LUKE DANZVARA
and
FARAI MUCHENA
and
PERCY TAKAVARASHA
and
STELLAH MUSHIRI
and
NYARADZO MGODI
and
PATIENCE MANENE
and
GETRUDE DAKA
And
WALTER MUDZINGWA
And
ANDREW DAKA
and
SARUDZAYI DANZVARA
and
CITY OF HARARE
and
DIRECTOR OF DEPARTMENT OF WORKS OF
CITY OF HARARE N.O
and
ZIMBABWE ASSEMBLIES OF GOD AFRICA
and
THE MINISER OF LOCAL GOVERNMENT, PUBLIC
WORKS AND NATIONAL HOUSING (N.O)

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 13 & 20 July and 3 August 2022

Opposed Court Application

A Tonhodzayi with *G Giya* for the applicants
R Zinhema for 1st and 2nd respondents
A Chimhofu for 3rd respondent

CHITAPI J: The applicants are owners of immovable properties in the splush suburb of Mount Pleasant Heights, Harare. The area of Mount Pleasant Heights in which their properties are situate is called Bannockburn. To that end they own properties in Bannockburn as follows:

(a) 1st and 10th applicant – stand 950.
(b) 2nd applicant –Stand 947
(c) 3rd applicant – Stand 949
(d) 4th applicant – Stand 939
(e) 5th applicant – Stand 931
(f) 6th applicant – Stand 913
(g) 7th and 9th applicant – Stand 945
(h) 8th applicant – not stated

The first respondent City of Harare is the responsible local authority which administers Bannockburn area. The second respondent is the first respondent's Director of Works. The third respondent is a *universtatis* and a Christian church denomination. It owns Stand 946 Bannockburn. It holds a permit issued by the first respondent to construct a church building on its Stand. The stand aforesaid adjoins the listed properties of the applicants. The applicants are not supportive of the construction of the church building. They consider the construction of the church building. They consider the construction of the church to be used for Godly worship by the first respondent to be an unwelcome and undesirable intrusion on *inter-alia*, their right to privacy. They listed a number of points of objection to the setting up of the church. However, I do not deal with those in this judgment at this juncture. I instead deal with points *in limine* raised by the respondents.

I set out a brief background of what happened to cause the applicant to make this application. I will, however, refrain from dealing with the merits of the application and where it may appear that I have done so, my comments must be construed accordingly as not intended to constitute a final finding as such. It is common cause that the first respondent issued the third respondent with a permit to construct a church at Stand 946 Bannockburn. The permit was issued on 7 December 2021. The applicants did not object to the issue of the permit nor note an appeal to the Administrative Court. The applicants have given various explanations for not filing objections and these include non-notification of the application made by the third respondent for change of use of Stand 946 from residential to church and other grounds on which they base this application which the applicants say is a review of the decision of the first

respondent. They pray that the decision be set aside and the whole process of inviting objections from affected parties be restarted.

The respondents raised objections *in limine* to this application. I propose to outline them whereafter I then analyze how this application is structured and then determine the merits of the objections. The objections by the first and second respondents were as follows:

(a) That the applicants had sought constitutional relief in an ordinary application and that it was incompetent to combine or conflate the two applications.

(b) That the second respondent was not a legal persona and that it was incompetent to cite the non-legal persona, meaning that there was in fact no second respondent in the proceedings.

(c) That it was improper to cite the seventh to twelfth respondents. There are however no such respondents in this application. Thus this objection falls away.

The third respondent's objections were as follows:

(d) That the application is defective because it purported to be brought in terms of both ss 26 and 27 of the High Court Act, [*Chapter 7:06*] and also in terms of ss 85(1) and 175(b) of the Constitution of Zimbabwe. The third respondent averred that the conflation of the provisions of the law on which the application purported to have been brought were procedurally irreconciliable.

(e) That the founding affidavit is replete with averments which do not relate to the cause of action and that the application be struck off the roll of this basis.

(f) That the founding affidavit is offensive and argumentative instead of setting out facts which inform and support the cause of action. The third respondent prays for the application to be struck off the roll on this ground.

(g) That the applicants did not comply with r 251 of the High Court Rules 1971 in that the relief sought in the notice of the application is different from the relief pleaded and prayed for in the founding affidavit and further that the exact relief sought is not set out.

(h) That the application lumps together four different applications which appear to be a review in terms of s 26 and 27 of the High Court Act, a declaratur in terms of s 14 of the same Act, an application in terms of s 85(1) of the Constitution and also in terms of s 175(6) of the Constitution.

I propose to deal with the objection relating to the alleged hybrid nature of the application. A determination of this objection will inform whether or not there is proper application before the court. If a finding is made that the objection has merit then the court would not have a basis to proceed to hear the rest of the objections.

The application was handed by the applicant as follows:

"**COURT APPLICATION IN TERMS OF SECTION 26 AND 27 OF THE HIGH COURT ACT AS READ WITH RULE 256, 257 AND 259 OF THE HIGH COURT RULES AND SECTION 85(1) (3) AND 175 (6) OF THE CONSTITUTION OF ZIMBABWE**

TAKE NOTICE THAT the Applicants hereby apply to the High Court at Harare for an order in terms of the Draft Order annexed to this notice and that the accompanying affidavits and documents will be used in support of the Application.

GROUNDS FOR REVIEW

1. The Applicants beseech the High Court to set aside the decision made by 1st and 2nd respondent to grant 3rd respondent a permit to construct a Church in terms of section 26(3) of the Regional, Town and Country Planning Act on stand 946 Bannockburn, Mt Pleasant Heights, Harare in terms of Section 27(1)(c) of the High Court Act, as read with Rule 259 of the High Court Rules and Section 85(1) (23) and 175(6) of the Constitution.

2. The decision-making process of 1st and 2nd respondent was grossly irregular and illegal in the following respect:
   2.1 The notice of application given by 3rd respondent was invalid for want of publication in the government gazette and publication in a newspaper that circulates within Bannockburn, Mt Pleasant Heights, Harare.
   2.2 The decision-making process of 1st and 2nd respondent to grant 3rd respondent a permit was grossly irregular for want of proper service on the Applicants who are owners adjacent to stand 946, Bannockburn, Mt Pleasant Heights, Harare.
   2.3 The decision-making process followed by 1st and 2nd respondent of granting 3rd respondent a permit was grossly irregular and illegal for want of the consideration of the suitability of the location stand 946 to construct a church and for want of considerations of the possible breach or threat to and of applicant's right to human dignity respected, before granting a permit.

RELIEF SOUGHT

Applicants seek a relief in terms of Section 26 of the High Court Act as read with Rule 257 of the High Court Rules, section 85(1) and 175(6) of the Constitution. The exact and just and appropriate relief sought is as follows:

I. The decision by the 1st and 2nd respondents granting 3rd respondent a permit to construct a Church on stand 946 Bannockburn, Mt Pleasant Heights, Harare on 7th December 2011 be and is hereby set aside.

II. The decision of the 1st and 2nd respondent that granted the 3rd respondent the permit is substituted with the following decision: "The application for a permit is refused".

III. It is declared that, the 1st applicants notwithstanding the power of 1st and 2nd respondent to grant a permit to 3rd respondent, is entitled to the right to human dignity which is a non-derogable right.

IV. It is declared that, the 1st and 2nd respondent in the process of considering the application by the 3rd respondent was required to consider the factors such as the suitability of the location to construct a Church being stand 946, the Bill of Rights and the right of all applicant to manage and develop the areas in which they reside in.

V. It is declared that, to the extent that the right to human dignity of the applicants was not considered, the conduct of 1st and 2nd respondent was inconsistent with the constitution and they accordingly failed to protect and promote the objectives of the constitution.

VI. The foundation constructed on stand 946 by the 3rd respondent is declared to be an illegal structure.

VII. The 1st and 2nd respondent are directed to give a notice to the applicants to file their written objections within ten days of this order.

VIII. The 1st and 2nd respondent are directed to determine the objections by the applicants in terms of the Regional, Town and Planning Act, in determining the objections and whether or not to grant the permit.

IX. The respondents shall pay costs of this application on an attorney-client scale, including costs of two counsel."

It is common cause that a court application made in terms of ss 26 and 27 of the High Court must comply with rr 256 and 257 of the High Court Rules 1971 (then in force when this application was filed). Section 26 of the High Court Act, [*Chapter 7:06*] provides as follows:

"**Power to review proceedings and decisions**

Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe."

The import of the quoted provision is that the High Court reviews proceedings and decisions of inferior courts of justice (not any court), tribunals and administrative authorities. Rule 257 of the High Court Rules provided as follows:

"The court application shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for."

The applicant headed the application as follows:

"**COURT APPLICATION IN TERMS OF SECTION 26 AND 27 OF THE HIGH COURT ACT AS READ WITH RULE 256, 257 AND 259 OF THE HIGH COURT**

RULES AND SECTION 85(1) (3) AND 175 (6) OF THE CONSTITUTION OF ZIMBABWE

TAKE NOTICE THAT the Applicants hereby apply to the High Court at Harare for an order in terms of the Draft Order annexed to this notice and that the accompanying affidavits and documents will be used in support of the Application.

GROUNDS FOR REVIEW

3. The Applicants beseech the High Court to set aside the decision made by 1st and 2nd respondent to grant 3rd respondent a permit to construct a Church in terms of section 26(3) of the Regional, Town and Country Planning Act on stand 946 Bannockburn, Mt Pleasant Heights, Harare in terms of Section 27(1)(c) of the High Court Act, as read with Rule 259 of the High Court Rules and Section 85(1) (23) and 175(6) of the Constitution.

4. The decision-making process of 1st and 2nd respondent was grossly irregular and illegal in the following respect:
   4.1 The notice of application given by 3rd respondent was invalid for want of publication in the government gazette and publication in a newspaper that circulates within Bannockburn, Mt Pleasant Heights, Harare.
   4.2 The decision-making process of 1st and 2nd respondent to grant 3rd respondent a permit was grossly irregular for want of proper service on the Applicants who are owners adjacent to stand 946, Bannockburn, Mt Pleasant Heights, Harare.
   4.3 The decision-making process followed by 1st and 2nd respondent of granting 3rd respondent a permit was grossly irregular and illegal for want of the consideration of the suitability of the location stand 946 to construct a church and for want of considerations of the possible breach or threat to and of applicant's right to human dignity respected, before granting a permit.

RELIEF SOUGHT

Applicants seek a relief in terms of Section 26 of the High Court Act as read with Rule 257 of the High Court Rules, section 85(1) and 175(6) of the Constitution. The exact and just and appropriate relief sought is as follows:

X. The decision by the 1st and 2nd respondents granting 3rd respondent a permit to construct a Church on stand 946 Bannockburn, Mt Pleasant Heights, Harare on 7th December 2011 be and is hereby set aside.

XI. The decision of the 1st and 2nd respondent that granted the 3rd respondent the permit is substituted with the following decision: "The application for a permit is refused".

XII. It is declared that, the 1st applicants notwithstanding the power of 1st and 2nd respondent to grant a permit to 3rd respondent, is entitled to the right to human dignity which is a non-derogable right.

XIII. It is declared that, the 1st and 2nd respondent in the process of considering the application by the 3rd respondent was required to consider the factors such as the suitability of the location to construct a Church being stand 946, the Bill of Rights and the right of all applicant to manage and develop the areas in which they reside in.

XIV. It is declared that, to the extent that the right to human dignity of the applicants was not considered, the conduct of 1st and 2nd respondent was inconsistent with the constitution and they accordingly failed to protect and promote the objectives of the constitution.

XV. The foundation constructed on stand 946 by the 3rd respondent is declared to be an illegal structure.

XVI. The 1st and 2nd respondent are directed to give a notice to the applicants to file their written objections within ten days of this order.

XVII. The 1st and 2nd respondent are directed to determine the objections by the applicants in terms of the Regional, Town and Planning Act, in determining the objections and whether or not to grant the permit.

XVIII. The respondents shall pay costs of this application on an attorney-client scale, including costs of two counsel."

The draft order to the application reads as follows:

"IT IS ORDERED THAT:

1. The decision by the 1st and 2nd Respondent granting 3rd Respondent a permit to construct a Church on stand 946 Bannockburn, Mt Pleasant Heights, Harare on 7 December 2011 be and is hereby set aside.
2. The decision of the 1st and 2nd Respondent that granted 3rd Respondent the permit is submitted with the following decision:
   "The application for a permit is refused."
3. It is declared that, the 1st Applicant notwithstanding the power of 1st and 2nd Respondent to grant a permit to 3rd Respondent, is entitled to the right to human dignity which is a non-derogable right.
4. It is declared that, the 1st and 2nd Respondent in the process of considering the Application by the 3rd Respondent was required to consider the factors such as the suitability of the location to construct a Church being stand 946, the Bill of Rights and the right of all Applicants to manage and develop the areas in which the reside in.
5. It is declared that, to the extent that the right to human dignity of 1st Applicant was not considered, the conduct of 1st and 2nd Respondent was inconsistent with the constitution and they accordingly failed to protect and promote the objectives of the constitution.
6. The foundation constructed on stand 946 by the 3rd Respondent is declared to be an illegal structure.
7. The 1st and 2nd Respondent are directed to give a notice to the Applicants to file their written objections within ten days of this order.
8. The 1st and 2nd Respondent are directed to determine the objections by the Applicants in terms of the Regional, own and Planning Act, in determining the objections and whether or not to grant the permit.
9. The Respondents shall pay costs of this Application on an attorney client scale, including costs of two counsel.

The applicants combined a review application based upon the grounds of review provided for in ss 26 and 27 of the High Court Act with a purported s 85 of the Constitution application. The applicants moved the court to hold that there was nothing wrong with such

approach. Reliance for the applicants' argument was placed upon the decision of the Supreme Court in the case *Central African Building Society* v *Penelope Douglas Stone and Ors* SC 15/21. It was argued by the applicants' counsel that the Supreme Court had held that a s 85(1) application should ideally not be brought as an alternative cause of action to an ordinary court application. It was argued that the Supreme Court not having declared that it was incompetent to bring the two applications combined in a single application, the making of such hybrid application as done herein was competent.

The facts of the CABS matter (*supra*) in brief were that the respondents held a USD denominated account with the bank. The account held an amount of US$142 000 as at 31 October 2016. The account had been opened in 2011. On 31 October 2016 bond notes and coins were introduced as legal tender with each unit of a bond note being equivalent to one United States Dollars. The respondents instructed CABS that the account should remain as such holding the US$142 000. The respondents wanted to preserve the USD balances. CABS however converted the USD balance to RTGS$142 000 arguing that the conversion was brought about by operation of law. The respondents then filed a court application in the High Court claiming the following relief:

(i) An order that the Reserve Bank of Zimbabwe and the Minister of Finance be ordered to pay the respondents USD$142 000

(ii) A declaration nullifying the Exchange Control Directive RT 120/18 which declared party of the USD to RTGS

(iii) A declaration that s 44B (3) and (4) of the Reserve Bank Act [*Chapter 22:15*] is unconstitutional.

The High Court granted the relief sought. On appeal by CABS, the Supreme Court found for CABS and allowed the appeal. The Supreme Court held that it was incompetent for the High Court to have ordered that CABS should pay the respondents the US$142 000 which they had claimed because CABS was bound by the exchange control directive which had the force of law. The Supreme Court set aside the constitutional orders which declared Exchange Control Directive RT 120/2018 and ss 44B (3) and (4) of the Reserve Bank of Zimbabwe Act as unconstitutional. The court held that it was irregular for the High Court to have the declarations without argument being presented on those issues.

The Supreme Court in an *obitaer dictum* expressed reservations about the propriety of the respondents having raised the constitutional issues in a matter where the main relief was not dependent upon an interpretation of the Constitution. The main relief was the refund or

restoration of the US$142 000 which had been converted to RTGS dollars. The Supreme Court expressed its reservation that the High Court had not been guided by or been alive to the principle of subsidiarity in terms of which the court generally should not invoke the Constitution to determine a matter for which there exists legislation that protect the rights or impose obligations sought to be enforced. The *dicta* that a s 85(1) application is should ideally be separately made because it is *sui generis* must be understood in the context not of the permissibility of conflating an ordinary application with a s 85(1) application but within the context that the court stated that the propriety of combining the two applications was open to question.

In *casu* the basis of the application is that the applicants claim that they were not consulted or did not see the invitations to make objections to the issues by the first respondent to the third respondent of a permit to construct a church at Stand 946 Bannockburn. They want to contest the decision to issue the permit. They aver that the permit was irregularly issued because they did not get due notice to object to the issuance thereof. Thus the prayer sought is based upon an alleged procedural irregularity. The applicants' claim that the decision of the first respondent be set aside and they be allowed to contest the application for the permit. The High Court in the exercise of review powers granted in ss 26 and 27 of the High Court Act adequately provides a remedy which is adequate to protect the rights of the applicants as pleaded in the application without invoking constitutional provisions. So there is dominant legislation outside the Constitution to deal with the dispute.

The third respondent's counsel cited the case of *Michael Nyika & Anor* v *Minister of Home Affairs & 3 Ors* CCZ 5/2020 to motivate the argument that a s 85 (1) application is a stand-alone application and that where a constitutional matter arises in a matter already pending before the court, the court has no jurisdiction to hear it but to refer the same to the Constitutional Court in terms of s 175(4). The referral is subject to the satisfaction of the provisions stated therein. The third respondent argued that at best the constitutional matters raised would duly be heard by the Constitutional Court and not by the High Court.

It is therefore clear that the applicants filed a hybrid application in which they seek a review of the decision of the first respondent. They also seek declaraturs and other such relief based upon an alleged violation of their constitutional rights. They seek the enforcement of the alleged violated rights. This approach is totally wrong. The invocation of constitutional rights are not necessary for the determination of the review. The applicants inadvisedly persisted that the hybrid application was regular. It is not. The applicants did not apply to

amend their application by abandoning the claim for constitutional relief. The respondents submitted that even if the applicants had sought to amend the application by withdrawing the prayer for constitutional relief, the application would still have remained fatally defective for a failure to comply with r 257 of the High Court Rules, 1971. The respondents submitted that the applicants did not state the exact relief sought and that the founding affidavit was argumentative.

In view of the finding that the application is fatally defective for want of form in that it is a conflation of a declaratur, review and a constitutional application, the application is improperly before the court. In this respect the applicant submitted in para 6 of the heads of argument that it would not persist with asking for constitutional relief. As I indicated, there was no amendment sought by the applicants. Heads of arguments do not amend a pleading. I take the view that I should not rule on whether or not the application is r 257 compliant to avoid prejudice to the applicants should they decide to take another go at petitioning the courts. The same goes for the point *in limine* that the founding affidavit should be struck out for being argumentative and pregnant with irrelevant matter instead of dealing with material facts. I therefore refrain from dealing with the application on the basis that it being fatally defective as outlined herein.

The last issue pertains to costs. The costs must follow the event in this matter. The applicants filed a hybrid and conflated application which they persisted in dispite the respondents who filed opposing papers pointing out to irregularity of form of the application. The applicants' legal practitioner persisted in seeking to sanitize a hopelessly defective application. Applicants' counsel even stated in the heads of argument that he would abandon the constitutional relief for progress purposes. In other words he remained convinced that the defective application was in fact regular but that he would not argue the point. Then he committed the elementary omission. He did not formally withdraw the application for constitutional relief. The whole application remained fatally defective. I would have been minded to consider penalizing the legal practitioner with costs *debonis propris* had such prayer been made because quite clearly, there was no reason to persist in an obviously defective application despite other counsel pointing out the defect to him. The court as indicated considers that the costs must follow the event.

I therefore determine the application as follows:

(i) The application be and it is hereby struck off the roll

(ii) The applicants shall jointly and severally, the one paying the others to be absolved pay the costs of the application.

Musendekwa & Mtisi, applicants' legal practitioner
Gambe Law Group, first and second respondent's legal practitioner
Matsikidze Attorneys at Law, third respondent's legal practitioners