DIAMOND BIRD SERVICES (PVT) LTD
and
THE TRUSTEES OF ZIMNAT VALUE PRESERVATION PROFESSIONAL FUND
versus
CITY OF HARARE
and
MASSBREED INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 12 November 2021 and 16 February 2022

Opposed Matter

No appearance for the Applicants
C.M. Mushayi for the 1st Respondent
D. Sanhanga for the 2nd Respondent

MUZOFA J: After hearing parties in this case, I granted the order declaring the process leading to the sale of a certain piece of land owned by the second respondent unlawful. A request for the written reasons was made for the purpose of an appeal.

The applicants are duly registered entities in terms of the laws of Zimbabwe. The first respondent is a local authority established in terms of the Urban Councils Act. The second respondent is a duly incorporated company operating in Harare.

The applicants own properties adjacent to land designated for recreational purposes by residents in Alexandra Park known as Stand 3189 Harare Township ' the property'. The property belongs to the first respondent. In mid-December 2020 they noticed that the area was fenced off and temporary site offices had been constructed. Upon enquiry they discovered that the first respondent had sold the land to the second respondent.

The applicants followed through the process which resulted in the sale and discovered that the first respondent did not comply with the peremptory requirements set out in s152 of the Urban Councils Act {Chapter 29:15} "the Act".

The applicants then approached the Court for a declaration that the process leading to the agreement of sale is unlawful and the sale agreement is null and void.

The first respondent opposed the application. The first respondent denied that it failed to comply with the Act. It did comply with the Act, it published the notice in the Newsday twice and no objections were made. The first publication was on 12 September 2019 and the second publication was on 19 September 2019. The Court was referred to some attachments. The publications made reference to the terms and conditions of the Agreement of sale. The publications also referred any party interested to visit the offices of the second respondent for the detailed terms and conditions. It did not change the land use of the property.

The second respondent also opposed the application. A preliminary point was taken, that the deponent to the second applicant's affidavit was not properly authorized to do so in that the affidavit was signed on the 30th of April 2021 and the resolution authorizing him to represent the second respondent was made on the 3rd of June 2021. The point taken was not taken further in the heads of argument and the oral submissions. The real purpose of a board resolution is to confirm to the court that it is the company that is litigating. The deponent is not on a frolic of his own. In this case the board of Trustees sat and passed the resolution on the 1st of June 2021. The resolution was signed on the 3rd of June. Technically the resolution was made a day after the affidavit was signed. In my view that technicality *per se* cannot render the affidavit invalid. It cannot be said that the company is not litigating. The bottom-line is that the company is litigating and the deponent is not on a frolic of his own. The point taken has no merit.

On the merits the second respondent averred that applicants have no *locus standi* to bring the application as they have not shown that they have a direct and substantial interest in the matter. It further averred that it bought the land for value and its use is for recreational purposes. It is now a bona fide owner of the land. From its understanding the procedure leading to the sale was not defective. The description of the property was not defective any interested party could have identified it. The applicants ought to have lodged their objection as provided for by the law. Approaching the Court at this stage is prejudicial to the second respondent which has already made some developments on the property.

It was submitted that the applicants have not established a direct or substantial right in the subject matter and outcome of the application. The Court was referred to a number of cases setting out what constitutes *locus standi*. The point taken has no merit. It is settled that a resident of a city has an interest in the affairs of the city. See *Stephenson v Min of Local Government & Ors SC38/02, Ndlovu v Marufu HH480/15, Herbstern and Van Winsen. The*

Civil Practice of High Courts of South Africa, 5th Edition. The applicant need only to specifically indicate with sufficient detail his *Iocus standi* to bring such proceedings.

In *casu* the applicants, specifically addressed the issue of their *locus standi* as follows:

> "5 The applicants have *locus standi* to bring this application as they are rate payers owning land within the City of Harare. In that respect, I attach hereto marked Annexures 'B' and 'C' copies of the applicants' Title Deed."

If a litigant is a resident of the first respondent and is a ratepayer, it has a right to know and participate in the affairs of the first respondent. The applicants have shown that they have locus *standi*.

Having established the interest, the court must determine if there was a violation of any right. The violation is in the non-compliance with s152 of the Act which provides,

> **152 Alienation of council land and reservation of land for State purposes**
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> (1) Subject to any rights which have been acquired by a miner of a registered mining location in terms of section 178 of the Mines and Minerals Act [*Chapter 21:05*], a council may, subject to section *one hundred and fifty three*, sell, exchange, lease, donate or otherwise dispose of or permit the use of any land owned by the council after compliance has been made with this section.
> (2) Before selling, exchanging, leasing, donating or otherwise disposing of or permitting the use of any land owned by it the council shall, by notice published in two issues of a newspaper and posted at the office of the council, give notice—
> (*a*) of its intention to do so, describing the land concerned and stating the object, terms and conditions of the proposed sale, exchange, lease, donation, disposition or grant of permission of use; and
> (*b*) that a copy of the proposal is open for inspection during office hours at the office of the council for a period of twenty-one days from the date of the last publication of the notice in a newspaper; and
> (*c*) that any person who objects to the proposal may lodge his objection with the town clerk within the period of twenty-one days referred to in paragraph (*b*).

The Section empowers the first respondent to alienate council land. It sets out the procedure that must be followed. Section 152 (2) of the Act is couched in mandatory terms. I respectfully disagree with *Ms Sanhanga's* submission that it is directory since it does not provide a sanction for noncompliance. The use of the term "shall" denotes a mandatory application. The first respondent must comply with the requirements to the letter. This is an elementary rule of interpretation. Noncompliance would invariably mean there is no efficacy in the alienation. This is the import of the sentiments of the court in *Ire Vibes Thyolo Pvt Ltd v City of Harare & 3 Ors* HH811/15 relied on by the applicants that:

"*Once there is proof that the provision of s152 was not followed in alienating council land, then such alienation becomes unlawful and unenforceable*."

I associate with these remarks. I must add that the court must also have regard to the extent of the noncompliance .Where the non-compliance is prejudicial to the administrative rights of the applicants, it certainly must be declared unlawful.

Where the second respondent intends to alienate any of its property, it must post a notice which must be flighted in two issues of a newspaper and also post the notice at its offices. As an administrative authority the first respondent runs its affairs in the interest of its residents. The notice is therefore to advise the residents of its intentions. Three things must be included in the notice, a description of the property so that any interested party can identify it including a justification of the intended action. It must advise the members of public where they can access the full proposal. Lastly it must advise of the right to lodge any objections within twenty one days of the last publication. The requirements give the members of public the right to hold the first respondent accountable for any action relating to the alienation of property. It is therefore its duty to properly adhere to the set standards.

In this case, the first respondent indicated that it made a publication in two issues of the Newsday. The first respondent's first publication was in respect of stand number 3189 Harare Township and referred to annexure 'B'. It turns out there is one advert. Even in its oral submissions there was no explanation for this omission or misrepresentation. Despite the spirited submissions that the first respondent complied with the provisions, it is apparent that there was no compliance. Before the court there was evidence of one publication.

In its publication, the first respondent is required to describe the property concerned. The rationale for the description is for the members of public to identify the property. It is from this clear description of the property that anyone can exercise their rights to raise any objection in terms of the Act. It is critical to this process. It is the gateway to making informed decisions. In the absence of such, the property remained unknown. In its one publication, the property is described as stand 3189 Harare Township yet the property's description is stand 3189 Salisbury Township. The agreement of sale captures the description as per the notice of publication.

Both respondents concede that there was a misdescription of the property. However it was argued that the misdescription is not fatal, it can be rectified. It was submitted that the irregularity can be rectified without prejudice. In my view, counsel down played the effect of the improper description which I believe actually impacted on the applicant's right to object within the prescribed period. These are administrative rights. So fundamental are these rights

that they are Constitutional rights enshrined in s68 of the Constitution. The respondent raised the issue that the respondents must have objected to the process within 21 days in terms of s152 (2) (c) of the Act. Counsel for the first respondent overlooked that, in terms of the s152 (2) (c) of the Act the objection must be filed within 21 days from the date of the last publication of the notice in a newspaper. In this case there was no last publication. In addition, the applicants indicated they could not identify the property since it was not properly described, otherwise they could have objected. I am aware that under HH413/21 the Judge dealing with the urgent matter between the parties observed that the description may not be found to be off the mark. Clearly this was an obiter statement based on what was before the Judge. In *casu*, the misdescription is considered in relation to the respondent's right to file an objection. The court cannot make a finding that the respondent must have appreciated the misdescription and thereby have known that stand 3189 Harare Township is 3189 Salisbury Township. The court cannot take away the applicants' understanding that the two descriptions could have related to two distinct properties.

It then follows that, contrary to the counsel's submission that there was no prejudice on the applicants, the prejudice is apparent. It is for all to see. The applicants could not lodge an objection. Instead there was emphasis on the financial prejudice on the second respondent that it has heavily invested on the property. I find the point of no moment. The first respondent as an administrative body which is required to act lawfully, reasonably and fairly must have complied with the law. Noncompliance may render its actions a nullity.

The third point of infraction is that, the first respondent is required to have a copy of the proposal and the notice of sale that interested parties may inspect at its offices. Although the time for lodging objections had lapsed, the applicants requested for the proposal. It was not produced. The agreement of sale was signed on 31 October 2019. The inquiries were made in 2020 hardly a year later, but the requisite documents were not available. There was no explanation proffered for the non-availability of the documents. The only reasonable inference is that the documents were not in existence at all.

I address some of the issues raised in oral submissions by the second respondent's representative although not set out in the heads of arguments. It was submitted that the applicants must have exhausted the domestic remedies available in terms of s311, s314 and s316 of the Act. In terms of those sections the Minister can order an investigation into council operations and can set aside decisions of the council. A reading of the sections does not show that the Minister is empowered to issue a declaratory order. It is trite that where a domestic

remedy does not provide sufficient protection, a party is at large to approach the court. The point taken has no merit.

In the final, the court must consider if this is an appropriate case to grant the order. *Ms Sanhanga* submitted that the order must not be granted as it would be prejudicial to the second respondent. Secondly it was said the order serves no purpose as it seeks to declare the sale as invalid but not challenging the alienation of the land itself. I have already addressed the prejudice. It is the respondent's conduct of describing the property wrongly which is prejudicial to the applicants in that it had the effect to deny them their right to object to the sale. This invariably goes to the root of the sale agreement. The attendant infractions are to such a magnitude that the court cannot clothe the process with some semblance of lawfulness. It is in the interest of justice that the order must be granted.

In the result the following order was made:

IT IS ORDERED THAT:

1. The process leading to the agreement of sale in terms of which the first respondent purported to sell a certain piece of land namely stand number 3189 Salisbury Township of Salisbury Township Lands be and is hereby declared to be unlawful.
2. The agreement of sale that was purported signed by the first and second respondents pursuant to the aforesaid process be and is hereby declared null and void.
3. Respondents to pay costs on an ordinary scale.

Messrs. Gill, Godlonton & Gerrans, Applicants' Legal Practitioners
Messrs Gambe Law Group, 1st Respondent's Legal Practitioners
Messrs Manase & Manase, 2nd Respondent's Legal Representatives