WESTGATE RESIDENTS ASSOCIATION

Versus

NATIONAL RAILWAYS OF ZIMBABWE

And

L. H. JIYANE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 28 MAY 2012 & 24 JANUARY 2013

N. Ndlovu for the applicant
J. James for 1st and 2nd respondents

Judgment

NDOU J: After hearing submissions by both counsel I ordered that the provisional order granted by this court on 29 June 2011 be discharged with costs on the ordinary scale. I indicated that reasons for doing so will follow in due course. These are they.

The applicant, is an association of residents at Westgate Security Complex ("the camp") a residential facility owned by the 1st respondent to provide accommodation to its employees. This facility appears to have been extended to other tenants who are not employees of the 1st respondent. The electricity and water bills at camp are in the name of the 1st respondent and the latter pays for the bills. The 1st respondent thereafter recoups the same from the residents. The 1st respondent disconnected electricity in the camp to houses occupied by members of the applicant. Members of the applicant consequently instituted an urgent chamber application seeking urgent relief in the form of an order restoring the status *quo ante*. A provisional order was granted. The respondents filed opposing papers. The respondents have raised a preliminary point on the legal standing of the applicant. It raised an issue that the applicant is not a body capable of suing and being sued. The applicant purported to correct this defect by belatedly filing what it terms a constitution in its answering affidavit. The said constitution is skimpy and does not meet the requirements of a constitution of a *universitas* – *Dadoo Ltd* v *Krugersdorp Municipal Council* 1920 AD 530 at 550 – 6. It is trite law that a *universitas* is an entity distinct from the individuals who compose it, and it has perpetual succession. The constitution of the applicant simply reflects an association of people who have a common interest, and is allegedly an offshoot of another organization. The averments in the answering affidavit constitute a belated and inadequate attempt to rectify a fatal error. It is trite that an

application stands or fails on its founding affidavit – *Mobil Oil Zimbabwe (Pvt) Ltd* vs *Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (H) at 70C. On this point alone the provisional order should be discharged.

In the event that I made a mistake in this finding, still the provisional order should be discharged on the second point raised. There is no written authority from the persons Mr E. Ngwenya (who disposed to the founding affidavit) purports to represent. *Guta Ra Mwari* v *Tayali & Ors* HB-132-04 and *Mashavave* v *Zimbabwe United Passenger Company Ltd & Anor* 1998 (1) ZLR 567 (H) at 570B – 571B. The purported resolution dated 24 August 2009, i.e. some twenty-three months before the urgent chamber application was filed, granting three people a vague mandate to sign court documents on behalf of the alleged association, is inconsistent, contradictory and illogical. It has apparently eleven different signatures, then an annexure with fifty-two names, where it is somehow expected that the fifty-two names have authorized the two persons to represent them. This is patently not so.

It is for the above reasons that the provisional order was discharged.

Cheda & Partners, applicant's legal practitioners
James, Moyo-Majwabu & Nyoni, respondents' legal practitioners