UNIVERSITY OF ZIMBABWE
versus
TASMIN ROYAGAH GREENLAND
(In her capacity as Executrix of Estate late SHERLA GREENLAND)

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 27 July 2016 and 27 September 2017

Opposed Matter

T. Mpofu, for applicant
Ms *D. Sanhanga,* for the respondent

MAKONI J: The present matter is made up of an application and a counter application. In the main application, the applicant is the University of Zimbabwe and the respondent is the now deceased Sherla Greenland. In the counter application Sherla Greenland is the applicant. The first respondent is the University of Zimbabwe and the second applicant is Zimbabwe Community Health Intervention Research Project (ZICHIRE). For ease of reference I shall cite the parties as they are cited in the main application. The University of Zimbabwe will be referred to as the Applicant. Sherla Greenland will be referred to as the respondent and ZICHIRE as ZICHIRE.

The respondent was formerly employed as a project manager for ZICHIRE. The respondent alleged that she was subjected to unfair labour practices at ZICHIRE which unfair labour practices were referred to conciliation and arbitration. During arbitration proceedings, the respondent cited ZICHIRE as her employer. ZICHIRE, and or their legal practitioners, failed to attend arbitration proceedings and in the result an arbitral award was made in favour of the respondent. ZICHIRE was ordered to pay respondent the amount of US $ 261 448.14.

The respondent made an application for registration of an arbitral award in terms of the Labour Act [*Chapter 28:01*] as read with Article 35 of the First Schedule of the Arbitration Act [*Chapter 7:15*] in case HC 7167/11. ZICHIRE opposed the registration of the arbitral award.

However, MATHONSI J granted the respondent's application to have the award registered. See *Sheila Greenland* v *Zimbabwe community Health Intervention Research Project (ZICHIRE)* HH-93-13.

ZICHIRE appealed against the decision to register the arbitral award. This appeal suspended the operation of the judgment granting the registration of the arbitral award in HC 7167/11. In the result, the respondents made an application for leave to execute pending appeal. This application for leave to execute was noted under HC 3765/13.

Up until this point the parties cited in the cases referred to above were the respondent and ZICHIRE. The applicant then made an application under case number HC 5763/13 seeking joinder in case HC 3765/13, namely the application for leave to execute pending appeal. This application was made on the basis that that ZICHIRE was not a registered legal entity. The applicant argued that ZICHIRE was a project managed under the Department of Community Medicine at the Applicant and as such ZICHIRE does not have legal standing to sue or be sued. The Applicant has since abandoned the application for joinder. ZICHIRE also abandoned the appeal against the decision to allow the registration of the arbitral award.

In the main application, the applicant seeks an order declaring that the office furniture, equipment, motor vehicles and any other property being used by ZICHIRE be declared the property of the applicant and not executable pursuant to any court order against ZICHIRE. In support of the application, the applicant repeats its argument that ZICHIRE is a project run by the applicant through the applicant's Department of Community Medicine. As such, ZICHIRE does not have a legal existence and it is not capable of owning property.

MAIN APPLICATION

In support of their application the applicant submitted that ZICHIRE came about as a result of a Memorandum Of Understanding (MOU) between the applicant and the Battelle Memorial Institute. The applicant stated that in terms of the MOU, which was attached as **U1** and **U2**, ZICHIRE was not to have a separate legal identity nor was it to be registered as a legal entity of any sort. Instead ZICHIRE was meant to be a project, one of many, operated by the Department of Community Medicine of the applicant. Of particular interest in Clause 9 of the MOU **U1:**

> "9. The MOU is not intended nor shall it be construed to create a joint venture, partnership, consortium, or any other form of business arrangement between the Parties. Each Party shall act as an independent institution and not as an agent or partner of the other for any purpose whatsoever, and neither Party shall have the authority to bind the other Party or make any commitments of any kind for or on behalf of the other Party. The employees of one Party shall not be deemed the employees of the other."

The applicant submitted that the property used by ZICHIRE is owned by the applicant. In this regard, the applicant attached annexures **U4 - U9** which show the registration books of vehicles used in carrying out ZICHIRE's work. On some of the registration books, under the section titled *Details of Owner Name and First Names,* appears the name "UNIVERSITY OF ZIMBABWE". The other registration books have the following: "UZ A/C ZICHIRE PROJECT". The address listed on the registration books is that of the project's operations, namely 28 Van Praagh Ave, Milton Park, Harare.

The applicants attached several memos from the applicant's Department of Community Medicine giving directives to ZICHIRE and its other projects. The applicant also attached copies of the Duty-Free Certificates which applicants submit show that the property used by ZICHIRE was imported by and is owned by the applicant.

The applicant submitted that in light of the above it is clear that the property being used by ZICHIRE is owned by the applicant and cannot be attached in order to meet a judgment obtained against ZICHIRE. The applicant further submitted that they have a real and direct interest in this matter and that a declaratory order would be appropriate in the circumstances.

The respondent is opposed to this application and raised the following points *in limine:*

1. That the applicant was approaching the court with dirty hands in that the applicant admits it operates ZICHIRE, which as far as the respondent is concerned makes the applicant and ZICHIRE one in the same, whilst all the while refusing to honour the obligations incurred by ZICHIRE. In particular the applicant has refused to obey a court order instructing the applicant to pay the respondent US $ 261 448.14, which refusal gives the applicant dirty hands.
2. That there are disputes of fact. The respondent alleges that there are material disputes of fact in as far as the parties are not in agreement on:
   (a) Whether or not ZICHIRE is autonomous;

(b) Whether or not donations made to ZIHCIRE via the applicant were in an effort to avoid paying duty;

(c) Whether the applicant can seek a declaratory order when it has not listed the property which it alleges it owns and seek the protection as the order;

(d) Whether registration books are proof of ownership.

3. That the deponent to the applicant's founding affidavit was not authorised to depose to the affidavit on the part of the applicant and as such no application is before this honourable court.

The Respondent later abandoned the second point *in limine*.

On the merits, the respondent submitted that ZICHIRE was founded by Professor Wodk who was the chairman of the Department of Community Health. She argued Professor Wodk was expected to fund projects which would be affiliated with the applicant. In exchange for this affiliation the projects would pay a portion of their funding to the applicant.

The respondent further submitted that property used by these projects belonged to the projects. In support of this, the respondent listed vehicles she maintained belonged to the project and were not registered in the applicant's name. The respondents did not, however, attach copies of the registration books of the vehicles she listed.

As far as the respondent is concerned, the applicant merely facilitated the importation of some of the property in order for its affiliate projects to benefit from non-payment of duty. In spite of this the projects remained autonomous and that the property belonging to a project would be donated to the applicant only when the project is complete.

Most importantly, the respondent submitted that the contract of employment she signed made it clear that her employer was ZICHIRE. The contract is marked annexure **U14**. The letterhead on the contract has two logos. The one appearing on the left belongs to ZICHIRE and the one appearing on the right belongs to the applicant. The heading reads as follows:

CONTRACT OF EMPLOYMENT WITH
ZIMBABWE COMMUNITY HEALTH INTERVENTION RESEARCH PROJECT
TERMS OF CONDITIONS

The preamble of the contract reads as follows:

> "I, SHERLA GREENLAND, agree to a permanent contract, renewable at the discretion of the Directors of the Zimbabwe Community Health Intervention Research Project (ZICHIRE), under the following Terms and Conditions:"

The respondent argued that this contract of employment made it clear that ZICHIRE operated as an independent, separate legal entity which can incur liabilities.

As regards the relief sought by the applicant, the respondent submitted that this is not an appropriate case for a declaratory order as the applicant seeks to obtain an interpleader and the suspension of a sale in execution "through the back door".

COUNTER APPLICATION

The counter application was made in terms of Order 2A Rule 8B of the High Court Rules for the purposes of enforcing her judgment. She seeks a declaratory order to the effect that the applicant is an associate of ZICHIRE. The respondent submitted that ZICHIRE and the applicant are one and the same entity and that ZICHIRE has the characteristics of an association. More specifically, ZICHIRE has the qualities of an association in that it consists of two persons bound together for one or more common purpose, by mutual undertaking and with each person having mutual duties and obligations. Consequently, the respondent is of the view that the applicant should be declared an Associate of ZICHIRE so as to enable execution of the arbitral award against the applicant.

In response, the applicant raised the following points *in limine:*

1. That the counter application be dismissed as the application is null and void *ab initio* as it was filed against a non-entity; namely ZICHIRE which was cited as the second respondent.

On the merits, the applicant reiterated that the ZICHIRE was a project of the applicant and that it had no separate legal existence. The applicant further submitted that ZICHIRE was not an association and as such Order 2A, Rule 8B of the High Court rules is not applicable.

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

POINTS IN LIMINE

The first point *in limine* was that the applicant approached the courts with **dirty hands**. I am not satisfied that the applicant approached the court with dirty hands. In the matter of *Deputy*

Sherriff Harare v *Makleza and Anor* 1997 (2) ZLR 425 (H) 426A-C the following is said of litigants who approach the courts with dirty hands:

> "People are not allowed to come to court seeking the court's assistance if they are guilty of lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. It is called time honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek the court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions. As stated by DAVISON J in *Underhay* v *Underhay* 1977 (4) SA 23 (W) at 24E-F:
> 'It is fundamental to court procedures in this country and in all civilised countries that standards of truthfulness and honesty be observed by parties who seek relief.'"

Also see *Ex Parte Rhoprops Ltd* 1975 (1) 302 RLR 305A and *Mutetwa* v *Mutetwa* 1993 (1) 176 ZLR 176.

It cannot be said that the applicant has dirtied hands because they refused to honour the order in HC 7167/11. The respondent quoted the following from *Beverly Building Society* v *Minister of Labour* (although referred to by the respondent as *Barclays Building Society*) 2002 (2) ZLR 241 (H) 248 C-D in support of their argument:

> "On this approach, the person must first obey the supposed invalid order and thereafter seek redress, if any, by way of appeal or review. He is not to determine for himself whether the order ought not to have been made, but should come to the court for relief if advised that it is invalid.
> Otherwise, as observed by Caney J in *S* v *Zungo supra* at 271E:
> '…the conduct of legal proceedings would become chaotic.'"

The applicant was not cited in the arbitration proceedings or in HC 7167/11 and as such no order was made against it. There is no legal basis upon which the applicant should be bound by the order in HC 7167/11. In this regard, the facts before me can be distinguished from the facts in *Beverly Building Society* v *Minister of Labour, supra,* in that the litigant therein was a cited party to proceedings and judgment was entered against it, however the said litigant failed to act in terms of the order.

The respondent argued that the applicant operated ZICHIRE and as such they are one and the same and the applicant should be held liable for ZICHIRE's indebtedness failing which they are in contempt. The problem with this argument is that the legal nature of the relationship between ZICHIRE and the applicant is one of the issues before the court and this issue is still to be

determined on the merits. Being that the court is yet to make a ruling on this issue, the respondent cannot seek to rely on same to sustain a point *in limine*.

The same must be said for the point *in limine* raised by the applicant in the counter application. The applicant submitted that the counter application be dismissed as it is null and void *ab initio* because it was filed against a non-entity, namely ZICHIRE. ZICHIRE's legal status is yet to be determined on the merits and as such arguments on the existence or otherwise of ZICHIRE cannot be used to sustain a point *in limine*.

The second point *in limine* raised by the respondent is that the person who deposed to the applicant's founding affidavit was not authorised to do so. The respondent states that section 18, as read with s 24, of the University of Zimbabwe Act [*Chapter 25:16*] states that the Registrar of the University of Zimbabwe is charged with the administration of the University. The respondent argued that this means that only the Registrar should have deposed to the founding affidavit. Alternatively, the Registrar should have written, to the deponent of the affidavit, authorising them to depose to the affidavit. The respondent maintains no authorisation was given as nothing in writing was attached to the founding affidavit.

The applicant cited the learned authors Hebstein and Van Winsen *The Civil Practice of the High Courts and Supreme Courts of Appeal of South Africa* – 5th ed Volume 2, Juta and Co. Ltd at p 438 where the following is said:

> "As in the case of a summons, it must appear from the application that the applicant has an interest or special reason entitling the bringing of the application - that he has the *locus standi* in the matter. The concept *locus standi in judicio* is here used in the sense of capacity to bring proceedings which is not necessarily the same as authority…"

The respondent also quoted *Ganes* v *Telcom Namibia Ltd* 2004 (3) SA 615 at 624 [2004] All SA 609 (SCA) where the following is said:

> "There is no merit in the contention that OOSHUIZEN AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the respondent Hanke said that he is duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he has no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke has been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised."

The applicant also argued that a litigant who queries the deponent of an affidavit must show a minimum of evidence before the court as the basis upon which the deponent's authority is questioned. See *Mall (Cape) (Pty) Ltd* v *Merino Ko - operasie BPK* 1957 (2) SA 347 (C).

I am in agreement with the Applicant. The respondent must show a minimum of evidence to bring a deponent's authority into question. Section 18, as read with s 24, of the University of Zimbabwe Act [*Chapter 25:16*] fails to create a minimum of evidence to bring the deponent's authority into question. Section 18 of the Act states that the Registrar is responsible for the general administration of the University. Nothing in the sections points to this meaning that the Registrar must depose to all affidavits.

It would be absurd to read this into the sections quoted above as affidavits by their nature are best suited to being deposed to by a person having personal knowledge of the contents thereof. Being that the applicant is a big institution involved in various transactions it would stand to reason that the most appropriate person would be called upon to depose to the affidavit. In the present instant, it would seem that Professor Mufuta Tshimanga, the deponent in question and the Director of the Applicant's College of Health Sciences Department of Community Medicine, is one such person. There is nothing about his deposition to the affidavit which raises suspicion enough to warrant an investigation into the matter by the court. The court thus accepts that the affidavit was properly deposed to.

In light of the above the points raised *in limine* are dismissed. I shall now proceed to consider the merits.

THE ISSUE

There are, in essence, two issues before this court. These issues are very simply:

1. Whether or not ZICHIRE is a separate legal entity from the applicant which entity can sue or be sued and is capable of owning property.
2. Whether or not this is an appropriate case to grant a declaratory order.

MAIN APPLICATION

In terms of section 14 of the High Court Act [*Chapter 7:06*] the High Court has the power to issue declaratory orders. Section 14 of the Act states the following:

> **"14 High Court may determine future or contingent rights**
>
> The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

The two considerations that must be borne in mind when deciding whether or not to grant a declaratory order are:

1) whether the applicant is an interested person in an existing, future or contingent right or obligation;
2) whether the case is a proper one for the Court to exercise its discretion.

See *MDC* v *President of Zimbabwe* and Ors 2007 (1) ZLR 257 (H); *RK Footwear (Pvt) Ltd* v *Boka Booksales (Pvt) Ltd* 1986 (2) ZLR 209 (H); *Family Benefit Society* v *Commissioner for the Inland Revenue and Anor* 1995 (4) SA 120 (T).

In *Safari Reservations Ltd* v *Zululand Safari (Pty) Ltd* 1966 (4) 165 (D) 171, it was held that the relief of a declaratory nature may be granted if the party seeking same does not require consequential relief.

In order to ascertain whether or not the applicant has an existing right it is important to bear in mind the terms of the declaratory order sought. The applicant seeks an order declaring that the office furniture, equipment, motor vehicles and property used by ZICHIRE be declared the property of the applicant and not executable pursuant to any court order against ZICHIRE.

It is clear that the applicant has an interest in this matter. The applicant has illustrated that their rights would be severely infringed if clarity is not sought as regards to who owns the property in question. The applicant has also shown that it risks great losses should the respondent be allowed to execute against the said property. In the result, a declaratory order is an appropriate remedy for the applicant to approach this court for.

The question now becomes whether or not this court should declare the Applicant the owner of the property being utilised by ZICHIRE. I am of the view that ZICHIRE as correctly

submitted on behalf of the applicant is a project that is managed by the applicant, through the applicant's Department of Community Health. I have come to this conclusion based on the contents of Clause 9 of the MOU referred to earlier on. Clause 9 makes it clear that the applicant and Battelle Memorial Institute are two distinct entities whose relationship does not amount to a "partnership, consortium or any other business arrangement." From this clause, it is clear that the parties' intention was to cooperate on the tasks allocated as agreed. The applicant was to perform its tasks and the applicant hired employees to execute their tasks.

This position is supported by the fact that the vehicles used by the project were registered under the applicant's name and donations of property and equipment were made to the applicant with the instruction they be used on the ZICHIRE project. The respondent's argument that the property was actually owned by ZICHIRE is not supported by evidence.

Being that ZICHIRE is a project it does not have legal capacity to sue or be sued. Furthermore, ZICHIRE cannot own property. It would in these circumstances be appropriate to declare the applicant the owner of the property in question and that the respondent cannot execute on that property for a judgment obtained against ZICHIRE.

The respondent tried to argue that the present application is an attempt to seek interpleader via the back door. I disagree with the respondent. The circumstances of this matter are such that it would be absurd for the court to refuse to make each party's rights and obligations clear. There is no sense in allowing mayhem to ensue by having property belonging to the applicant attached pursuant to a court order that was:

a) not made against the applicant;
b) that was made against a non-entity.

The respondent tried also to argue that the declaratory order should not be granted as the applicant did not list the property which it alleges belongs to it. Listing the property which applicant alleges belongs to it is not necessary for the purposes of this application. The application herein concerns property used by ZICHIRE in its operations. This description of the property over which the declaration is sought is enough to allow the parties to identify the property involved when being guided by the terms of the order.

COUNTER APPLICATION

Order 2A Rule 8B only applies to associations. Rule 7 defines an association as follows:

7. Interpretation in Order 2A

In this Order—

"associate", in relation to—
(*a*) a trust, means a trustee;
(*b*) an association other than a trust, means a member of the association;
"association" includes—
(*a*) a trust; and
(*b*) a partnership, a syndicate, a club or any other association of persons which is not a body corporate.

Rule 8B reads as follows:

"8B. Declaration of persons to be associates
(1) Where proceedings have been instituted by or against an association in terms of this Order, the court or a judge may, on court application made by any party to the proceedings either before or after judgment, declare any person to be an associate of the association.

(2) Upon a declaration being made in terms of subrule (1), the proceedings shall continue in the same manner, and the same consequences shall follow, as if the person who is the subject of the declaration had been named in the summons or notice commencing the proceedings."

In order for me to find that the applicant is an associate in terms of r 8B I must first find that an association exists between the applicant and ZICHIRE. An association exists when there is a *"a partnership, a syndicate, a club or any other association of persons which is not a body corporate."* As I have already stated ZICHIRE and the Applicant do not fall into the definition of a partnership, syndicate or club. ZICHIR is a project managed by the applicant.

The respondent tried to argue that ZICHIRE was the trading name of the applicant. This is not so. Again, ZICHIRE is simply a project run by the applicant. In the result, the counter application must fail.

The respondent presented the argument that the Applicant sought to avoid liability for its obligations by stating that ZICHIRE was not a legal entity and then in the same breathe stating that the respondent cannot execute against the applicant. This is not true. All the applicant is saying is that since ZICHIRE is a non-entity any legal proceedings by

and against it are null and void. See *Zimbabwe Bata Shoe Company Limited* v *Bata Shoe Company Middle Management* SC -30-12.

In *Gariya Safaris (Pvt) Ltd* v *Van Wyk* 1996 (2) ZLR 246 (HC) at p.252 G MALABA J (as he then was) stated that:

> "A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void *ab initio*".

This reasoning applies with the same force and effect herein. Also see *JDM Agro Consult and Marketing (Pvt) Ltd* v *Editor of the Herald Newspaper* 2007 (2) ZLR 71.

In order to seek redress for the alleged unfair labour practices the respondent must sue its true employer, the applicant.

In light of the forgoing I make the following order with regards to the main application:

1. The office furniture, equipment, motor vehicles and any other property which is being used by the Zimbabwe Community Health Intervention Research Project (ZICHIRE) for all its operations in the execution of the project be and is hereby declared to be owned by the applicant.
2. The property referred to in paragraph 1 above be and is hereby declared not to be executable pursuant to any court order against Zimbabwe Community Health Intervention Research Project (ZICHIRE).
3. The respondent bear the costs of the application.

As regards the counter application I make the following order:

1. The application is dismissed with costs.

Mawere Sibanda Commercial Lawyers, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners