REPORTABLE (04)

CLEMKWA BUILDING CONTRACTORS (PRIVATE) LIMITED
v
(1) CHIVI RURAL DISTRICT COUNCIL (2) MINISTER OF LOCAL GOVERNMENT PUBLIC WORKS AND NATIONAL HOUSING N.O

SUPREME COURT OF ZIMBABWE
UCHENA JA, KUDYA JA & MWAYERA JA
HARARE: 9 SEPTEMBER 2024 & 24 JANUARY 2025

R. Mutero, for the appellant

M. Mavhiringidze, for the first respondent

L.T. Muradzikwa, for the second respondent

MWAYERA JA:

INTRODUCTION

1. This is an appeal against the whole judgment of the High Court ("the court *a quo*") handed down on 17 January 2024, wherein it dismissed an application for relief, made in terms of s 4 of the Administrative Justice Act [*Chapter 10:28*] ("AJA"). The court *a quo* held that it had no jurisdiction to hear the dispute between the appellant and the first respondent emanating from a lease agreement between the two parties, in which they agreed that any disputes would be heard by the Magistrates Court.

FACTUAL BACKROUND

2. The appellant is a duly incorporated company registered in terms of the laws of Zimbabwe.

The first respondent is a local authority while the second respondent is the Minister of the relevant Ministry cited in his official capacity. Since 1 February, 2021 the appellant was in occupation of stand number 114 Mhandamabwe Business Centre, Madyangove Communal Area, Chivi District measuring 5695m^2 ('the property') having been granted a lease by the first respondent with the approval of the second respondent.

3. By letter dated 21 May 2002, the first respondent allocated stand number 114 Mhandamabwe Business Centre, Madyangove Communal Areas, Chivi District, measuring 5695 square metres to the appellant ("the property"), subject to the conclusion of a lease agreement. The anticipated written lease agreement was however only executed with the approval of the second respondent on 20 February 2021. Thereafter, the appellant took occupation of the stand and commenced to operate a service station thereon. It effected some improvements on the property, with the approval of the first respondent.

4. In May 2021, the appellant applied to the first respondent for authority to further develop the property by expanding the infrastructure with the aim of constructing a food court and a superette at the property. By letter dated 21 September, the first respondent, questioned the correctness of the site plan submitted together with the appellant`s application on the basis that the site plan submitted was not a true representation of what was on the ground. It also requested the appellant to furnish a land utilization diagram. It further ordered the appellant to stop carrying out any developments on the property before the approval of the building plans. On 18 January 2022, the first respondent wrote a letter to the appellant, through its lawyers, explaining the importance of the production of a utilisation diagram and suggested that the parties meet so as to settle the issues amicably.

5. Dissatisfied by the first respondent`s response the appellant approached the court *a quo* seeking relief in terms of s 3 of the AJA.

PROCEEDINGS *A QUO*

6. The appellant sought to impugn the decision of the administrative authority, the first respondent, for want of compliance with provisions of the AJA. It was argued on behalf of the appellant, that s 3 of the AJA placed a duty on the first respondent as an administrative authority to act lawfully, reasonably and fairly when taking an administrative action which may affect the rights and interests of others. The appellant argued that the first respondent reduced the size of the property allocated to it from 5695m^2 to 2600m^2. It therefore argued that the first respondent was guilty of commissions and omissions which infringed on its rights and interest.

7. The appellant contended that the first respondent acted contrary to the rules of natural justice. It argued that it had provided a utilization diagram, as such the respondent could not unilaterally reduce the size of the property.

8. The respondent opposed the application and argued on both the preliminary points and the merits. Firstly, it was argued on behalf of the respondent that the appellant had not established a cause of action. It was further argued that the appellant had rushed to approach the court *a quo* without first exhausting domestic remedies. It was also contended that the respondent sought for a round table conference but the appellant through its counsel did not accede to the request. It was further averred that no administrative decision was made on the issue. Secondly the respondent contended that the court *a quo* did not have jurisdiction to deal with the matter because the parties had in their lease agreement, submitted to the jurisdiction of the Magistrates Court of the area

in which the property is situated. On the merits, counsel submitted that the first respondent was yet to make an administrative decision on the appellant's proposal and that the appellant had failed to provide the requisite utilization diagram. In relation to the size of the property, it was averred that there was an error, but the site plan that was given to the appellant, and pegs shown to the appellant in 2002, correctly showed that the stand measured 2584.86 m^2 and as such there was no reduction shown by the layout plan. The first respondent`s contention was that the alleged 5695m^2 as provided for in the lease agreement or letter was never the true size of the stand.

FINDINGS OF THE COURT *AQUO*

9. The court *a quo* held that, as the court application did not contain any grounds of review, it was improperly before it. In relation to jurisdiction, the court *a quo* held that the Magistrates Court had jurisdiction in terms of the lease agreement which was signed by both parties. Regarding the size of the property, it was held that the appellant could not demand and thereafter be granted a property whose dimensions were not on the master plan. It therefore, held that it had no jurisdiction to hear the matter and proceeded to dismiss the application. It however further remitted the dispute to the first respondent for it to carry out administrative processes and survey within 30 days.

10. Aggrieved by the determination of the court *a quo*, the appellant noted the present appeal on the following grounds of appeal.

GROUNDS OF APPEAL

1. The court *a quo* erred at law in failing to find that the position taken and communication made by the first respondent to the appellant that stand 114

Mhandamabwe business centre, Madyangove Communal Area, Chivi District measures Two Thousand and Six Hundred square metres (2600m$^{2)}$ constituted administrative action which at law is reviewable.

2. A *fortiori*, the court *a quo* erred at law in not finding that the letter by the first respondent to the appellant dated 21 September 2021 constituted administrative action which, at law is reviewable.
3. The court *a quo* grossly misdirected itself on the facts in failing to find that the first respondent had decided to reduce the extent of the stand allocated to the appellant from Five Thousand and Six Hundred and Ninety-five square meters (5695m^2) to Two Thousand and Six Hundred Square metres (2600m^2).
4. The court *a quo* erred at law in failing to find that it was entitled to grant a mandamus in terms of s 4 (1) (c) of the Administrative Justice Act [*Chapter10:28*].
5. The court *a quo* erred at law in dismissing a matter in respect of which it heard the points *in limine* only and was yet to hear the substance.
6. The court erred at law in granting a substantive relief in a matter it had dismissed (sic).

11. At the hearing, by consent the appellant added the following grounds of appeal.

7. The court *a quo* erred at law in finding that the court application before it did not have grounds of review in a case where the grounds provided by the Administrative Justice Act [*Chapter 10:28*] were referred to and relied on.
8. The court *a quo* erred at law in failing to find that the Magistrate Court had no jurisdiction to entertain a review of the conduct of an administrative authority.
9. The court *a quo* grossly misdirected itself on the facts in finding that a stand measuring 5695 m^2 did not exist on the master plan.

12. Ground number 8 was struck out and the parties then proceeded to argue on the basis of the remaining grounds of appeal.

SUBMISSIONS BEFORE THIS COURT

13. Mr *Mutero*, counsel for the appellant submitted that grounds 1, 3 and 9 related to the issue of jurisdiction. His contention was that the court *a quo* had exclusive jurisdiction to hear and determine an application for review filed in terms of s 4 of the Administrative Justice Act. He further submitted that the first respondent made an administrative decision when it resolved that the property in question measured 2600m^2 instead of 5 695m^2. He argued that such an improper administrative decision was reviewable, and not a case of breach of contract. He submitted that the administrative decision was not a breach of contract as there was a clause in the lease which stated the dimensions of the property.

14. Counsel further submitted that the court *a quo* having found that it had no jurisdiction ought to have merely declined jurisdiction and after finding that there were no grounds of review it ought to have struck the matter off the roll instead of dismissing it. He further submitted that ground 7 related to the issue of remittal of the matter to the first respondent which he argued was irregular as the court *a quo* was clothed with jurisdiction to hear and determine the application for review in terms of the AJA. He further submitted that the issue that the stand measuring 5 695m^2 did not exist on the master plan was a finding of fact which could only be determined on the merits. He thus urged the court to allow the appeal and remit the matter to the court *a quo*.

15. *Per contra*, *Mr Mavhiringidze*, counsel for the first respondent, submitted that the first respondent did not make any administrative decision. He argued that the first respondent requested the appellant to avail a land utilization diagram which the appellant failed to

do. He contended that as far as the first respondent was concerned, there was no administrative decision made since the matter was still to be referred to the appropriate committee for a decision. He further, submitted that the appellant did not exhaust domestic remedies before approaching the court *a quo*.

16. Regarding jurisdiction, counsel submitted that the court *a quo* was correct in declining jurisdiction as the parties had submitted to the Magistrate Court's jurisdiction per the jurisdiction clause in the lease agreement. He however, conceded that the court *a quo* having declined jurisdiction ought to have ended there and not delved into the determination of the merits. He prayed for the court to dismiss the appeal and give an appropriate order since the court *a quo* had no jurisdiction.

ISSUE FOR DETERMINATION

17. The issue that commends itself for determination in this case is whether or not the court *a quo* had jurisdiction to determine the matter.

THE LAW

18. The AJA clothes the High Court with power to grant relief to anyone who is aggrieved by the decision of an administrative authority. Sections 3, 4 and 5 of the AJA are pertinent. Section 3 provides as follows:

> **"3. Duty of administrative authority**
> (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—
>
> *(a)* act lawfully, reasonably and in a fair manner; and
> (*b*) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
> (*c*) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period,

within a reasonable period after being requested to supply reasons by the person concerned.

(2) In order for an administrative action to be taken in a fair manner as required by paragraph (*a*) of subsection (1), an administrative authority shall give a person referred to in subsection (1)—

(*a*) adequate notice of the nature and purpose of the proposed action; and

(*b*) a reasonable opportunity to make adequate representations; and

(*c*) adequate notice of any right of review or appeal where applicable.

(3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if—

(*a*) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or

(*b*) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including□

(i) the objects of the applicable enactment or rule of common law;

(ii) the likely effect of its action;

(iii) the urgency of the matter or the urgency of acting thereon;

(iv) the need to promote efficient administration and good governance;

(v) the need to promote the public interest. (Underlining for emphasis)

Section 4 provides as follows:

"**4 Relief against administrative authorities**

(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.

(2) Upon an application being made to it in terms of subsection (1), the High Court may, as may be appropriate –

(a) confirm or set aside the decision concerned.

(b) refer the matter back to the administrative authority concerned for consideration or reconsideration;

(c) direct the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;

(d) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by the law or, if no such period is specified, within a period fixed by the High Court;

(e) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section *three*.

(3) Directions given in terms of subsection (2) may include directions as to the manner or procedure which the administrative authority should adopt in arriving at its decision and directions to ensure compliance by the administrative authority with the relevant law or empowering provision.

(4) the High Court may at any time vary or revoke any order or direction given in terms of subsection (2).”(Underlining for emphasis)

Section 5 provides as follows:

5 Determining factors

For the purposes of determining whether or not an administrative authority has failed to comply with section *three* the High Court may have regard to whether or not—

(*a*) the administrative authority has jurisdiction in the matter;
(*b*) the enactment under which the action has been taken authorises the action;
(*c*) a material error of law or fact has occurred;
(*d*) a power has been exercised for a purpose other than that for which the power was conferred;
(*e*) fraud, corruption or favour or disfavour was shown to any person on irrational grounds;
(*f*) bad faith has been exercised;
(*g*) a discretionary power has been improperly exercised at the direction, behest or request of another person;
(*h*) a discretionary power has been exercised in accordance with a direction as to policy without regard to the merits of the case in question;
(*i*) a power has been exercised in a manner which constitutes an abuse of that power;
(*j*) the action taken is so unreasonable that no reasonable person would have taken it;
(*k*) there is any evidence or other material which provides a reasonable or rational foundation to justify the action taken;
(*l*) an irrelevant matter has been taken into account;
(*m*) a relevant matter has not been taken into account;
(*n*) a breach of the rules of natural justice, where applicable, has occurred
(*o*) the procedures specified by law have been followed;
(*p*)any departure from the requirements of section *three* is in the circumstances reasonable and justifiable. (Underlining for emphasis)

19. Further, s 26 of the High Court Act [*Chapter 7:06*] provides that the High Court has review powers over administrative authorities. It provides as follows:

“**26 Power to review proceedings and decisions**

Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe.” (Underlining my emphasis)

20. It is settled that the purpose of review is to ensure that an individual receives fair treatment at the hands of the administrative authority to which he is subjected. See *Phillip Ndlovu N.O* v *Commercial Bank of Zimbabwe & Anor* SC 27/17

APPLICATION OF THE LAW TO THE FACTS

21. The law is clear that the High Court is clothed with review jurisdiction. It is also not in dispute that the first respondent is an administrative authority. Section 2 of the AJA defines an administrative authority with clarity. It provides as follows:

> "**2 Interpretation and application**
>
> (1) In this Act –
>
> administrative authority means any person who is –
>
> (a) an officer, employee, member, committee, council, or board of the State or a local authority or parastatal; or
> (b) an committee, or board appointed by or in terms of any enactment; or
> (c) a Minister or the Deputy Minister of the State; or
> (d) any other person or body authorised by any enactment to exercise or perform any administrative power or duty, and who has the lawful authority to carry out the administrative action concerned."

22. The first respondent is an administrative body which is alledged to have exercised its administrative power or duty in reducing the size of the property without affording the appellant an opportunity to make representations, without furnishing reasons for the reduction of the size of the property. That alledged action of reducing the size of the property by the first respondent would amount to an administrative decision, which decision warranted review by the court *a quo* to test for the non-compliance with s 3 of the AJA.

23. The court *a quo* erred in holding that the appellant had no cause of action arising from the AJA. It held that what was brought before it was a contractual dispute which could only be resolved by invoking breach of contract remedies which would be determined by

the Magistrates' Court in terms of clause 15 of the lease agreement. To this extent, the court *a quo* erred as the dispute brought before it pertained to an alledged administrative decision arising from the purported unilateral reduction of the stand size by the first respondent. The issue of contractual breach and sanctity of contract did not arise at all. What fell for consideration was purely the said administrative action of the first respondent, which had to be tested against compliance with the AJA.

24. It is worth mentioning that even in contractual matters, an administrative authority, like the first respondent is obliged to comply with the AJA. This position was lucidly expressed in the case of *U-Tow Trailers (Pvt) Ltd v City of Harare & Anor* 2009(2) ZLR 259 (H) at p 268D-F where it was stated that:

> "On the basis of the above, it is therefore my finding that the first respondent was bound to act fairly in terminating the lease agreement between itself and the applicant. It failed to do so. By failing to act fairly in the circumstances, it breached the obligations placed upon it by the Act. Its consequent decision arrived at in circumstances where it had failed to act fairly cannot therefore stand. I make this decision in full knowledge of the fact that the first respondent genuinely believed it had a case against the applicant and that the lease agreement between itself and the applicant allowed it to act as it did. Notwithstanding all that because the law imposes a duty on the first respondent to act fairly in the matter, its decision has to be set aside as it was arrived at unfairly. The decision is set aside even without an examination of whether or not the applicant was subletting the premises, in promotion of the need to advance fairness in public administration as embodied in the Act."

25. In light of the sentiments expressed in *U-Tow Trailers supra*, it is apparent that the AJA provides that an administrative authority which has the responsibility or power to take any administrative action, which may adversely affect a right, interest or legitimate expectation of any person shall, *inter alia*, act reasonably and in a fair manner.

26. In *casu*, the case presented before the court *a quo* did not pertain to a breach of contract but it related to the question of the appropriateness or of the otherwise alledged

administrative action of the reduction of the stand leased to the appellant by the first respondent. The appellant and the first respondent's lease was for property measuring 5 695m^2. From 2002 when the property was allocated to the appellant, it was informed by the first respondent that it measured 67m x 85m. This essentially comes up to 5 695m^2. The size of the stand is further captured in clause 1 of the lease agreement in these terms:

> "…….. 1. The lessor hereby lets to the lessee who hereby hires the said piece of land (herein after called the "stand") in extent approximately 5695 square metres."

27. The appellant in this case made plans to expand its business by adding a food court and a superette to the service station. This intended expansion was to be on the property measuring 5 695m^2. It was upon the application for the land development that the first respondent is alledged to have reduced the property size to 2 600m^2. This reduction is what the appellant considered to be a unilateral action as it alledged that it was not consulted. It approached the court *a quo* for recourse as it alleged the first respondent's action was contrary to the AJA.

28. In the case of Zindoga & Ors v Minister of Public Service, Labour and Social Welfare & Anor 2006 (2) ZLR 10 (H) at p 13 D – E, it was stated that:

> "It is axiomatic that any party who has a right or interest that is likely to be affected by an administrative decision or which is susceptible to being prejudiced thereby must be heard before that decision is taken. This is dictated by the time-honoured percept of common law embodied in the *audi alteram partem* rule and now codified in the Administrative Justice Act [*Chapter 10:28*]."

29. The AJA enjoins an administrative authority to observe the rules of natural justice whenever it makes an administrative decision adverse to vested rights. In the present case, the first respondent is alledged to have taken a unilateral administrative action which gave rise to the purported discrepancies in the size of the property which formed the basis of the lease agreement. It is against this background that the appellant

approached the court *a quo* seeking to have the matter adjudged on whether or not the alledged actions offended against the AJA.

30. In terms of the law, the High Court has the review powers vested in it. The court *a quo* therefore erred in declining jurisdiction in a matter which squarely fell in its purview. Further, having declined jurisdiction, the court *a quo* erred in attempting to delve into the merits by dismissing the application.

31. To that extent therefore, the court *a quo* erred in finding that it had no jurisdiction to review the matter and proceeding to dismiss the application. It further erred by issuing an incompetent remittal order. The appeal in this case therefore has merit and it must succeed.

32. Regarding costs, the general rule is that they follow the result, and this Court finds no reason to depart from it.

DISPOSITION

Accordingly, it is ordered that:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside.
3. The matter is remitted to the court *a quo* for the determination of the merits.

UCHENA JA : I agree

KUDYA JA : I agree

Mutamangira & Associates, appellant's legal practitioners

Mavhiringidze & Mashanyare, the 1st respondent's legal practitioners

Civil Division of the Attorney General's Office, the 2nd respondent's legal practitioner