

**NELSON MASHIRIR t/a POWER MANUFACTURING**

**Versus**

**CITY OF KWEKWE**

IN THE HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 29 FEBRUARY & ..... 2024

**Opposed Application**

*Advocate S. Siziba* for the applicant  
*A. Mutatu* for the respondent

**MOYO J:** This is an application wherein the applicant seeks the following relief:

“The respondent replaces 970 to 1077 Kwekwe Township of stand 7799 Kwekwe Township situate in the District of Kwekwe with a suitable industrial stand acceptable to the applicant and that the respondent bears the costs of suit.”

At the hearing of the matter respondent raised 3 preliminary points, one of documents irregularly filed in the court record in breach of the rules, seeking that such documents be expunged. The second preliminary point is that of *locus standi* that the purported agreement of sale is between respondent and a different party and the party now seeking to enforce it is a different party. The third preliminary point was that of prescription.

I will start with the issue of *locus standi*, for it is my considered view that, before the court looks at which documents are to be considered when dealing with the matter on the merits, or whether the claim has prescribed, the court must first of all deal with the issue of *locus standi* for it then determines whether the rightful parties are before the court. It is only after the court is satisfied of that aspect of whether the correct parties are before it, that it will then proceed to deal with the

papers, whether they are regular or not and whether the debt has prescribed or not.

It is for this reason that I will restrict myself to the preliminary point on *locus standi* at this stage. The applicant states thus in the founding affidavit paragraph 1.

“I am the applicant herein and it is in that capacity that I am familiar with the facts deposed to herein and I am entitled to depose hereto.”

In paragraph 5 of the founding affidavit applicant states the following:

“This is an application for the respondent to replace my stand that it resold to a third party and the parties subsequently agreed that the stand would be replaced with another stand acceptable to me and inspite of the respondent showing me different stands it has not done anything to consummate the replacement of my stand.” (Emphasis mine)

The applicant has attached a memorandum of agreement of sale between the Municipality of Kwekwe as the seller and Power Manufacturing Industry as the purchaser.

The agreement of sale is not between applicant and respondent. It is between Power Manufacturing industry and respondent. This is not what applicant tells us in the founding affidavit. In the founding affidavit applicant is telling us that he is here to enforce his own personal rights flowing from his own agreement with respondent. Whilst the suit is titled Nelson Mashiri t/a Power Manufacturing industry, in the agreement of sale the parties are not Nelson Mashiri t/a Power Manufacturing Industry but the party therein is Power Manufacturing Industry only. Clearly, there is problem here. Here we have a suit wherein one Nelson Mashiri t/a Power Manufacturing is the applicant. Even if it were to be assumed that Power Manufacturing and Power Manufacturing Industry are one, the problem is that Nelson Mashiri has never been a party to the

agreement of sale between respondent and Power Manufacturing Industry. If Nelson Mashiri was a party therein, the agreement of sale would have had the purchaser named “Nelson Mashiri t/a Power Manufacturing Industry” as well. An agreement of sale cannot be entered into with an artificial person called Power Manufacturing Industry and yet it is between respondent and a natural person called Nelson Mashiri who trades as Power Manufacturing Industry. It does not happen that way.

Let us say for a moment perhaps there was confusion either in the doing of the agreement of sale, or for some reason parties were not stated as they should have been in the agreement, applicant was duty bound to make a case for that by providing a full explanation for the court, so that the court appreciates and is confident that the correct party is before it. Applicant states in the affidavit that he bought a stand from respondent, he does not mention Power Manufacturing Industry at all and his relationship with it. He however, proceeds to attach an agreement of sale between Power Manufacturing Industry and the respondent. Even then, he does not say a thing. He just leaves the court to question and assume that these 2 parties are one. The applicant had a duty to explain his standing in this matter seeing the agreement of sale does not bear his name as a purchaser. Nowhere in the founding affidavit does the applicant even mention Power Manufacturing Industry he just puts it as a title and leaves it there. Nowhere in the founding affidavit does applicant explain his relationship with Power Manufacturing Industry.

*Locus standi in judicio* is a serious matter for it creates the avenue for the appropriate party to access relief from the courts. It is not a matter that can be taken lightly where a litigant pleads a disjointed case *vis-à-vis locus standi* and expect the court to sift the chaff from the grain in a bid to establish who is before it and whether they are the rightful party. Seeing that the agreement of sale was

between respondent and Power Manufacturing Industry, applicant was duty bound to mention in the founding affidavit why an agreement entered into with Power Manufacturing Industry, wherein no Nelson Mashiri was named as a party, was being enforced by him as an individual. It is trite that a party cannot enforce an agreement that he is not a party to. And if he traded as Power Manufacturing Industry why the agreement of sale was not between him so trading with respondent?

Clearly, the applicant has failed to properly place himself as an appropriate party in these proceedings and they must be struck off the roll for the simple reason that the wrong party is before the court. It will not be necessary in my view to consider the other points *in limine* raised by respondent for they would only become relevant if the correct parties were before the court.

It is for these reasons that the application will be struck off the roll with costs.

*Mhaka Attorneys*, applicant's legal practitioners  
*Mutatu & Partners*, respondent's legal practitioners