SUNDAY MUTUVHA
and
NEVER NHIRA
and
MUGOVE MUTUVA
and
MARK MUTUVA
and
ZVIDZAI GWESE
and
STANLEY GWAVAVA
and
THOMAS MARUNZE
versus
THE CHIKOMBA RURAL DISTRICT COUNCIL (CRDC)
and
THE CHIEF EXECUTIVE OFFICER OF CRDC N.O.
and
EDWARD MATIKA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 23 May 2024 & 17 February 2025

Opposed Application- Review in terms of s 4(1) of the Administrative Justice Act [*Chapter 10:28*]

K Hanyani-Mlambo, for the applicants
M T Pununqwe, for the 3rd respondent

MUSITHU J: The applicants approached this court seeking the review of the first respondent's decision to allocate a piece of communal land in Wada Nhira Village, Chief Neshangwe, Chikomba District of Mashonaland East Province to the third respondent. The application was made in terms of s 4(1) of the Administrative Justice Act [*Chapter 10:28*] (the AJA). On 23 May 2024, I granted the following order following concessions made by the third respondent's counsel, Mr *Pununqwe*:

"**IT IS ORDERED THAT:**

1. The application be and is hereby granted.
2. The first respondent's decision to allocate a certain piece of communal land Wada Nhira Village, Chief Neshangwe, Chikomba District of Mashonaland East Province, measuring approximately 5 hectares ("the land") to the third respondent be and is hereby set aside.
3. The piece of land identified in paragraph 2 above, which was previously allocated to the third respondent be and is hereby returned to its previous occupants being the applicants herein. The status *quo ante* be and is hereby restored and rights of use and occupation to the said land are hereby restored to the applicants.
4. The costs of this application shall be borne by the third respondents on an ordinary scale."

Despite the order having been granted following concessions made by the third respondent's counsel, a request for the reasons of the order was made through the registrar's office. The reasons for the order are set out hereunder.

BACKGROUND

The background to the application is that the applicants' grandfathers and fathers were allocated rights over land that was initially occupied by the third respondent's father, which had been abandoned by the third respondent's family following the demise of the third respondent's father. The applicants allege that sometime in 1999, the third respondent emerged from nowhere and erected a movable structure on the same piece of land now occupied by the applicants. The third respondent acted on the basis that he had been allocated the same piece of land by the headman. The third respondent had, in 2001, approached the High Court claiming right of occupation over the land, but his claim was dismissed by the then High Court judge MUNGWIRA J. The learned judge then recommended that relevant authority carry out investigations to ascertain the third respondent's claims.

Several legal skirmishes ensued between the same parties over the said piece of land. In 2015, some members of the Wadanhira clan where the said piece of land was located, secured an order for the eviction of the third respondent from the said piece of land from the Chivhu Civil Magistrates Court. The third respondent was duly evicted from the said piece of land. Undeterred by the decision, the third respondent engaged the office of the first respondent in October 2016. The first respondent, through the second respondent allocated the third respondent, rights of occupation and use of the same land from which the third respondent had been evicted through an order of court.

The applicants approached the office of the first respondent to resolve the dispute amicably. A letter was dispatched to the first respondent on 22 July 2022. The first respondent

acknowledged receipt of the letter through an email of 16 August 2022. The first respondent undertook to respond within 14 days from the 16th August 2022. No response ever came from the first respondent as had been promised.

It was because of the above that the applicants approached this court for the review of the first respondent's decision to allocate communal land to the third respondent and an order invalidating that decision and the allocation thereof. The applicants contend that the allocation of the land to the third respondent was in violation of s 8 of the Communal Land Act [*Chapter 20:04*].

The first respondent opted not to oppose the application and instead abide by the decision of the court. This position was communicated through its legal practitioner Herbert Mutasa of Gill, Godlonton & Gerrans Legal Practitioners.

In his opposing affidavit, the third respondent submitted that the application was improperly before the court as it was filed out of time. As regards the merits, the third respondent averred that the land was properly allocated to him as it had automatically devolved to him customarily following his father's death. The third respondent denied that the allocation of the land to him violated the Communal Lands Act, since it was his ancestral land that he inherited customarily from his late father. By extension, the third respondent denied that the first respondent had acted improperly, by confirming this position through the allocation of the land to him.

In their replying affidavit, the applicants denied that their application for review ought to have been filed within 8 weeks of the decision of the first respondent. They argued that their application had been made in terms of s 4 of the AJA and did not need to comply with r 62(4) of the High Court rules, 2021.

As regards the merits, the applicants averred that the fact that the first respondent had chosen to abide by the decision of the court, and the second respondent did not file a notice of opposition amounted to a concession that the conduct of the first respondent was unlawful.

SUBMISSIONS AND ANALYSIS

At the hearing of the matter, Ms *Hanyani Mlambo* for the applicants submitted that the application should be treated as unopposed since the third respondent's heads of argument were filed way out of time. The applicants' heads of argument were filed on 19 October 2023 and served on the third respondent's legal practitioners on 20 October 2023. The third respondent's

legal practitioners ought to have filed the third respondent's heads on or before 6 November 2023. The third respondent's heads of argument on record do not bear the registrar's stamp to show when exactly they were issued by the registrar. They are however dated 13 November 2023, meaning that they were prepared and signed by the third respondent's counsel on that date.

Mr *Pununguwe* appearing for the third respondent conceded that the third respondent's heads of argument were indeed filed out of time. He expressed his desire to apply for the uplifting of the bar operating against the third respondent because of the late filing of the third respondent's heads. He told the court that he enquired from his principal, a Mr *Tafara Zibusiso Nsingo* who was handling the matter on why the heads were filed out of time, and the said Mr *Nsingo* had advised him that he had been unwell and forgot to file the heads. He only realised upon returning to work that the third respondent's heads of argument were already out of time, and he immediately prepared them and had them filed with the court.

It was therefore clear to the court that at the time that the third respondent's heads of argument were filed, his counsel was well aware that he was already out of time and needed to seek the indulgence of the applicants' counsel to have them filed out of time or file an application for the upliftment of the bar and condonation for the late filing of the heads of argument. At the hearing of this matter, counsel for the third respondent did not even rise to motivate an application for the uplifting of the bar. He waited for the applicants' counsel to rise first and request that the matter be treated as unopposed because of the late filing of the third respondent's heads of argument.

In his brief exchanges with the court, Mr *Pununguwe* conceded that the explanation given for the late filing of the heads of argument was far from being satisfactory. The third respondent's legal practitioners ought to have been more proactive the moment they realised that the third respondent's heads of argument were already out of time. They did not have to wait for the applicants' legal practitioners to remind them that their client's heads of argument had been filed out of time.

Be that as it may, from a consideration of the merits of the matter, Mr *Pununguwe* also conceded that the third respondent had no leg to stand on in defence of the application. This was because the applicants' complaint and the relief sought herein arose out of the first respondent's decision acting through the second respondent, to allocate the piece of land in contention to the third respondent. The substantive relief sought herein was against the decision

of the first respondent acting through the second respondent. Although the third respondent was clearly an interested party, no relief was sought against him.

The first and second respondents' decision not to oppose the application was the third respondent's undoing. He could not defend the first and second respondents' decision on their behalf as the administrative authorities. The third respondent is not an administrative functionary. What was under attack was an administrative decision which needed to be dealt with by the responsible administrative functionary.

Mr *Pununguwe* also attempted to point to the failure by the applicants to file their application within the 8-week period as required by r 62(4) of the High Court rules, as being fatal to their application. He sought to argue that there was no proper application before the court. Ms *Hanyani Mlambo* countered by arguing that the application was not made in terms of r 62(4). It was made in terms of the AJA. The position of the law on whether review applications can be made outside the ambit of r 62(4) as read with s 27 of the High Court Act was settled in *Gwarazimba N.O. v Gurta A.G*[1], where the court said:

> "My understanding of this provision is that the High Court Act contemplates and permits review proceedings that are brought before it in terms of "any other law." Specifically, judicial review may be done in terms of another statute, for instance the Administrative Justice Act, as happened *in casu*. Further to this, and as clearly indicated above in subsections (1) and (2) of s 27, grounds for review are not limited to those particularised in that section. Other laws can properly dictate the consideration of, or specify, other grounds on the basis of which proceedings of a lower court or tribunal may properly be reviewed."

What is clear from the above dictum is that an application for review can be made outside the ambit of s 27 of the High Court Act as read with r 62(4) of the High Court rules. The applicant's failure to comply with r 62(4) of the rules was therefore not fatal and their application was properly before the court. Ultimately, Mr *Pununguwe* conceded that the third respondent's fate had been sealed even if the court were to indulge him and condone the late filing of the third respondent's heads of argument. The third respondent simply had no defence to the applicants' claim since it was not his decision that was under attack.

It was for the foregoing reasons that the court granted the order above.

Hogwe Nyengedza, legal practitioners for the applicants
Gill, Godlonton & Gerrans, legal practitioners for the first respondent
Nsingo and Associates, legal practitioners for the third respondent

[1] SC 10/15 at p 6 of the judgment