

MICHAEL PETER HITSCHMANN
versus
CITY OF MUTARE
and
THE TOWN CLERK OF CITY OF MUTARE

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 8 March 2016 & 23 March 2016

Opposed Matter

T Maanda, for the applicant
Ms D Sanhanga, for the respondents

MATANDA-MOYO J: The applicant sought the following order from this court:

- “1. Respondents shall within fourteen (14) days of this order furnish applicant with the record and all documents relating to the sale and alienation of a piece of land ordinarily described as ‘an infill area bordering Arcadia road to the South, Muvambi Road to the East, Cecil Kops Nature Reserve to the North and in the east the access road from Arcadia Road upto the Cecil Kops Nature Park.
2. Respondents shall jointly and severally pay applicant’s costs on a legal practitioner and client scale.”

At the date of hearing the order sought was amended to only include documents showing that procedures in terms of the Urban and Councils Act to alienate land were followed. The applicant dropped its request for documents including names of those who purchased the land in question. The applicant also dropped the issue of costs on a higher scale and requested ordinary costs.

The respondents opposed the granting of the relief sought on the following grounds;

- 1) That the applicant could not access information relating to third parties without citing such parties.

- 2) That applicant had failed to exhaust domestic remedies as provided for under the Access to Information and Protection of Privacy Act [*Chapter 10:27*].
- 3) That the applicant is not entitled to receive any of the claimed information as it is unnecessary and undesirable. The disclosure of such information is protected under s 14(4) of AIPPA as read with s 19 (1), 19 (2) (d) (e) and s 25 (3) (d), (f) (j) and (i) of the same Act.
- 4) That applicant is not entitled to any costs at all.

The brief facts are that the applicant is a resident of Mutare. On 2 September 2014 the applicant applied to be allocated the above land. The respondents advised him that such land was set aside for the Zimbabwe Republic Police who intended to construct their police station thereon. Sometime in December 2014 after obtaining information that the land was no longer reserved for ZRP, the applicant again applied for the above piece of land. The respondents advised the applicant on 19 February 2015 that the land was ‘an open space not subject to sale’. The applicant now has information that the respondents went ahead and sold the above land to certain individuals. The applicant believes that since he had applied for that particular land he had a right to participate in the sale process of such land. Such right has been violated by the respondents. The applicant suspects that the respondents failed to follow its own procedures as set out in the Urban Councils Act [*Chapter 29:15*] in alienating the land. In order to ascertain whether procedures were followed the applicant has requested access to documents kept by the respondents. The applicant requires such information to enable him to assert his rights. The respondents have refused to avail such information to the applicant leading to this application.

At the hearing of this matter the applicant conceded that he could not be allowed access to information involving third parties without such third parties having being joined to the application. He then amended his order to exclude such information. That disposed of the first point *in limine* raised by the respondents.

The respondents submitted that this court should decline its jurisdiction to hear the application on the basis that the applicant has failed to exhaust domestic remedies as provided for under part X of the Access to Information and Protection of Privacy Act. It is common cause the applicant requested records from the respondents in terms of s 5 (1) of AIPPA as read with s

62 (2) of the Constitution. Such request was ignored and in terms of the AIPPA, the end result is that the respondents refused to provide the information as requested. Section 54 (1) of AIPPA provides:

“For purposes of the section the failure by a head of a public body to respond within the time limit to a request for access to a record shall be deemed to be a decision to refuse access to the record”.

“Section 53 Right to request a review (1) A person who makes a request to a head of a public body, other than the commission, for access to a record or :- may request the commission to review any decision or act of the head of that public body that relates to that request.”

It is true that the applicant could have sought a review in terms of s 53 (*supra*). Mutambanengwe J in *Tutani v Minister of Labour and Others* 1987 (2) ZLR 88 (H) opined that a litigant should exhaust his domestic remedies first before approaching the courts unless there are good reasons for approaching the court earlier. See also *Moyo v Forestry Commission* 1996 (1) ZLR 1 (H). It is trite that where remedies are available that are capable of speedily and effectively resolving the dispute, litigants should exhaust those domestic remedies before approaching the court. See *Ramani v National Social Security Authority* SC 38/03. With regard this domestic remedy the applicant was silent as to why he did not pursue such. I can therefore not rule whether there are good grounds for not following that route.

However, the applicant herein has also approached this court in terms of s 4(1) of the Administrative Justice Act [*Chapter 10:28*] which provides;

“4(1) subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section three may apply to the High Court for relief.”

Once the applicant has approached this court in terms of the above section, then the issue of the applicant not having exhausted domestic remedies falls away. It is my view that the applicant is properly before this court. The applicant alleged the respondents also breached s 3 (1) of the Administrative Justice Act.

Let me now proceed to deal with the merits of the application. The applicant seeks information held by the respondents and requires such information for the exercise or protection of his right. It is therefore imperative upon the applicant to show that he requires such information to exercise or protect a right. The applicant submitted that he has a right to participate in the alienation of land by the respondents and that such right has been violated by

the respondents. He submitted that s 152 (2) of the Urban Councils Act provides for the procedure in alienating council land. It provides as follows;

- “(2) Before selling Or otherwise disposing or permitting the use of any land owned by it the council shall, by notice published in two issues of a newspaper and posted at the office of the council, give notice -:
- (a) of its intention to do so, describing the land concerned and stating the object, terms and conditions of the proposed sale..... and
 - (b) that a copy of the proposal is open for inspection during office hours at the office of the council for a period of twenty-one days from the date of the last publication of the notice in a newspaper; and
 - (c) that any person who objects to the proposal may lodge his objection with the town clerk within the period of twenty-one days referred to in paragraph (b).”

The Act also provides that once an objection has been noted then council can only alienate land after considering those objections.

The applicant complained that by not following its own procedures the respondents have violated his rights to lodge any objections or to participate in the process. The applicant further submitted that he is entitled to the requested records and that this court should grant his application. In terms of s 9 (4) (a), (b) and (c) of AIPPA the requester is entitled to the records if;

- “(a) such access will not contravene the Act or
(b) access will not result in the disclosure of personal information pertaining to a third party that is protected from disclosure in terms of part III; or
(c) and access is in the public interest.”

The applicant must show the following;

- (i) that the information is required for the exercise or protection of any rights;
- (ii) that he has complied with the requirements of AIPPA in relation to a request for access to information and
- (iii) that access to the information requested cannot be refused on any of the grounds provided for in s 14 – 25 of AIPPA.

The respondents argued that the applicant is not entitled to such information. They argue that such information is protected by s 14 (4), 19 (i) (d) and (e) and s 25 of AIPPA. Section 14 (4) is not applicable in this matter. The requested information do not fall under deliberations of a local government body held in camera. The applicant simply wants information to verify that the respondents acted within the confines of s 152 of the Urban Councils Act; in other words that the respondents complied with statutory requirements equally I find s 19 inapplicable in this matter.

Section 25 became inapplicable as soon as the applicant conceded such information is not available to him.

The respondent's counsel argued that this matter fell on all fours with the case of *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA). I have gone through the above case and observed that it is distinguishable from the current case in various material respect. In *Unitas Hospital* matter cited above the hospital had availed all records to the respondents which included a complete set of the deceased's records, including notes by the nurses, their observations as well as treatment received. The respondents had been supplied with all documents they required to exercise or protect their right. However the respondents had requested for a particular report which did not deal with the death of the deceased. The report dealt with the quality and efficiency of the nursing care in the ICU and High Care Unit of the hospital. The Supreme Court of appeal found that the respondents had failed to show that such information would be of assistance for the stated purpose and access was denied. The court held that "open and democratic societies would not encourage what is commonly referred to as "fishing expeditions". The applicant herein requires those records used by council in alienating land, which is different from the record required in the *Unitas* case.

I am of the view that the applicant would be assisted in having access to the requested records to determine what actions to take. In *Van Niekert v Pretorial City Council* 1997 (3) SA 834 T @ 848 G the court said;

"Either way, disclosure will promote an early settlement of the dispute and bring the envisaged litigation, by settlement or abandonment, to a short, sharp end. In this sense, the applicant can in my view be said reasonably to require the report."

Streicher JA in *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 (3) SA 1013 SCA para 28 said:

"Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise of protection of the right. It follows that, in order to make out a case for access to information An applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how the information would assist him in exercising or protecting his right."

From a reading of the applicant's case, he requires such information to protect his right to participate in the sale. He requires the advertisement in terms of s 152 of the Urban Councils Act

which would assist to show whether the respondents complied with the requirements set out statutorily in disposing of council land.

Zimbabwe has ratified several International and Regional Instruments that provide for the right to access to information of importance are the International Covenant on the Civil and Political rights and the African Charter on Human and People's rights. Article 19 of the ICCPR and Article 9 of the ACHPR are instructive on the right to information. In the current Constitution the legislature has clearly provided for the right to information even from public bodies. This right was not specifically provided for in previous Constitutions. Hence in the case of *Matebeleland Zambezi Water Trust v Zimbabwe Newspapers (1980) Limited* and the Editor of the Chronicle S/C 3/03 the court held that the then s 20 (1) of the constitution did not cover a situation where one could approach and demand information from another.

The current constitution in particular s 62(2) of the Constitution of Zimbabwe provides;

“Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or a protection of a right.

The respondent is a public institution and the ACHPR provides that public institutions “hold information not for themselves but as custodians of the public good and everyone has a right to access this information.”

There is no doubt access to information held by public institutions more so for purposes of ensuring that they complied with the law in carrying out their obligations ensures accountability by these public bodies. If the courts fail to give effect to these constitutional provisions that promotes transparency and accountability by public bodies, then the ability of citizens to hold public actors to account will be violated. Section 3(1) (a) of the Administrative Justice Act [*Chapter 10:28*] enjoin an authority as the respondent to act lawfully, reasonably and in a fair manner in taking an administrative actions which may affect the rights, interests or legitimate expectations of any persons.

I am of the view that the applicant has satisfied the requirements for granting the order sought with amendments.

Accordingly, I order as follows;

- 1) That the respondents shall within fourteen (14) days of this order furnish the applicant with the records and documents showing that they complied with s 152

(b) of the Urban Councils Act, that is to say, the advertisement and the notice published relating to the sale and alienation of a piece of land ordinarily described as “an infill area bordering Arcadia road to the South, Murambi Road to the East, Cecil Kops Nature Reserve to the north and in the east the access road from Arcadia road up to the Cecil Kops Nature Park.

- 2) That the respondents jointly and severally pay the applicants costs of suit.

Maunga Maanda & Associates, applicant’s legal practitioners
Matsika Legal Practitioners, 1st and 2nd respondent’s legal practitioners