papers of which he will have read. It would be a sad day for the applicant in an urgent application to have a legal practitioner who states that he has read what he has not read. That statement will be tantamount to a blue lie which the court cannot condone let alone accept.

The application shows that it was prepared on 23 September, 2022 when the certificate of urgency which supports it was prepared on 22 September, 2022. The legal practitioner who prepared the certificate of urgency, one Elvis Dondo, was therefore not being candid with me when he stated, in the certificate, that he read and understood the founding affidavit of Sukai Tongogara and proceeded to certify the application as urgent. This is a *fortiori* the case given that the founding affidavit was not at hand when he certified as he did. It only came into existence a day after he had certified nothing.

The seventh and eights respondent spoke eloquently on the issue which relates to the defective certificate of urgency. They referred me to what BUNU J (as he then was) stated on the matter in *Mlondurago Investments (Pvt) Ltd t/a Mbada Diamonds* v *Mutual Finance (Pvt) Ltd,* HH 630/15 in which, dealing with a situation which is similar to the present one where the certificate preceded the founding affidavit, he stated that:

> "……..the certificate of urgency was prepared without recourse to a valid founding affidavit as it predated the affidavit.
> That being the case, the certifying lawyer could not have properly applied his mind to the facts arising from a non-existent founding affidavit. For that reason alone, I come to the conclusion that the urgent chamber application is fatally defective for want of an essential element of such an application."

The statement of the Judge, as captured in the foregoing paragraphs, remains clear, cogent and to the point. It cannot be controverted by any serious-minded litigant. It passes the test which relates to matters of the present nature.

The assertions of the applicant on the issue which relates to the certificate of urgency are at the very best unfortunate and at the worst completely devoid of merit. Its meaningless statement on the matter is that the normal order in preparation of urgent applications is that, before its issuance, an application is given to an independent legal practitioner who, upon reading it, certifies that indeed he or she perused the affidavit and surely believed that the matter is urgent.

The procedure which seems to be perculiar to the applicant does not seem to find support from many applications which litigants file through the urgent chamber book. If the procedure were to be accepted, then the same would introduce serious chaos in the administration of justice as no one would know whether or not the certifying legal practitioner has read the founding papers when he alleges that he has read them before they have been born. Simple common-sense dictates that one cannot read what is not in existence. On the mentioned basis alone, the application cannot succeed.

(b) The ninenth respondent.

The fact that the applicant delayed in bringing these proceedings to court and only did so when the event which necessitated the application had occurred speaks volumes of the lack of urgency of this matter. It cannot be disputed that the applicant's raison de'etre for applying as it did was to arrest the situation which related to the release by the second respondent of the passport to the ninenth respondent. The applicant became aware of the respondent's application for variation of his bail conditions on 9 September, 2022. It did not apply there and then. It, in fact, wasted its precious time engaging its legal practitioners to write to the first and seventh respondents. It requested for the transcribed record of the proceedings of 8 September, 2022. The same did not find its way to it up until 22 September, 2022. It only filed this application on 23 September, 2022. It, in fact, waited from 9 to 22 September, 2022 and, during its period of waiting,

the ninenth respondent's passport was released to him. The applicant does not explain why it waited that long without arresting the situation which, according to its papers, was so dear to it. This is clearly a case of self-created urgency. Nothing prevented the applicant from filing and serving the application upon the respondents on either 9 or 10 September, 2022. Such an application would have achieved its desired end-in-view. Its delay of two consecutive weeks places the blame upon no one else but itself. Its effort to close the stables when the horses had already bolted displays nothing but its tardiness. It applied when the sting had already removed itself from the equation. That the stated matter reflects the correct position of the case is evident from a reading of the amended draft order, Annexure Z, which the applicant filed of record on the date that the application was heard. The observed position leaves the application in the area of an academic exercise more than it remains in the area of the attainment of real and substantial justice.

(c) Paragraph 2 of the final order.

The applicant, the seventh and eighth respondents contend, owes its existence to the constitution of Zimbabwe. It, they assert, worked with them from the time that it was born to date. It did not, they correctly submit, move the court as it is doing now that they be directed to notify it of any proceedings which relate to all matters it brings to them for prosecution. Both of them question the intention of the applicant as stated in the latter's motion.

The applicant's statement which is to the effect that the Prosecutors' Guidelines which were gazette in 2021 allows it to move me to direct the respondents to act in the manner that it stated is devoid of merit. By its own assertion, the Guidelines were published in 2021. It does not mention the exact date that the Guidelines were gazetted. Whatever date it was remains of no moment as long as it is accepted, as it should, that the Guidelines came into existence in 2021. The applicant which places reliance on the Guidelines does not explain why it waited for eight consecutive months before it filed the present application.

It shall be assumed that the Guidelines came into effect in either November or December, 2021 on a generous interpretation of the applicant's statement. The applicant does not explain why it waited from January – August, 2022 before it filed the application in which it is moving me to order the respondents to work in close co-operation with it. A period of eight consecutive months cannot, by any stretch of imagination, be considered to fall into the realms of urgency on the part of the applicant.

It is trite that a party who files an application on the basis of urgency must show that he acted with the urgency which the matter deserves. Where he does so, his day in court will be a rewarded one. Where, on the other hand, he fails to do so, as the applicant did *in casu*, he blames no one but himself when the court closes its doors against him. The applicant cannot, at this late stage, move me to grant its prayer as contained in para 2 of its final order. That matter ceased to be urgent eight or so months ago.

(d) Paragraph 2 of the Interim Order Sought

The impression which the applicant conveys with reference to the above-mentioned paragraph is that the ninenth respondent is, for its whole lifespan, the first person whom it arrested and referred to the seventh and eighth respondents for prosecution. That cannot be the correct position of the matter otherwise it would not be able to justify its function let alone its existence. The probabilities are that it, prior to its arresting and investigation of the ninenth respondent, arrested and investigated many persons-natural or legal- in the past, persons who fell into the category of the ninenth respondent and it referred those to the seventh and eighth respondents for prosecution. It does not explain why it did not move that the respondents in question with whom it worked in the past be directed, at the time, to notify it of any proceedings which related to the prosecution of those persons. It also does not explain why the direction which it is moving me to grant to it in respect of the seventh and eighth respondents' *vis-à-vis* the ninenth respondent should come into effect only at this stage. This is *a fortiori* the case given that it worked on matters which were/are of the nature which is similar to that of the ninenth respondent in the past without any hustles. The issue of urgency as viewed from the above-observed perspective is therefore devoid of merit.

The question which begs the answer is why only at this stage is the applicant moving as it is doing in para 2 of the interim order. The answer is not far to see. The applicant, it is my considered view, inserted para 2 into the interim order for the specific reason that it had to argue from the particular to the general. It employed what is normally referred to as inductive logic wherein, if paragraph 2 of the interim order succeeds, as its intention seems to suggest, the same may be replicated in para 2 of the final order so that the general position taken is that the seventh and eighth respondents should always notify it of any proceedings of persons whom it brings to them for purposes of prosecution. The logic, viewed in the context of the observed matter as read with the intention of the applicant, remains without merit, so to speak.

LOCUS STANDI

Practically all the respondents maintain the singular view that the applicant does not have the *locus* to sue them as it did. They argue that the applicant is a creature of statute which cannot approach the court in order to obtain a court order which is *ultra vires* the constitution or the Anti-Corruption Act under which it operates. They deny that it has any real and/or substantial interest in the matter which is the subject of the present application. They compare its interest to that of a complainant in a bail application or to that of members of the police whose role comes to an end when they refer persons whom they have arrested to the Prosecutor- General for remand and/or prosecution.

The applicant claims that it derives its mandate to sue from s 255 of the constitution which enjoins it to secure the prosecution of persons who are reasonably suspected of corruption, abuse of power and other improper conduct which falls within its jurisdiction.

Locu standi in judicio is a person's right to bring legal proceedings in a court of law. The person who claims the existence of *locus* must show that he has a direct and substantial interest in the subject-matter and outcome of the litigation: *ZIMTA & Ors* v *Minister of Education & Culture*, 1990(2) ZLR 48 (HC) at 52; *Deary NO* v *Acting President & Ors*, 1979 RLR 200 (G).

In real life, every person has a right to approach the court and sue another or others. The suit should, however, not be allowed to exist in a vacuum. It should not, in other words, be born out of fiction but reality. There should, in other words, be a relationship or a *nexus* between the plaintiff and the defendant or the applicant and the respondent. The relationship may arise out of contract, delict, statute or some other cognizable law which defines the interconnectedness of the parties to the suit so that they do not remain strangers to each other. A suit which is mounted in a vacuum is, as is evident, a nullity. For the plaintiff or the applicant to succeed to sue, there must be some justifiable link between the one whom he is suing and him.

None of the respondents disputes the applicant's mandate to fight, if not eradicate, corruption from within Zimbabwe. Its functions as is stipulated in s 255 of the constitution are admitted by all and sundry. Its power as provided in s 255(1)(e) is apposite. It can, by virtue of that paragraph, direct the Commissioner-General of Police to investigate cases of suspected corruption and to report to it on results of any such investigation. It is only in the stated circumstance that it maintains some semblance of supervision over another body which performs

functions which are similar to those of its own. It therefore has a direct and substantial interest in the investigation of cases of corruption and other related offences. What it does not have, from the constitution and its enabling Act, is its insistence on the point that the first respondent who, though not a constitutional appointee, falls under the sixth respondent's general supervision and the seventh and eighth respondents, both of whom draw their existence and power from the constitution, respectively furnish it with the record of proceedings which the court allegedly conducted on 21 September, 2022 under CRB No.243/22 and/or notify it of any proceedings which relate to the ninenth respondent. It clearly has no *locus to* direct any of the respondents to act in the manner that it is moving me to grant to it. The constitution under which it operates does not confer upon it any supervisory role over the first, seventh and eighth respondents. It, in fact, enjoins it, by virtue of paragraph (f) of subsection (1) of s 255 of the constitution to refer cases of persons whom it arrests and investigates to the seventh respondent for prosecution. The respondents are therefore within their rights when they insist on the point that the applicant does not have the requisite *locus* to sue them as it did. Their statement on the mentioned point is valid and is, therefore, with merit.

MANDATORY INTERDICT/ MANDAMUS:

The applicant states, in para 14 of its founding affidavit, that the application is one for a mandatory interdict. Its purpose, as the applicant asserts, was/is to compel the first respondent to furnish it with the record of proceedings which, according to it, were conducted on 21 September, 2022. Its further motion was/is to have the ninenth respondent's passport remain in the custody of the first respondent until the matter under CRB No. ACC 243/22 has been heard and determined.

A *mandamus* is a judicial remedy which is available to enforce the performance of a specific statutory duty or remedy the effect of an unlawful action already taken: *Chironga & Anor* v *Minister of Justice & Ors*, CCZ 14/20. It is clear that, because a *mandamus* is an interdict, the requirements of an ordinary interdict apply to the application. These, as stated in *Universal Merchant Bank Zimbabwe Limited* v *The Zimbabwe Independent & Anor*, 2000 (1) ZLR 234 (HC) comprise:

i) a clear or a *prima facie* right;
ii) irreparable injury actually committed or reasonably apprehended- and
iii) absence of a similar protection by any other remedy.

It is not only improbable but is also doubtful if the first respondent has a specific statutory duty which the law imposes upon him to perform in the sense of availing to the applicant the record of proceedings of 21 September, 2022. Put differently, the question is: does the applicant have the right to compel the first respondent to provide to it the record of proceedings of 21 September, 2022. The answer is, in my view, in the negative.

Once it is accepted, as it should, that the applicant cannot compel the first respondent to furnish it with the record of proceedings of 21 September, 2022 the mandatory interdict remains unavailable to it. This is *a fortiori* the case given that the applicant does not allege, in any of its papers, that the first respondent did, at any stage which relates to CRB No. 243/22, conduct himself in an unlawful manner. The applicant, it is evident, has no *prima facie*, let alone a clear right to demand that the first respondent furnish it with the record of proceedings. It cannot state that it has no other remedy to the same. It has every right to have a recourse to the method which it employed in para(s) 23 and 24 of its founding affidavit and, through the stated process, obtain the record of proceedings which it wants from the first respondent. Alternatively, it has the unfettered right to go to the office of the first respondent and read the contents of the record which, as is known, is a public document to which all persons have access by virtue of its nature.

The applicant does not state the harm which it fears it will suffer if the application is not granted to it. It alluded to the offence of contempt of court but it did not claim that the same has been, or will be, preferred against it by anyone. Nor does it state the date that the same will be mounted, if at all. It, accordingly, suffers no harm if the application which it filed is refused.

The raison *de'etre* of the application, it has been observed, was the release of the passport to the ninenth respondent. Once the same was released to him, as it was, the application lost its urgency altogether. It ceased to exist as an urgent matter. It assumed the character of an ordinary application which was/is of academic interest.

The application was premised on what the applicant was able to glean from its reading of newspaper articles. Its reaction to the articles was unfortunate. It busied itself on nothing and invited me to walk with it on a matter which was completely devoid of any substance. Its appetite to want to encroach on to the work and functions of such statutory bodies as the sixth, seventh and eighth respondents who, like itself, owe their existence to, and draw their power from, the constitution as read with their respective enabling legislations, cannot be condoned let alone

accepted. Each of them is guaranteed, by the constitution, the liberty to perform its work independently of the other so that none of these four bodies is allowed to step onto the toes of the other or others. Yet they must co-operate, one with the other, for the proper administration of justice in Zimbabwe. In their co-operation, which is not a matter of law but policy, none of them should exercise an oversight role over the other or others unless the law from which it draws its power allows it to do so.

What I have stated about the applicant and the sixth, seventh and eighth respondents applies with equal force to the first, second, third, fourth and fifth respondents. These are natural persons who fall under the judiciary arm of the State and they work under the general administration of the sixth respondent which is itself a constitutionally established body. They are not, in terms of the law, subject to the control or direction of anyone in the discharge of their judicial functions. They do not answer to the applicant and, save in few instances which relate to their conditions of service or some misdemeanor on their part wherein the sixth respondent has some role to play, they work independently of all independent commissions, the applicant included. They are a stand-alone group of persons. They are their own masters, so to speak. They are not subject to the direction or control of either the Executive or the Legislative arm of the State.

This application is everything which an urgent matter should not be. It stands on nothing. It appears to have been filed as way of having the applicant showing its intention to impose itself on other constitutionally established bodies. Those stood their ground, correctly in my view, and made sure that it backs off.

The applicant failed to prove its case on a preponderance of probabilities. The application is, in the result, struck off the roll with costs.

Muvingi & Mugadza, applicant's legal practitioners
Kantor & Immerman, first to sixth respondent's legal practitioners
National Prosecuting Authority, seventh to eighth respondent's legal practitioners
Tarugarira Sande, nineth respondent's legal practitioners