NIMROD NCUBE
versus
CLOTHING INDUSTRY WORKERS UNION
HOUSING SCHEME
and
JONATHAN MOYO N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 19 JANUARY 2018 AND 25 JANUARY 2018

Opposed Application

Applicant in person
S Mguni for the respondents

MATHONSI J: Everything that could possibly go wrong in an application went wrong in this application. It is for that reason that after hearing submissions from the parties I promptly dismissed the application with costs on an ordinary scale in recognition of the fact that the applicant is a self-actor who was gropping in the dark owing to ignorance of both the rules and the law. I stated then that the reasons for dismissing the application would follow. These are they.

The applicant is a member of the Clothing Industry Workers Union which union has a housing scheme for its members in terms of which the subscribing members are entitled to purchase stands located in the Upper and Lower Rangemore area of Umguza District which is however under the City of Bulawayo's master plan. This is in terms of certain terms and conditions set by the union and communicated to members.

In terms of clauses 4, 5 and 6 of those terms and conditions;

> "4. The approximate estimated price for unserviced stands are as follows:
> Two hundred (200) square metres US$440-00 (four hundred and forty US dollars)
> Three hundred square metres US$660-00 (six hundred and sixty US dollars)
> Four hundred square metres US$ 880-00 (eight hundred and eighty US dollars)
> An additional US$20-00 (twenty US dollars) shall be added to price of the stand for administration purposes.
> 5. Payment towards purchase of the stands shall be:-
> (i) in cash (once off payment of the total amount)

(ii) in instalments for a period not exceeding twelve (12) months starting from August 2013.

6. Methods of making payments shall be as follows:

(i) by depositing the payment directly into the Clothing Industry Workers Union Housing Scheme account at FBC Building Society, 109 Robert Mugabe Way, 11th Avenue, Bulawayo Account No 5884049426302. (3 deposit slips are completed, one remains with the bank, one is retained by the depositor and the other is surrendered to the Finance Committee member for receipting and bookkeeping purposes).

(ii) by making the payment to an appointed Finance Committee member who shall issue an official receipt for the payment." (The underlining is mine)

The housing scheme is managed by the second respondent who is the Organizing Secretary of the Union. The papers placed before me reveal that the applicant was allocated a 400 square metre stand under the Housing Scheme's Phase 1 Housing Project in the Rangemore area by letter dated 15 October 2013. By then he had paid a sum of $400-00 as a deposit and was advised to pay the balance of $500-00 including the administration fee. The applicant has produced proof of receipts amounting to $600-00 and sought to argue that a bank deposit slip showing a deposit $400-00 made on 17 September 2013 is proof of another payment which should bring his total payments to $1000-00. I do not agree.

Firstly, the letter allocating him the stand as I have said was written on 15 October 2013 after the $400-00 was deposited into the Union's account at which date if the unreceipted deposit were to be taken as a second payment it would mean that he would have paid a total of $800-00 regard being had that a cash receipt of $400-00 was issued on 30 September 2013 again before the offer letter of 15 October 2013 was written. Therefore the applicant would have immediately queried the amount and insisted that $800-00 had been paid upon receipt of the offer letter. He did not. Clearly therefore the applicant has tried to pull a fast one and the argument that the deposit slip signifies a second payment which is not what was receipted on 30 September 2013 is opportunistic and an afterthought. I reject it.

In any event, the terms and conditions of the scheme which I have cited above make it clear that a bank deposit as that referred to by the applicant had to be receipted by the Union. The bank deposit slip is therefore not proof of payment. I have had to dwell on the issue of the receipts because the respondents claim that the stand allocated to the applicant was initially down sized to 234 square metres to match the amount he had paid which fell short of the amount

required for a 400 square metre stand. When he still failed to pay the full amount for the smaller stand (he had withdrawn a sum of $175-00 to pay his arbitration fees in a dispute with his employer) even that stand was withdrawn.

It is that course of action taken against the applicant which caused him to make this application seeking an order nullifying the repossession of the stand on the pain of punitive costs. He maintained that he paid the full amount for a 400 square metre stand and is therefore entitled to it. I have stated that there is no proof that he paid for such a stand.

However, the applicant's woes do not end there. There is a host of insurmountable procedural difficulties standing in his way. For a start the citation of the two respondents presents the applicant with a serious problem. The first respondent is cited as a housing scheme. It has no legal personality of its own and, as I have said, it is a scheme run by the Clothing Industry Workers Union to which the applicant is a member. Clearly the first respondent cannot sue or be sued in its own right as it is not a juristic person.

Apart from that, no legal basis has been established for joining the second respondent as a party to the application. In his founding affidavit the applicant states at paragraph 3 that the second respondent is the director of the scheme "and being an Industrial Clothing Trade Unionist in his official capacity ----." That is meaningless. When asked at the hearing why he had cited the second respondent the applicant was emphatic but thoroughly unhelpful. He said of the second respondent;

> "He is the project's director who is the decision maker. He is accountable for his actions."

Clearly the applicant was afflicted by ignorance. A cause of action against the second respondent cannot be founded on being an employee or official of the Union which contracted with the applicant as there is no privity of contract between him and the applicant. His citation is a misjoinder. What it means therefore is that this is an application that is hanging in the air as it has no respondent.

The point is made by this court in *Gariya Safaris (Pvt) Ltd* v *Van Wyk* 1996 (2) ZLR 246 (H) at 252G that;

> "A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the

> names in the summons as being those of the defendant, the summons is null and void *ab initio*."

The same reasoning was adopted by this court in *JDM Agro-Consult and Marketing (Pvt) Ltd* v *Editor, The Herald and Another* 2007 (2) ZLR 71 (H) at 75G-76A where GOWORA J (as she then was) expressed the view that:

> "It matters not, in my view, that the two defendants entered appearance to defend and proceeded to file a plea. The process of filing pleadings under those names would not have imbued the summons with any form of legality. There was no summons for them to plead to given that there were no persons answering to the names on the summons. They cannot be identified as such. This is not a mis-description which can be amended by altercation of the names on the summons nor is it a substitution. One cannot amend or substitute something that does not exist."

See also *Nuvert Trading (Pvt) Ltd t/a Triple Tee Footwear* v *Hwange Colliery Company* HH 791/15 (unreported)

It has been stated that to try an action in which there is only one party is an exercise in futility. The same applies to an application in which there is only one party. It is a non-starter. There can be no cause of action in an application involving one party.

As if that was not enough, the applicant insisted a paragraph 5 of his founding affidavit that "this is an application for review." To the extent that this is an application for review, it must meet all the characteristics and requirements of an application of that nature. This court enjoys review jurisdiction as provided for in section 26 of the High Court Act [Chapter 7:06]. However it only exercises such review jurisdiction where there exists grounds on which proceedings or a decision may be brought on review as set out in section 27 of the Act.

In addition to that, an application for review is brought to this court in terms of Order 33 of the High Court of Zimbabwe Rules, 1971. Rule 257 requires a court application for review to state shortly and clearly the grounds upon which the applicant seeks to have the matter reviewed. Such grounds are conspicuous by their absence in this matter. In my view that brings the application finally to its knees and I find it completely unnecessary to even consider the submissions made by Mr *Mguni* for the respondent that the application was made out of time in breach of rule 259 requiring an application to be made within eight weeks of the occurrence of the irregularity. This is because the applicant sought to argue that the decision brought on

review was communicated to him by letter dated 13 June 2017 when the respondent asserted that it was on 8 May 2015. As I have said it is really unnecessary to resolve that dispute.

It is for the foregoing reasons that I dismissed the application with costs on an ordinary scale.

Messrs R. Ndlovu and Company, 1st and 2nd respondents' legal practitioners