

NEWTON ELLIOT DONGO
versus
JOYTINDRA NATVERIAL NAK
and
HEMANT KUMAR NAIK
and
BABNIK INVESTMENTS (PVT) LTD
and
CLINVEST INVESTMENTS (PVT) LTD
and
THE MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 18 July 2017 and 9 February 2018

Opposed matter

Applicant in person
T Zhuwarara, for the 1st and 2nd respondents
Ms R Gasa, for the 3rd respondent

MWAYERA J: After considering the papers filed of record inclusive of heads of argument and hearing oral evidence from the applicant and the respondents' counsels, I gave oral reasons for my disposition I indicated that written reasons would be availed in due course on why I effectively dismissed the application with costs on attorney client scale.

The reasons for my disposition are captioned herein.

The applicant sought a declaratory order in terms of s 14 of the High Court Act. The applicant effectively sought the nullification of the appointment of Joytindra Natverial Naik as an executor testamentary of the Estate of Shushila Natverial Naik. The first, second and third respondent opposed the application and raised the following points *in limine*.

1. *Locus standi*
2. Wrong procedure

The applicant was a tenant at the property falling under the deceased estate as represented by the first respondent. The second and third respondents are interested parties. The applicant in this case seeks to impugn the administration of the estate of late Sushila Natverial Naik and appointment of its executor. The question is in what capacity does the applicant who is neither a relative or beneficiary of the estate seek a declaratory order invalidating the appointment of an executor testamentary of the estate in question.

Section 14 of the High Court Act under which the application has been brought is instructive. It states

“The High court may, in its discretion at the instance of any interested person enquire into and determine any existing, future or contingent right on obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

It is apparent there is a condition precedent to bringing an application for a declaratory order. The applicant must be an interested person having a substantial and direct interest in the matter and such interest must relate to an existing future or contingent legal right. (see *Recoy Investments (Pvt) Ltd v Tarcon* 2011 (2) ZLR 65 (H); *Mpukuta v Maker Insurance Pool & Ors* 2012 (1) ZLR 192 (H)). The legislature’s intention was surely not to create an absurdity were anyone in the abstract would seek a declaratur. The applicant, a subtenant to the premises appears to be bringing the application in anticipation of eviction which he intends to oppose. The intention to resist eviction in the premises does not constitute a legal right to seek a declaratur in the manner sought by the applicant. There is no evidence to show the alienated right on the part of the application warrants the declaratory order sought. It is apparent from the applicant’s submission that the applicant has no existing future or contingent right. The applicant is an illegal subtenant who happens to be in occupation by virtue of unsanctioned sub-tenancy in breach a lease agreement. The applicant has no rights arising which ought to be protected by a declaratur. It is settled that a legal right, and not the factual basis upon which a right may be founded, ought to be shown.

See *Movement for Democratic Change v President of the Republic of Zimbabwe and Others* HC 129/05, *Electrical Contractors Association (South Africa) and Another v Building Industries Federation* (2) SA 1980 S 16 wherein NICHOLAS J emphasised that a person seeking a declaration of rights must set forth his contention as to what the alleged right is. In *RK Footwear Manufacturers (Pvt) Ltd v Boka Book Sales Pvt Ltd* 1986 (2) ZLR 209 SANDURA JP as he then was had occasion to identify two considerations that a court had to take into consideration in determining whether or not to issue a declaratory order. He stated that the

court had to consider whether the applicant was an interested person in an existing future of contingent right of obligation and secondly whether the case was a proper one for the court to exercise its discretion. In *RK Footwear* case, the court was required to issue a declaratory order involving the rights of a lessor to evict a tenant at a future date. The judge came to the conclusion that the matter before him was not a proper one for him to exercise his discretion as at the time of the hearing of the matter, there was no good and sufficient cause for requiring the order. In *casu*, the applicant is seeking a declarator order in a matter where he has no legal right to the estate. Further, the applicant is seeking the court to assist him to continue occupying the premises in question illegally given the sub tenancy was specifically prohibited by the lease agreement between Gold-Pack Investments and Sushila Natverial.

The applicant is clearly not an interested party in the administration of Estate late Sushila Naik. There is no basis for the applicant bringing the action before the court as he clearly has no *locus standi*. It is evident that the applicant appears bent on abusing court process to frustrate the administration of an Estate to which he is not an interested party. My position is fortified by the fact that there is an extant magistrate court order for eviction of Clintvest and all those claiming occupation through it. These would include the applicant an illegal subtenant. In the case of *Newton Elliot Dongo v Bobnik Investments (Pvt) Ltd and Messenger of Court* HH 384-17 this court had occasion to deal with the issue of eviction of the applicant as a subtenant from the same premises 107 Salisbury Township also known as number 12 Harare Street, Harare which constitutes the deceased Estate represented by the first respondent. In that case CHAREWA J ably dismissed the applicant's urgent application for stay of execution on basis of lack of urgency and *locus standi*. She stated that the applicant was a subtenant to an in fact illegal tenant thus there was no nexus with the first respondent. She in conclusion, stated that since there was no nexus between Estate late Sushila Naik and the applicant, there can be no direct and legal interests in the administration of the Estate by the applicant. At the back drop to such a finding and clear explanation of lack of *locus standi* it is clear the applicant is simply taking a gamble with the courts in a matter where he has no legal interest entitling him to the declaratory order sought. The court has to express its displeasure on conduct which borders an abuse of court process, moreso in situation were the litigant ignores clear directions from the court. The applicant having no *locus standi* improperly sought a declarator in a matter which he has no interest existing or future or contingent right or obligation. The court will express its displeasure on abuse of court process by awarding costs on a higher scale. It appears the applicant in a lawless manner seems to feel justified to occupy the deceased Estate property

simply because the late is Indian and the Executor appointed is Indian. Such conduct is unacceptable in a progressive democratic society. The requirements for a declaratur have not been met given the lack of legal right on the part of the applicant.

The application is accordingly dismissed with costs on an attorney client scale.

G.N. Mlotshwa and Company, 1st & 2nd respondent's legal practitioners
Gasa Nyamadzawo & Associates, 3rd respondent's legal practitioners