

TIRIVEPANO HOUSING CO-OPERATIVE
versus
TSL LIMITED
and
H.G.P. VOSTERMANS (PVT) LTD
and
THE SHERIFF N.O.

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 21, 24, 26, August 2015 & 9, 23 September 2015

Urgent Chamber Application

A. Nyamupfukudza, for the applicant
S. Hashiti, for the 1st & 2nd respondents

DUBE J: The applicant brought an application on an urgent basis for the restoration of it and its members onto Mokum portion of Orda situate in the District of Salisbury, [hereinafter referred to as the land], from where its members were ejected by the respondents.

. The applicant is a co-operative. The applicant through its members has been in occupation of a piece of land. The second respondent is a company in whose name the land is registered. The second respondent is a wholly owned subsidiary of the first respondent and the two companies have been working jointly to develop the land into a commercial business park. The third respondent is the Sheriff of the High Court and is cited in his official capacity. The Sheriff has not defended the application.

The brief background to this application is as follows. The second respondent is the original owner of the land and purchased the land in issue in 1954. Sometime in the year 2000 the applicant and its members occupied the land in dispute. The applicant claims that the land belongs to it and was given to it by the Government of Zimbabwe. The land was gazetted for compulsory acquisition in the year 2000. After the acquisition, a caveat was placed over the land. This endorsement was subsequently cancelled in the year 2007. The applicant and its members still remained on the land. The aftermath of the acquisition is in dispute but is not relevant for the purposes of this judgment. What is significant is that the applicant and its members have persisted on the land and have put up structures on it. A

dispute has arisen over who the rightful owner of the land is. The applicant submitted that it together with its members were wrongfully evicted from the land in question based on a writ wrongfully and erroneously issued.

Sometime in 2014, the respondents filed an application for a declaratory order seeking confirmation of the applicant as the registered owner of the land in dispute and an interdict seeking to bar the applicant and its members from the land under HC 9047/12. The application was granted in default on 12 November 2014 and the respondents obtained an order on the following terms,

“IT IS ORDERED THAT:

1. A declarator confirming that the applicant is the registered owner of the immovable certain piece of land measuring one hundred and nineteen decimal point five three six eight (119 5368) Morgen of land called Mokum portion of order situate in the District of Salisbury.
2. An order interdicting the 1st and 2nd respondent, their members and any associated third party from entering the land described in paragraph 1 above, or interfering with the business and constructions operations of the applicants on the land.
3. An order permitting the applicants to immediately access the land and continue building operations on the land.
4. An order compelling the 5th respondent to investigate the applicants’ complaints, arrest those engaging in unlawful activities on the land and restore law and order.”

Following this order and on 16 June 2015 the respondents filed an urgent application seeking to evict the applicant and its members from the land in dispute. The basis of the application was that there had been fresh invasions onto the land in dispute. The respondents obtained an order by consent on the following terms;

“IT IS ORDERED BY CONSENT THAT:

1. Chief Inspector Chabuda N.O be and is hereby substituted by the Officer in Charge of the Zimbabwe Republic Waterfalls as the fourth respondent.
2. Pending the determination of the application for rescission of judgement instituted by the second respondent under HC 688/15.
 - (i) The first and second respondents their members and all those claiming possession through them are hereby ordered to desist from any further construction of any structure of whatever nature on the immovable property of the second applicant being a certain piece of land measuring one hundred and nineteen point five three six eight (119, 5368) Morgen, comprising of 102, 3854 hectares of land called Mokum portion of order situate in the district of Salisbury (‘the Land’) as demarcated on the figure “ABCDEA” (excluding the shaded portion marked “1825”) attached as annexure “A” hereto.
 - (ii) The first and second respondents are to desist from allocation of any further stands on the aforesaid land to their members or any other third parties.
 - (iii) The third and fourth respondents are hereby ordered to assist the Sheriff of Zimbabwe, his deputy or authorised agent in executing this order in the event that it becomes necessary.
 - (iv) Each party to bear its own costs.”

On 6 August 2015 the applicant and its members were evicted from the land in dispute. The applicant challenges the validity of the writ upon which the respondents acted. The applicant avers that the respondents have breached the terms of the consent order by proceeding with the eviction on the basis of the default judgment which order does not provide for ejection. That whilst the order declares that the applicant is the owner of the land, the default order merely interdicted the applicant to desist from any further construction and allocation of any further stands to their members or any other third parties. The applicant contended that the relief of ejection can only be carried out when a court judgement orders eviction of the other party and that the eviction is contrary to the spirit of the order by consent.

At the hearing, the respondent raised preliminary points. The respondent submitted as follows. Whilst the applicant has an interest in the matter as it is cited as an evictee in the writ, it can only come to court upon following the requirements of the law. Section 19 of the Co-operative Societies Act [*Chapter 24:05*] dictates that proof of registration as a cooperative be brought to establish the cooperative's legal powers and status. A cooperative must identify itself, its registration, membership, powers and authority by furnishing the court with its articles or constitution and certificates of registration. In the absence of these documents, its application is unlawful and without proper authority. The applicant submitted that the court cannot condone a departure from a statutory requirement. The court was referred to the case of *Shrierhout v Minister of Justice* 1926 AD 99 for that proposition.

The respondent submitted further that the applicant has no *locus standi in judicio* to represent its members in these proceedings. The respondent submitted that a litigant which has no direct and substantial interest in the right which is the subject matter of the litigation and in the outcome of the litigation cannot participate in the proceedings. The court was referred to the following dicta in *SA Optometric Association v Frames Distributors Pty Ltd T/A Frames Unlimited* 1985(3) SA 100 (O) at 1031 for the proposal,

“To justify its participation in a suit or to bring proceedings for relief, a party must show that it has a direct and substantial interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.”

The respondent also submitted that the applicant has failed to show that its members resolved that it represents them and brings this application on their behalf. That the applicant can only bring the application in respect of its own direct harm, and may not bring same on

behalf of people not before the court and who have not authorised it to do so. The respondent urged the court to dismiss the application on the basis of these preliminary points alone.

On the merits, the respondent applicant urged the court to consider only whether the eviction was carried out in terms of the law and whether the applicant is entitled to the order sought. The court was urged not to consider the issue of the ownership of the land as that issue was settled by the default order which is extant. Advocate *Hashiti* conceded that the respondents have failed to attribute any wrongful conduct or breach towards any of the members of the cooperative who are not named.

The applicant submitted that it has *locus standi* to bring these proceedings as it is cited as the first respondent in the writ and that it can bring proceedings on behalf of its members. The court was referred to the case of , *Ahmadiyya Anjuman Ishaati –Islam Lahore (SA) and Another v Muslim Judicial Council* 1993 (4) SA 850 (C) for the proposition that the applicant has *locus standi in judicio* to bring proceedings on behalf of its members. The applicant submitted that there is no requirement that the members resolve to be represented by the applicant when the respondents themselves conferred that representative capacity on applicant by suing it in its representative capacity.

Section 19 of the Co-operative Society's Act provides as follows,

“19 Register and certificates to be proof of registration, etc.

(1) The register shall be *prima facie* proof of matters directed or authorized by this act to be entered therein.

(2) Without derogation from section one hundred and eighteen, a document purporting to be a certificate of provisional registration or a certificate of registration shall be admitted in evidence in any court upon its production by any person and shall be *prima facie* proof that the society named therein is provisionally registered or registered, as the case may be.”

Section 19 provides that a cooperative register and certificate shall be proof of registration. In other words, any party wishing to prove the existence of a co-operative can do so by producing the cooperative's register and certificate of registration to prove such fact. The purpose of the section is merely to underline what suffices as proof of registration of a cooperative. I did not read s 19 to dictate that proof of registration of a cooperative is a requisite which ought to be met by a cooperative instituting proceedings in order to establish the cooperative's status and powers as suggested by the applicant. Further, I did not understand the provision to preclude cooperatives who fail to produce a certificate of registration, its constitution or articles of association at the commencement of proceedings to

be precluded from bringing any proceedings. It is not peremptory for every cooperative bringing litigation to produce proof of registration.

I am not in agreement with the conclusion reached by my brother TAGU J in *Greendale One District T/A Mukuvisi Co-operative v Caledonia Enterprises (Pvt) Ltd* HH 511 /15 that in every case where a cooperative is bringing proceedings, it is incumbent upon it to attach a certificate of registration to the application to establish that it is a registered cooperative and has power and authority to bring proceedings. Section 19 of the Co-operative Societies Act is not authority for the proposition that any cooperative wishing to institute proceedings can only do so on production proof of its certificate of registration, constitution or articles of association to establish its legal status and powers. There was no legal requirement on the part of the applicant to attach to its application, its certificate of registration, constitution or its articles at the commencement of these proceedings. That is not the law.

There is no legal requirement for a party instituting proceedings to file proof of authority to bring proceedings on behalf of another at the commencement of every proceeding. It is only in instances where a party's authority has been challenged that it may be required to produce such proof. The respondent did not challenge the applicant's authority to bring this application on behalf of its members in its opposing affidavit. Had it done so, this could have alerted the applicant of the requirement. This challenge is being raised at a very late stage.. The documents in issue if available could have been availed at a subsequent stage or through an answering affidavit. The persons sought to be evicted are cited in the second paragraph of the writ as the applicant, Nyashadzamwari Housing Cooperative and all persons claiming occupation and possession through them, thus members of the cooperatives. The applicant's members were evicted off the disputed land. The applicant seeks an order restoring its members onto the land and yet the members are not part of this application. The writ does not name these persons. The applicant's members have not filed supporting affidavits to this application. The applicant has not filed any proof to support the assertion that that it is mandated by members of its cooperative to bring these proceedings. The applicant has failed to prove that that it is mandated to bring this application on behalf of its members.

Our law is clear that a litigant can only bring proceedings on behalf of another where it is able to show that it has a direct and substantial interest in the subject matter and outcome of the proceedings. See *Zimbabwe Teachers Association v Minister of Education*

and Anor 1090 (2) ZLR 48. It must be shown that the litigant has a legal interest in the subject of the dispute which could be adversely affected by the judgment of the court. See *United Watch and Diamond Co (Pvt) Ltd v Disa Hotels Limited* 1972 (4) SA 409 (C). The right of a private person or association of persons is limited to bringing or prosecuting actions in his or its own interest. The right or interest which he or it seeks to enforce or to protect must be available to him or it personally. He or it has no title to institute proceedings in the public interest. See *Dairyple v Colonial Treasurer* 1910 T.S 372, *Ahmadiyya Anjuman Ishaati – Islam Lahore (SA) and Another Muslim Judicial Council (supra)* at 863H - 864A where Tebbutt J remarked:

“It is clear that in our law a person who sues must have an interest in the subject-matter of the suit and that such interest must be a direct one (see *Dalyrymple and Others v Colonial Treasurer* 1910 TS 372). In *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (T) at 804B, Eloff J states that: 'It is well settled that, in order to justify its participation in a suit such as the present, a party... has to show that it has a direct and substantial interest in the subject-matter and outcome of the application'. The learned Judge cited with approval the view expressed in *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (0), approved by Corbert J in *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C), that the concept of a 'direct and substantial interest' connoted 'an interest in the right which is the subject-matter of the litigation'. Corbert J went on to say at 415H: 'This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division... and it is generally accepted that what is required is a legal interest in the subject-matter of the action which would be prejudicially affected by the judgment of the Court'."

In *Zimbabwe Stock Exchange v Zimbabwe Revenue Authority* SC 315/06 the court dealt with a case involving litigation brought by the Stock Exchange on behalf of its members, the stock brokers. It challenged a decision of the Zimbabwe Revenue Authority assessing amounts of tax payable by stockbrokers. The Zimbabwe Stock Exchange made an application for an order declaring that the stockbrokers were exempted from liability for payment of tax. The court remarked as follows,

“The common law on *locus standi in judicio* of a party instituting proceedings in a court of law is that to justify participation in the action the party must show that he or she has a direct and substantial interest in the right which is the subject matter of the proceedings and the relief sought and not merely a financial interest which is only an indirect interest in the litigation. The exception to the rule is of a case in which the question raised for determination by a court involves the liberty of an individual who because of mental illness or detention is unable to institute the proceedings himself.”

The court held that none of the affairs of the appellant justifies the institution of proceedings to vindicate the right of a stockbroker to an exemption from liability to pay tax.

A party instituting proceedings is required to justify its participation in the proceedings. It must show that it has a direct and substantial interest in the right or subject matter of the dispute and outcome of the proceedings. It is required to show that the litigant has a legal interest in the subject of the dispute which could be adversely affected by the judgment of the court. It is not sufficient simply to establish a financial interest in the right sought to be addressed. A financial interest amounts to an indirect interest in the proceedings. It appears to me that where a party seeks to represent the interest of its members, it is incumbent upon such litigant to outline in its application, its affairs or business which justify its participation in the proceedings in order to vindicate the rights of its members.

The applicant is a cooperative. The nature and core of its affairs and business as a housing cooperative was not revealed. Its interest in the right sought to be protected by the it is obscure. It has not been shown how the issue regarding whether its members should remain in occupation of the land in issue is of interest to it and how the applicant will be adversely affected by a judgment of this court. It is not known which members it purports to represent. This court is not equipped to make a determination regarding whether its affairs and role as a cooperative justifies its institution of the proceedings for restoration on behalf of its members. It appears that the applicant merely has a financial interest in its members, such interest amounts only to an indirect interest in the proceedings. I am not satisfied that the applicant has shown the existence of a direct and substantial interest in the subject and outcome of these proceedings justifying it to bring these proceedings on behalf of its members. Further, the applicant has not shown that it is mandated to bring these proceedings on behalf of its members. I am also not satisfied that the applicant's members are part of these proceedings. Only the applicant is properly before the court. Because the applicant is cited in the writ, it has *locus standi* to challenge this writ. Even assuming I am wrong in my finding on *locus standi* , the applicant did not do a good job of this application. Awkwardly, the members the applicant evicted and it purports to represent are not named and known .It is not known who the applicant purports to represent. It would be inappropriate to grant an order restoring persons not identified.

The second issue that I will deal with is whether the writ was properly issued. The writ of ejectment reads in part as follows,

“Whereas TSL Limited and H.G.P Vostermans (Pvt) Limited of 28 Simon Mazorodze Road, Southerton, Harare obtained an order in the High Court of Zimbabwe on the 12th day of November 2014 against Tirivepano Housing Cooperative and Nyashadzamwari Housing Co-operative of Southlea Park, Harare interdicting them, their members and any associated

third party from entering the immovable piece of land measuring one hundred and nineteen decimal point five three six eight (119.5368) Morgen of land called Mokum Portion of Odar situate in the district of Salisbury at present occupied by the said Tirivepano Housing Co-operative and Nyashadzamwari Housing Co-operative, as appears of record.

Now, therefore you are required and directed to eject the said Tirivepano Housing Cooperative and Nyashadzamwari Housing Cooperative and all persons claiming occupation through them, their goods and possessions from and out of all occupation and possession whatsoever of the said ground and/or premises, and to leave the same, to the end that the said TSL Limited and H.G.P Vostermans (Pvt) Limited may peaceably enter into and possess the same, and for so doing this shall be your warrant.”

The writ records that it is issued on the basis of an order interdicting the applicant and its members from entering the immovable property. The order interdicting the applicant and its members from the land is the default order. That default order does not authorise the eviction of the applicant and its members from the land in dispute. The writ was therefore premised on a wrong order.

The consent order entered into by the parties was to the effect that the co-operatives and their members should desist from any further construction of any structure of whatever nature on the property in issue. The co-operatives were to desist from allocation of any further stands on the land in dispute to their members or any other third parties. The breach would arise in circumstances where the applicant and its members continued to construct structures and allocate more stands. The assistance of the Zimbabwe Republic Police would be enlisted to execute the order.

Advocate *Hashiti* conceded that the breach complained of could only arise from clauses 2 (1) and 2 (ii) of the consent order and further that the writ is premised on a wrong order. He submitted that the writ of ejectment ought to have been premised on the consent order and that the writ is irregular. The concession is properly made.

An execution which is challenged on the basis that it is irregular, can only be upset where it has been shown that the irregularity relied on constitutes sufficient cause for setting it aside. Irregularities concerning judgments and orders, writs of execution or property which is subject of an execution may constitute good reason for setting aside an execution. Mistake may also constitute a good reason for upsetting an execution. A litigant challenging an execution is required to show that the execution was carried out irregularly. Secondly, that the irregularity is material warranting the court to upset the execution. An irregularly issued writ of execution may constitute sufficient cause for setting it aside where it is premised on a wrong order. Such writ of execution is incompetent and is fatally defective and has no force

of law and no legal consequences flowing from it. It is a nullity. Nothing stands on it. It is not necessary for the court to set it aside.

The writ relied on in carrying out this execution is based on an order that does not give it authority to eject the applicant and its members. The writ was a mistake. It is for this reason irregular. This is a serious defect which goes to the root of the execution and is consequently fatal to the execution. The writ of execution relied on to evict the applicant and its members is a nullity. I will not set the writ it aside because it is not legally required of me to do so and I have not been requested to do so. Having found that the writ is premised on a wrong footing, it is not essential for the court to examine the merits of this application.

The applicant itself was not ejected from any land or premise. For this reason, I am unable to make an order restoring the applicant back onto the land. In the result, I am unable to accede to the applicant's prayer for restoration of its members onto the disputed land.

It is ordered as follows,

The application is dismissed

Each party is to bear its own costs

Nyamupfukudza & Partners, applicant's legal practitioners
Dube Manikai & Hwacha, 1st & 2nd respondent's legal practitioners