NEBART GOMBERA
and
GERALD CHIRENJE
and
GARIKAI KANENGONI
and
JACK CHRIS HIYA
and
SHADMONT CHIVERO
versus
MAZOWE RURAL DISTRICT COUNCIL
and
MINISTER OF LOCAL GOVERNMENT AND NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 14 October 2022 & 1 November 2022

Opposed Application

T. Zhuwarara, for the applicants
G.R.J. Sithole, for the 2nd respondent

TAGU J: This is a joint application for leave to bring a class action as well as to compel the respondents to furnish requested information pursuant to the right of access to information brought in terms of Rule 89 of the High Court Rules, 1971.

The background facts are that sometime at the beginning of the year 2021, the first respondent commenced subdividing land which houses Rossa Clinic and which land is earmarked for the expansion of the clinic. The community through the applicants who are their representatives sent a delegation to the Chief Executive Officer of the first respondent to enquire as to why council was subdividing land meant for the expansion of the clinic. The Chief Executive Officer referred the representatives from one officer to the other. Applicants, on advise of a legal practitioner wrote to the first respondent seeking to be furnished with the site plan, master plan and related documents for the first respondent. The same not forthcoming, the applicants are now seeking for leave to bring a class action as well as to compel the respondents to furnish the requested information pursuant to the right of access to information.

Four points *in limine* were raised by the respondents. The first one being that the application is bad at law. The second one being that there is a fatal misjoinder of the Department of Physical Planning which has the statutory mandate to inter alia issue out all subdivision permits and is the public office custodian of all rural and urban planning plans and permits for the whole country. The third one being that the applicants failed to exhaust domestic remedies. The fourth one being that the court lacks jurisdiction.

In respect of the first point *in limine* the contention by the respondents is that the application is bad at law. This is because the present is an application for leave to institute proceedings in terms of the Class Actions Act combined together with an application for a mandamus brought through the chamber book. They said in terms of the Act, one is supposed to apply for leave to institute class action proceedings first. If the leave is granted, albeit with the conditions thereto which must be complied with, the main suit will then be instituted thereafter. Combining the two as has been done *in casu* renders the entire application bad at law and the court was urged to dismiss the present application as the irregularity cannot be remedied in the answering affidavit.

In their answering affidavit the applicants submitted that the hybrid application is one which falls within the judicial discretion of the court. In fact, they said it is convenient to deal with the combined application in order to afford the right of access to information which the First respondent has refused to avail.

The starting point is section 3 of the Class Actions Act [*Chapter 8.17*] (the Act), which provides:

> "3**. Application for leave to institute class action**
>
> (1) Subject to this section, the High Court may on application grant leave for the institution of a class action on behalf of any class of persons."

It was submitted by the respondents that leave must be obtained first and then proceed to file case in terms of section 5 of the Act. Section 5 says:

> "Appointment of representative
> (1) Where the High Court grants an application under section three for leave to institute a class action it shall appoint the applicant or any other suitable person to be the representative of the class of persons concerned in the class action.
> (2) In making an appointment for the purpose of subsection (1), the High Court shall have regard to –
> (a) the suitability of the appointee to represent the best interest of all the members of the class of persons concerned, and
> (b) any conflict of interest between the appointee and the members of the class of persons concerned, and

(c) the ability of the appointee to make satisfactory arrangements to pay for the class action and to pay any order of costs that may be made."

The draft order being sought is that:

"**IT IS ORDERED THAT**

1. The application be and is hereby granted.
2. The first respondent be and is hereby ordered to furnish the Applicants with Site Plan and Master Plan for Rosa Clinic, A copy of the Master plan for Mazowe Rural District Council.
3. The costs of the application be borne by the fist respondent at the higher scale as between legal practitioner and own client."

A look at the draft order will show that this is a hybrid application. It is an application for leave to institute a class action coupled with a mandamus. As submitted by the counsel for the respondents this type of application is fatally defective. The Applicants ought to have sought leave to institute class action proceedings first. Once leave has been granted they then can commence litigation provided that section 5 is complied with. In the circumstances I can do no better than to dismiss the application with costs. In doing so I took into account the case referred to me of *Mark Mupungu* v (1) *Minister of Justice, Legal and Parliamentary Affairs,* (2) Judicial Service Commission (3) Musa Kika (4) Young Lawyers Association of Zimbabwe (5) Fredrick Charles Mutanda (6) Attorney General President of Zimbabwe (7) CCZ 07/21 where there was failure to comply with Rule 18 of the Rules of the High Court.

Having found that the application is fatally defective, I will not labour myself with dealing with the other points *in limine* as well as the merits.

IT IS ORDERED THAT

1. The application is dismissed with costs.

Tabana and Marwa, applicants' legal practitioners.
Madzingira and Nhokwara, first respondent's legal practitioners.