

CITY OF HARARE
versus
CHARLES MATSIKA AND 21 OTHERS

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 26 January 2017, 9 February 2017, 20 November 2018 & 21 April 2021

Opposed Application

ADV L. Uriri, for the applicant
I Mataka, for the respondents

FOROMA J: This opposed application was argued on the 9th February, 2017 and the court reserved judgment then. While preparing the judgment it occurred to me that none of the counsels had raised an issue as to whether respondents 4 – 22 were properly before the court as none of them had filed any opposing affidavits or any supporting affidavit making common cause with either second or third Respondents who had purported to be authorised to file opposition on their behalf. This aspect was so pertinent and could not be determined without giving the parties an opportunity to present argument on it. As a result I invited the parties through their counsels to address me on the aspect before I could settle the judgment. In response Applicant filed heads of argument contenting that the 4th – 22nd Respondent were in default but Respondents did not file any submissions. Before I could finalise judgment in the matter, Applicant's legal practitioners wrote on the 18th February 2019 indicating that the parties had met and settled the matter and attached an unsigned deed of settlement and draft consent order purportedly signed by the parties but which in reality none of the parties had signed. For unexplained reasons Respondents subsequently withdrew their instructions to their legal practitioners to sign the deed of settlement. As a result the applicant wrote to the court requesting that the court hand down a judgment in the matter as the legal practitioners for respondents no longer had instructions to sign the deed of settlement or order by consent. The foregoing explains the rather long delay in finalising this matter.

That said this opposed court application commenced as an urgent chamber application which UCHENA J as he then was referred to the opposed roll for determination at the request of the parties' legal practitioners. Before the court are two opposing affidavits – one filed by Onward Chinhengo the second respondent (purportedly on behalf of 14 cooperatives named) and the other by Tauya Mauka the third respondent which is filed on his own behalf and purportedly on behalf of 4th to 22nd respondents. The 2nd respondent's notice of opposition is referred to as second respondent's opposition and so is the opposing affidavit even though the opposing affidavit purports to be filed on behalf of a consortium of 14 co-operatives named as Crowborough North Housing Project. The members of the consortium are (i) Risedale (2) Promised Land (3) Universal, Habit (4) Shelter yourself, (5) Megawatt (6) All Stars (7) Pentagon (8) High Score (9) Westcan (10) Munhumutapa (11) Nyashanu (12) Build IT Zimbabwe (13) Takawira and (14) Kubatana.

It is clear that none of the 14 co-operatives is cited as a respondent in this matter. Quite why the said co-operatives have been made participants in this application remains unclear and pretty much an unresolved puzzle. Despite applicant in its answering affidavit making the point abundantly clear that these co-operatives are not and have not been sued by applicant in this application and that they were lawfully allocated residential stands under Plan TPY487/4/B, Second Respondent has not abandoned its opposition. Second respondent was cited in his personal capacity and yet did not file any opposing affidavit in his personal capacity. As a party second Respondent has therefore not opposed the applicant's application despite the respondent's heads of argument purporting that they were filed on behalf of him (second respondent) as well.

The Third Respondent filed an opposing affidavit in which the depositions are made on his own behalf and allegedly on behalf of 4th to 22nd Respondents. The 3rd Respondent makes the following averment "I depose to this affidavit for myself and on behalf of the 4th to 22nd respondents." He goes on to say "I am the Chairperson of a Consortium / Union of co-operatives (22nd Respondent herein). The 13th to 21st Respondents are members of the 22nd Respondent and 3rd to 12th Respondents are the respective co-operative Chairpersons. The aforesaid respondents have authorised me to depose to this affidavit on their behalf." This statement calls for a detailed scrutiny as it casts serious doubt on whether the respondents had in fact and as a matter law filed any opposition in this matter.

It is axiomatic that authority to represent an association or body corporate including a universitat is evidenced by a resolution. However sometimes the Court has been content to accept a statement that the actor claims that it has been authorized to act on behalf of a litigant who is not a natural person even where such authority is placed in issue.

It is not as a matter of course that the court will accept an averment that the deponent to an affidavit is duly authorized to depose to an affidavit on behalf of a natural person cited in legal proceedings without ado. This is because ordinarily legal practitioners are authorized to act on behalf of the litigants otherwise litigants should appear as self-actors. Where a person purports to act on the authority of another a power of attorney has to be produced as evidence of such authority. Courts will be slow to accept the authority of party to act on behalf of another on the mere say so for obvious reasons. The following are some of the reasons why the court insists on evidence of authority:-

- (i) the alleged representative may infact not be authorized to act on behalf of that other.
- (ii) depositions may be made that are not infact authorized.
- (iii) it becomes difficult to hold the party to account who has himself not personally sworn to the depositions.
- (iv) any innocent adversary may wrongfully be prejudiced both in term of costs and outcome of a court dispute by reason of misrepresentations by an unauthorised deponent.
- (v) not all oaths taken are treated with the weight they deserve neither do all persons who take oaths to say the truth do say the truth under oath.

The above list is not exhaustive. For these reasons among others it is always necessary that where a person requests another to depose to an affidavit in litigation on their behalf the person on whose behalf the sworn statement is made verifies the facts by identifying oneself with the contents of the statement made on its behalf if authority is not given through a power of attorney. *In casu* the Third Respondent purports to be authorized by the rest of the respondents (i.e. 4th to 22nd) to depose to the affidavit on their behalf yet there are no resolutions by the associations (co-operatives) so authorizing neither is there any supporting or verifying affidavit by any of the respondents. The Third Respondent avers that 3rd Respondent to 12th Respondents are Chairpersons of the co-operatives in the consortium without specifying which respondent chairs

which co-operative member of the consortium. Whilst there are 9 co-operatives (excluding 22nd Respondent) cited there are 10 Chairpersons according to 3rd Respondent's affidavit.

The court is left to guess what the real situation is in the absence of evidence matching individual chairpersons to the respective co-operatives.

The situation is made worse when the deponent makes sweeping statements such as

“Paragraph 7

The 3rd to 22 Respondents herein never forcefully wrongfully or unlawfully occupied the land they are occupying. They followed due process and the correspondence attached shows that as at February 2015 there is such progress on such regularization.

I am also advised that there is no spoliation to talk of here. There has not been unlawful dispossession. The occupants of Lot 22 of Partridge did so following due process of the law and they are bound to get their allocation in no time.”

The quoted paragraph does prove in fact and contrary to argument to the contrary that occupation of the land was irregular otherwise if due process had been followed what would be there to regularize in the respondents' occupation.

None of the respondents has identified with or adopted the text of the deponent's affidavit. In the absence of a verifying affidavit or powers of attorney the court cannot attribute the contents of the affidavit of the third respondent to any of the respondents whom the 3rd respondent purports to be representing in the deposition –See –*Munandi Arcdel & D-Troop Employees v Munandi – Arcdel & DTroop* HH 118/13 page 2 of the cyclostyled judgment where BERE J as he then was observed that a party who purports to have authority to represent others in litigation must have his or her authority properly proven (and I must add unless as a legal practitioner). His Lordship observed that such proof of authority can be achieved by way of either a special power of attorney or an affidavit of collegiality. *In casu* no such proof of authority to represent 4th to 22nd respondents was provided. In the circumstances the 4th- 22nd respondent did not oppose the grant of the provisional order neither did they bring themselves before the court. See- also *Eastview gardens Residents Association v Zimbabwe Reinsurance Corporation Limited and Others* HH 174-03.

In the circumstances 4th – 22nd Respondents are in default and judgment against them must follow in terms of the draft order. Although 3rd Respondent filed a notice of opposition it did and jointly opposed the applicants claim I do not find that it thirds defendant has satisfied the court that he did not unlawfully invade applicant's property together with other respondents cited by

applicant. In fact his averments as observed above disclose that he has lied that due process was followed before occupation of the applicant's piece of land.

Applicant is accordingly granted relief against third respondent personally as prayed in the final order.

As first and second respondent did not file any opposing affidavits the court considers and finds them to be in default and the provisional order is confirmed in favour of the applicant against both of them.

In the circumstances the court makes the following order.

It is ordered that:-

1. The Respondents and all those claiming occupation through the Respondents be and are hereby ordered to restore possession of Lot 2 of Parkridge Estate situate in the District of Salisbury also known as Paddock 27 of Crowborough Farm situate in Crowborough Harare to the applicant failing which the Respondent and all those claiming occupation through the Respondents shall be evicted from Lot 2 of Parkridge Estate also known as Paddock 27 by the Sheriff of this court.
2. The Respondents be and are hereby ordered to demolish their structures at Lot 2 of Parkridge Estate also known as Paddock 27 failing which the Sheriff shall demolish the said structures.
3. The respondents pay the costs of suit jointly and severally the one paying the others to be absolved.

Chihambakwe, Mutizwa & Partners, applicant's legal practitioners
Chambati Mataka & Makonese, Respondent's legal practitioners