ELIAS ZANONDOGA MAPENDERE
and
FRANCIS CHIKASHA PHIRI
and
JANI MUSANJEYA
versus
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
and
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT
and
ATTORNEY GENERAL OF ZIMBABWE
and
GIFT MARUNDA (FORMER COPAC NATIONAL COORDINATOR)

HARARE HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 10 November 2016 and 5 July 2017

Opposed Matter

G R Sithole, for the applicants
Ms O Zvedi, for 1st and 3rd the respondents
No appearance for the 2nd and 4th respondents

MAKONI J: This is an application for an interdict in which the applicants seek a mandatory interdict against the respondents, compelling them to pay the applicants their end of project benefits as per their promise. The applicants are all former employees of Constitution Parliament Select Committee (COPAC) mandated to draft the Constitution of Zimbabwe. COPAC winded up their activities in 2013 by drafting a draft constitution and submitting a report to the Parliament of Zimbabwe.

COPAC, through the fourth respondent, submitted a list, with names of the beneficiaries who were to be paid, to the first respondent and they were paid. The list did not include the names of the applicants resulting in them not receiving any payment. The applicants approached this court seeking a mandatory interdict compelling the respondents to pay them their end of project.

The opposing affidavit was deposed to by Ms Virginia Mabiza, the Secretary for Justice Legal and Parliamentary affairs, on behalf of the first and third respondents.

In their answering affidavit, the applicants took issue *in limine*, with the opposing affidavit filed by the Secretary on the basis that there are no papers showing that she had authority to depose to the affidavit. There is no explanation why the first and third respondents could not file opposing affidavits.

I will deal with the *point in limine* first.

Mr *Sithole* for the applicants submitted that there are no papers showing that the secretary had authority to depose to an affidavit on behalf of the first and third respondent. He argued that it is the Minister being sued not the Ministry hence the secretary cannot act on behalf of the minister. The application stands unopposed because there are no reasons why first and third respondents did not file opposing affidavits if indeed they were opposing the relief sought by the applicants. The second and fourth respondents did not file any opposing affidavits.

Mrs *Zvedi* for the first and third respondents argued that the secretary was legally authorized to act on behalf of the first and third respondent in that it is generally accepted that a person can depose to an affidavit if he can swear positively to the facts of an affidavit and the facts are within his or her personal knowledge. The secretary is the accounting officer for the first respondent responsible for the day to day running of the Ministry. It is not within the personal knowledge of the Minister or the Attorney General why the applicants were not paid. She submitted that the facts *in casu* are within the accounting officer's personal knowledge not the Minister's.

In support of her submissions Mrs *Zvedi* referred to the case of *Zimbabwe Banking Corporation Ltd* v *Trust Finance Ltd and Anor* 2006(2) ZLR 405 at D, where the court held that the omission in a founding affidavit of the allegation that a deponent was duly authorized was not fatal particularly in view of the history and background of the application.

Rule 227(4) provides:

> "An affidavit filed with a written application –
> (a) Shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein; and
> (b) May be accompanied by documents verifying the facts or averments set out in the affidavit, and any reference in this Order to an affidavit shall be construed as including such documents."

Hebstein and van Winsen, state the following on the point:

> "It has been held that documentary proof of authorisation may be supplied in an answering affidavit. Where an application is made by an agent on behalf of a principal, an averment of the agent's authority is essential, unless it appears from the affidavits filed in the application that the principal is aware and ratifies the proceedings. A statement that the applicant is acting in the capacity of agent for the principal in question is a sufficient allegation of authority to make the application." Hebstein and van Winsen, *Civil Practice of the High Courts of South Africa* 5th Edition Volume 1 at page 437."

Similarly, in *Mall (Cape) (Pty.) Ltd v Merino Ko-operasie BPK* 1957 (2) C-D it was held that:

> "When an artificial person, such as a company, commences notice of motion proceedings some evidence must be placed before the Court that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Though the best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution, such form of proof in not necessarily in every case. Each case must be considered on its merits and then Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not the same unauthorized person."

In casu, the Secretary in paragraph 1 of the opposing affidavit states:

> "I am the Secretary for Justice, Legal and Parliamentary Affairs and as such l am the Accounting Officer for the said Ministry. I have <u>been duly authorized to depose to this affidavit on behalf of the first and third respondents. The matters of fact which l depose to herein are, save where otherwise indicated or the context so suggests, within my personal knowledge and are true and correct to the best of my knowledge and belief</u>. Where l make submissions on the this is as a result of legal advice rendered to me by my legal practitioners of record, which advice l accept and verily believe to be correct."

From the above it is clear that the Secretary makes a clear averment that she has authority to depose to the affidavit. She is the accounting officer in the Ministry of Justice, Legal and Parliamentary Affairs and is seized with day to day running of the Ministry. She would be privy to the facts relevant to this application unlike the first and third respondents who are not and could not possibly depose to the affidavit.

The averment in para 1 of the Secretary's affidavit is enough proof to satisfy the court that it is the first and third respondents who are litigating in this matter. As was stated in Mall Cape supra, it is not always that some form of prof is necessary in every case.

I will therefore, dismiss the point *in limine* and find that the opposing affidavit of the first and second respondents is properly before me.

MERITS

Mr *Sithole* submitted that the application meets the requirements of a mandatory interdict in that the applicants have a clear right to be paid their end of year project just like their colleagues who were paid. He further submitted that a clear right arises from the fact that the respondents never disputed that the applicants are entitled to their end of project benefits.

He further submitted that injury on the applicants exists on the basis that the applicants were unfairly differentiated from their colleagues and this infringed upon their right to equality.

He further submitted that there is no other available remedy available to the applicants other than an interdict compelling the respondents to pay the applicants their end of project benefits.

Mrs *Zvedi* further submitted that the applicants anticipate a right to payment because payments were made to other members but they have not established that they have a clear right. He further argued that what the applicants have is a financial interest which alone does not suffice to satisfy the requirements of a mandatory interdict.

The issue in this matter is whether a mandatory interdict can be granted in favour of the applicants.

In determining whether a mandatory interdict can be granted to the applicants there are certain requirements that must be met. In *Setlogelo v Setlogelo* 1914 AD 221 at 227 INNES JA accepted that:

> "The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.

The requirements of a mandamus or mandatory interdict were enunciated by GUBBAY J in *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 52(S) at 56 B-D wherein it was held that:

> "An application for a *mandamus* or "mandatory interdict", as it is often termed, can only be granted if all the requirements of a prohibitory interdict are established. These are:
> 1. A clear or definite right – is a matter of substantive law.
> 2. An injury actually committed or reasonably apprehended – an infringement of the right established and resultant prejudice.
> 3. The absence of a similar protection by any other ordinary remedy. The alternative remedy must (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; and (d) grant similar protection."

The above explanation highlights that the requirements for a *mandamus* or mandatory interdict are the same as those for a prohibitory interdict.

In *Oil Blending Enterprises (Pvt) Ltd* v *Min of Labour* 2001 (2) ZLR 446 (H) CHINHENGO J described a mandatory interdict in the following terms:

> "A *mandamus* or mandatory interdict is a judicial remedy recognized under our law: see *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 52(S). It is applied against public authorities. It is an order which requires a public authority to comply with a statutory duty imposed upon it or one which requires a public authority to perform some act which remedies a state affairs brought by its own unlawful administrative action (L Baxter on *Administrative Law* at p 687). It is, therefore, a judicial remedy available to enforce the performance of a specific statutory duty or to remedy the effects of an unlawful action already taken. In this application. In this application, I am concerned with the former – to order or not to order the respondent to perform a specific statutory duty placed upon him. The remedy will be granted were the public authority is under a clear duty to perform the act ordered."

CB Prest in *The Law & Practice of Interdicts,* Juta 1993 at p43 provides that:

> "The word 'clear' relates to the degree of proof required to establish the right and should not be used to qualify the 'right' at all. The existence of a right is a matter of substantive law. Whether that right is clearly established is a matter of evidence. In order to establish a clear right the applicant has to prove on a balance of probability the right which he seeks to protect."

In my view, in order for an application for an interdict to succeed, the applicant must establish the following criteria which has been established in terms of case-law, that is;

1. A clear right which must be established on a balance of probabilities,
2. Irreparable injury committed or reasonably apprehended and
3. The absence of a similar protection by any other remedy

Mr *Sithole* contended that the applicants have a clear right to be paid their end of project benefits just like their colleagues.

Mrs *Zvedi* submits that the applicants anticipate a right to payment on the basis that their colleagues who were members of COPAC were paid. They claim a financial interest.

The learned authors Hebstein and Van Winsen supra, at p1458 stated the following about a financial interest

> "The right which the applicant must prove is also a right which can be protected. This is a right which exists only in law, be it at common law or statutory law. The right that forms the subject matter of a claim for an interdict must thus be a legal right. A financial or commercial interest alone will not suffice. The right must be the one that is enforceable in law."

Further down on the same page they state:

> "In order to decide whether a right has been established, one must look to the branch of substantive law concerned. When the right is one that arises automatically in law it is not necessary for the applicant to allege any facts in order to establish the right."

From the above it is clear that all that the applicants have established is a financial interest and that will not suffice to satisfy the requirements of a mandatory interdict.

It was incumbent upon the applicants to establish that they have a legal right. Their right had to be either founded in statutory law, whereby they would be required to cite the relevant statute or in common law whereby they would cite the relevant principle of law. As Hebstein and Van Winsen supra stated, one must look at the branch of substantive law concerned, in other words, identify the branch of substantive law such as contract or delict where their right is predicated on.

From the above, it is clear that the applicants have failed to establish a clear right at law entitling them to seek a mandatory interdict. To merely allege that some of their colleagues were paid is not sufficient. They could have been wrongly paid and that does not entitle the applicants to payment.

Having been satisfied that the applicants failed to meet the first requirement of a mandatory interdict which is a clear right, it will not be necessary for me to deal with the other requirements.

The court is satisfied that the applicants have not successfully managed to satisfy the requirements for a *mandamus* or mandatory interdict to be granted in their favour.

In the result, l will make the following order:

1) The application is dismissed.
2) The applicants to pay the first and second respondent's costs.

Messer's Mapendere and Partners, for the applicants
Civil Division, for the 1st & 3rd respondent