NEVERMIND MUTAMBA
and
MUSEKIWA SUNGANO ZVAREBWANASHE
and
MASVINGO UNITED RESIDENTS AND RATEPAYERS ALLIANCE
versus
CITY OF MASVINGO
and
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING N.O
and
MINISTER OF HEALTH AND CHILD CARE
and
MINISTER OF FINANCE N.O

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 6, 7, 10 April and 21 May 2020

Urgent chamber application

M. Mureri for the applicants
R. Makausi with him *J. Mupoperi* for the 1st respondent
T.Undenge with him *F. Chingwere* for the 2nd to 4th respondents

WAMAMBO J: I earlier, ordered that the application is dismissed with costs. These are the comprehensive reasons for so ordering.

This is an urgent chamber application wherein applicants seek the following relief:

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a Final Order should not be made in the following terms: -

1. The 1st respondent is ordered to continue to supply adequate constant, clean and potable running tap water or water from bowsers to the 1st applicant and residents of Rujeko, Mucheke, Zimre Park, Rhodene and Cloverly, Masvingo.

2. The 1st Respondent's failure to ensure supply of adequate constant clean and potable water to 1st applicant and residents of Rujeko, Mucheke, Zimre Park, Rhodene and Cloverly in Masvingo be and is hereby declared to be a violation of Applicant's right to clean, safe and potable water as provided for under Section 77(a) of the Constitution of Zimbabwe (2013).

3. The 2nd, 3rd and 4th respondent's failure to take steps to ensure that 1st respondent supplies adequate constant, clean safe and potable water to the Applicants and the residents of Rujeko, Mucheke, Zimre Park, Rhodene and Cloverly for the period of the national lockdown and beyond.

   (a) be and is hereby declared to be a violation of the Applicants' right to clean, safe and potable water in terms of section 77(a) of the Constitution.

   (b) it further be and is hereby declared to be a violation of the Applicants right to basic healthcare in terms of section 76 of the Constitution.

4. The respondents shall jointly and severally one paying the other to be absolved bear the costs of this suit.

INTERIM RELIEF GRANTED

Pending determination of this matter applicant is granted the following relief:-

1. That the 1st respondent is ordered to immediately supply adequate constant, clean and potable tap water and water on wheels of water bowsers to the 1st applicant and residents of Rujeko, Mucheke, Zimre Park, Rhodene and Cloverly suburbs during the period of the national lockdown and state of disaster and as may be subsequently extended.

2. The 1st respondent is ordered to supply a schedule for the immediate deployment of water bowsers within Rujeko, Mucheke, Rhodene, Zimre Park and Cloverly suburbs to the applicant's legal practitioners within twenty-four hours of this order.

3. The 1st respondent shall supply bulk water supplies to the applicants during the period of the national lockdown and state of disaster and or its extension and such supplies shall be supplied subject to social distancing guidelines
4. The 2nd Respondent and 3rd respondent are ordered to ensure that they provide oversight and monitoring to the 1st respondent in implementing the measures above.

5. The 4th respondent shall urgently assist the 1st respondent in implementing the measures above.

6. There should be no order as to costs

SERVICE OF THIS ORDER

Applicants legal practitioners be and are hereby granted leave to effect some of this order on the relevant parties.

The first respondent is opposed to the application. *Mr Mureri* for the applicant withdrew the application against the 4th respondent on the grounds that 4th respondent had disbursed money to first respondent and additionally paid money towards water treatment. The second to third respondents were content to abide by the decision of the court.

Mr Makausi counsel for the first respondent raised a number of points in *limine* as follows:

- matter is not urgent
- 3rd applicant is improperly before the court and lacks *locus standi* to bring this application
- the draft order is defective
- the applicants used the wrong form for the application

It would appear that some of the points in *limine* appear as separate in separate *paragraphs* though the actively are just points that flow from the main points *in limine as* reflected above. I will deal with the points in *limine* in full.

URGENCY

First respondent avers that the application is not urgent as applicants have not alleged that 1st respondent has not been supplying water to the residents of Masvingo as specified before the Minister of Health lockdown declaration encapsulated in S.1.83 of 2020 (hereafter referred to as the Lockdown Order). First respondent further avers that applicants make it clear that the cause of action arose many years before the Lockdown Order as referred to earlier.

First respondent makes many other averments which effectively denote that the applicants did not act when the need to act arose and that they are abusing court process.

The applicants stick by their application and clarified the issues by stating that their application clearly relates to the period after the Lockdown Order. Effectively that the cause of action only arose because of the COVID epidemic that has engulfed virtually the whole world. Between the Lockdown Order and this application are only four days. It is indeed common cause that COVID 19 is an epidemic with astronomical consequences.

I am in agreement with the applicants that they have established urgency. Clearly the need to act in this cause only arose after the Lockdown Order. The application was filed a few days afterwards. If I understand the applicants well the need to act only arose because COVID 19 was officially and legally recognised as an epidemic in our country through the law. The application has its basis on the recognition that the disease COVID 19 is not only an epidemic but the real and broad dimensions have also been recognised under our law. That is to say the precautions to be taken against the disease, the symptoms thereof among others are spelt out explicitly in the law and is splashed all over the television advertisements, radio and other media. The certificate of urgency is also attacked for various reasons. I find that the attack is misplaced. It clearly reflects the history, the reasons and the implications of the urgency as based on founding affidavit. In light of the above I find the preliminary point.

LOCUS STANDI OF 3RD APPLICANT.

1st respondent argues that 3rd applicant is not only a universitas but also that Anoziva Muguti who deposed to an affidavit representing 3rd applicant calls himself a director while the organisation he purports to represent does not have directors but Trustees. While arguing that 3rd applicant is not a universitas 1st respondent in paragraph 3.2. of the application avers as follows:-

> "*Further to that a perusal of the same Annexure 'D' to the applicant's urgent chamber application reveals that the universitas created by the document is MASVINGO UNITED RESIDENTS AND RATEPATERS AND ALLIANCE TRUST (MURRAT).*"

Clearly 1st respondent have acknowledged that 3rd applicant is indeed a universitas. In the same paragraph 1st respondent avers that 3rd applicant is improperly before this court as it has not been shown how it is a universitas.

A further major complaint raised by 1st respondent is that Annexure "D" the Deed of Trust creating 3rd respondent indicates that it is not membership based but is made entirely of 6 to 10 Trustees, the management team and the employees. That there is no mention of any general membership of the residents of Masvingo as members of the Trust. 1st respondent avers that the objectives of the Trust do not mandate 3rd applicant to represent Masvingo residents in court. The residents purportedly represented by 3rd applicant are not only mentioned but clearly 3rd applicant cannot represent people who are not its members. The 1st respondent argues further that 3rd applicant does not allege that it is a resident of Masvingo or where it operates from or how it is affected by the water shortage.

The applicant's counter argument is that they are covered by section 85 of the Constitution.

In *C.T. Bolts (Pvt) Ltd* v Workers Committee SC 16/12 GARWE JA at page 2 had this to say:-

> "*Under the common law an incorporated association not being a legal persona cannot as a general rule, sur or be sued in its name apart from the individual members, whose names have to be cited in the summons. A universities on the other hand has the capacity apart from the rights of the individuals forming it to acquire rights and incur obligations. The position is also established that a body that has no Constitution is not a universitas for it is the Constitution that determines whether an association is or is not a universitas*."

MUSAKWA J *in Southlea Park Home Owners' Association v Sensene Investments* (Private) Limited & Others HH 90/19 at page 5 contributed as follows:-

> *"Another essential ingredient of locus standi is that a party who institutes legal proceedings must demonstrate some interest that requires legal protection. In the case of Lottie Gertrude Bevier Stevenson v The Minister of Local Government and National Housing and Others SC 38/02 it was held that there must be real and substantial interest or direct and substantial interest."*

In this case 3rd applicant's Deed of Trust – Annexure "D's" first main objective is 'to advocate for quality service provision by the local authority and other service providers for the residents of Masvingo'.

Section 85 of the Constitution reads as follows:-

> "*85. Enforcement of fundamental human rights and freedoms*
>
> *(i) Any of the following persons, namely-*
>
> *(a) any person acting in their own interests;*
>
> *(b) any person acting on behalf of another person who cannot act for themselves;*
>
> *(c) any person acting as a member, or in the interests, of a group or class of persons;*
>
> *(d) any person acting in the public interest;*
>
> *(e) any association acting in the interests of its members;*
>
> *is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation."*

Applicants aver that the failure to supply adequate, clean potable water is a violation of their rights to clean, safe and potable water as provided for under section 77(a) of the Constitution Section 77(a) reads as follows:-

"*77. Right to food and water*

Every person has the right to-

(a) safe, clean and potable water; and

(b) *sufficient food; and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right.*"

I find in the circumstances that not only has 3rd applicant established that it has a Constitution but that the Constitution expressly provides inter alia that it can advocate for quality serve provision by the local authority and other service providers, for the residents of Masvingo.

Applicant has also established that it is acting in the interests of its members in pursuance of the right established by section 77(a) of the Constitution.

That the 3rd applicant's representative may call himself a director as opposed to a Trustee is neither here nor there for the 3rd applicants Constitution clearly establishes that the representative, Anoziva J. Muguti is one of the Trustees.

In the circumstances I find that the 3rd applicant has *locus standi* to institute these proceedings. The point *in limine* raised is thus dismissed.

DEFECTIVE DRAFT ORDER

First respondent argues that the applicants do not assert that they are representing all residents of Masvingo. It is further argued that the interim and final relief are the same.

A close examination of the terms of the interim and final relief reflect major differences. The interim relief seeks the relief of supply of constant water during the period of national lockdown and ancillary relief of schedules, oversight and monitoring in light of the COVID 19 disease and its inherent damages, for example social distancing.

The final relief sought is a continuation of supply of water and declarations that the respondents' actions are violations of Sections 77(a) and 76 of the Constitution.

Clearly the draft order could have been better drafter. There are repetitions and gaps in some parts.

However it is not so badly drafted that it amounts to the same relief in the interim and final order.

I dismiss this point *in limine*.

WRONG FORM USED FOR THE APPLICATION

1st respondent avers that applicants have notified respondent to file their notice of opposition in Form 29 B while the High Court Rules do not provide for a Form 29B. Further that the format employed by applicants left the respondents confused on how to file their responses.

In this case it becomes clear that applicants were supposed to make use of Form No. 29 "with appropriate modifications as provided for in Rule 241(1) of the High Court Rules 1971.

In *Luke Harvest Aquaculture (Pvt) Ltd* versus *Tichaona Revesai* CHITAPI J said at page 9:-

> "*The problem which I find with the proviso to r 241(1) s that it does not spell out the nature and extent of the 'appropriate modifications which should be made to Form 29 where a chamber application is to be served on interested parties".*

While it is commendable to use the correct Forms in such applications there was no prejudice occasioned to the respondents. 1st respondent on his part managed to file a response within three days of the filing of the application. I take a purposive robust approach and condone the wrong form and format being employed by applicants. This point *in limine* is dismissed.

On the merits applicants seeks an interim order for the supply of adequate constant clean and potable tap water and water on wheels of water bowsers to Rujeko, Mucheke, Zimre Park, Rhodene and Cloverly suburbs of the ancient city of Masvingo and ancillary relief as spelt out at the start of this judgment. Paragraph 5 of the draft order falls away as a result of the withdrawal by applicants of 4th respondent as a party in these proceedings.

Applicants' case hinges on the laws relating to the COVID 19 epidemic. Basically applicant's case hinges on the fact that the history and background reflect that 1st respondent has for years been rationing water supplies to the applicants. More particularly that in light of the COVID 19 pandemic there are guidelines issued by the World Health Organisations specifically encouraging individuals to wash their hands using running water including hand washing facilities.

Applicants aver that the Government of Zimbabwe has recognised and declared a state of disaster and a mandatory lockdown to prevent and contain the spread of the COVID 19 virus. To that end the erratic supply of adequate clean and potable water is exposing Masvingo residents to

the COVID 19 virus. Flowing therefrom applicants' rights under sections 76 and 77 (a) of the Constitution have been infringed.

The 1st respondent opposes the application. A brief history of the challenges facing Masvingo water supplies is given as follows:-

Masvingo City abstracts and treats water at Bushmead Water Works close to Lake Mutirikwi. The city has a water demand of about 45 000 cubic meters a day for residential, commercial and industrial use. The water treatment plant has the capacity to deal with only 30 000 cubic metres per day. However because the water treatment plant is old its pumping capacity is 27 000 cubic metres per day, which amounts to 60% of the demand. The pumping capacity of 27 000 cubic metres is only achievable where there is no load shedding and electricity is available around the clock.

The Town Engineer Mr Tawanda Gozo's report on the state of water supply is attached as Annexure "B".

1st respondent attaches letters reflecting efforts made to increase the pumping capacity of the water to be supplied to Masvingo City.

1st respondent also avers that it has drilled 39 boreholes to avert the water problem within the city and also attaches Annexure "G" reflecting that 1st respondent through its employees regularly supplied water via bowsers to different section of Masvingo.

Applicant asserts that 1st applicant's house is at a low lying area. After being served with the interdict application a council employee was dispatched to 1st applicant's house and found that water was running, that the house had no water problem and that a garden flourishes at 1st applicant's house. Monthly water bills apparently reflecting that water is consistently supplied are attached as Annexure "H". 1st applicant avers that he resides at Rujeko suburb and goes on to traverse water problems apparently faced by residents in other suburbs of Mucheke, Rhodene, Zimre Park and Cloverly.

1st respondent responds that 1st applicant has not proffered any proof of the alleged actions or inactions of 1st respondent. 1st respondents avers that a council employee was dispatched to 1st applicants' house and determined that he has been receiving regular water at his residence.

In *TM Supermarkets (Private) Limited* and *Sheriff of Zimbabwe* CHIDYAUSIKU CJ enumerated the factors to be considered when interim relief is sought as follows at page 5 :-

´The factors to be take into account in considering the grant of interim relief are well settled. These are –

(1) whether or not the party seeking the relief has a prima facie right in casu, whether the University has a prima facie right to stay the executions of the sale of the attached property pending the determination of the appeal

(2) whether or not the appellant, in this case the University will suffer irreparable harm if execution of the arbitral award is not stayed and the appeal succeeds, and

(3) the balance of convenience."

The first and second applicants reside in Rujeko and Mucheke suburbs respectively. Do they have a *prima facie* right to demand the supply of water in the face of the COVID 19 epidemic?

The 1st respondent has responded by asserting that the 1st applicant resides in a low lying area which receives a constant water supply. A supporting affidavit of Onias Chirovera is attached supporting the 1st respondent's position. I did not hear the applicants laying any strong opposition to the assertions by Onias Chirovera. 1st applicant has on the papers been proven to receive a constant water supply. This has not been controverted. 1st applicant refers to the water supply in other suburbs where he does not lay any personal and positive knowledge of the water supply thereat. He refers to Zimre Park, Rhodene and Cloverly suburbs without laying a basis on how he obtained or has reasonable proof of the water supply position of those suburbs.

2nd respondents resides at Chesvingo, Masvingo. He associates himself with 1st applicant's founding affidavit. His affidavit clearly does not advance the case any further.

3rd applicant is represented by Anoziva J. Muguta. His affidavit is quite short. He associates himself with the affidavit deposed to by the first applicant. He states as follows in paragraph 5;

"*I also wish to add that in some parts of Masvingo particularly Rujeko, Mucheke, Zimre Park and Cloverly the 1st respondent does not supply any clean and potable water at all."*

The assertion above leaves other suburbs of Masvingo. The assertion that 1st respondent does not supply any clean and potable water at all is not substantiated. This is considered in the light of the position of 1st respondent as supported Annexures "B" and "C"

There appear to be contradictions between Anoziva J. Muguti's affidavit and that of 1st applicant's representative, Nevermind Mutamba.

In the light of the 1st respondent's response and efforts made to elicit the true water supply situation of the 1st and 2nd applicants I find that the 3 applicants have not established a *prima facie* right.

I have not lost sight of the interim relief as sought which also includes suburbs where no representative has deposed to an affidavit in this case. This gap was supposed to be closed by 3rd applicant who has not added much.

It has been demonstrated that as for the 1st and second applicants their personal supplies of water are not erratic and if anything are fairly consistent. As mentioned before 3rd applicant's representative's affidavit is not very helpful.

Irreparable harm to be suffered by applicants if the relief they seek is not granted has not been proved either 1st respondent has brought to the fore the position on the ground which has not been controverted. Much as it is expected that 1st respondent should attempt by all means to adequately supply consistent water to the residents of the city they have laid bare their capacity and efforts to resolve the same. In the light of the limited pumping capacity of 1st respondent in the circumstances I do not find that irreparable harm has been proven. There are further avenue like sinking of boreholes and deliveries of water to residential areas as per Annexure "G".

The alarming and possibly fatal consequences of the COVID 19 disease aside, it has not been proven that there will be irreparable harm if the relief sought is not granted. To revert to the rights under Sections 76 and 77(a) of the Constitution which applicants advanced in their applications it should be clear that both rights are subject to the State taking reasonable legislative and other measures within the limits of the resources available to it, to achieve the progressive realisation of this right.

The 1st and 2nd applicants themselves have not demonstrated irreparable harm as they have been proved to receive constant water supply. They advert to other residents and other suburbs without laying such a basis.

3rd applicant as pointed out earlier adds little flesh to the matter.

I find that he does not prove that irreparable harm will occur. It is clear 3rd applicant places reliance on 1st applicant's founding affidavit. As a representative of the residents of Masvingo there was need for 3rd applicant to prove a *prima facie* right in the circumstances. The

contradictions in the applicants' affidavits of the true state of the water supply in Masvingo does not help matters either.

It is a well-known adage that he who alleges must prove.

As for the balance of convenience one only has to consider the nature of relief sought to realise that the balance of convenience does not favour the applicant.

The nature of interim relief sought namely "adequate consistent, clean and potable water and water on wheels" is on its own vague. Particularly where applicant seeks supply of adequate water. What is adequate is not defined in the application. In oral submissions, counsel for applicants was asked to define adequate water and was not very helpful in that regard.

I am averse to granting as vague an order as one reflecting "adequate" supply of water.

It is this type of order that will result in parties reverting time and again back to court for a definition of what is adequate.

I am aware that the COVID 19 epidemic presents many challenges to our country and the world at large. The 1st respondent should clearly assist in averting a catastrophe in the circumstances. However in the circumstances as spelt out before me I also find that the balance of convenience does not favour the applicant. It has not been proven before me that the current supply of water as presented by the applicants as averted to earlier is such that the balance of convenience favours their case.

Although 1st respondent proposed that I dismiss the application and grant costs against the applicants on a legal practitioner and client scale, I have considered that the grave implications of the COVID 19 are not to be disregarded. The application deals with a novel area impacting on citizens health. To that end I will make an order of costs on the ordinary scale.

In the circumstances I make the following order –

The application is dismissed with costs.

Matutu and Mureri, applicants' legal practitioners
Saratoga Makausi, 1st respondent's legal practitioners
Civil Division of the Attorney General's office, 2nd to 4th respondents' legal practitioners