NOT REPORTABLE/DISTRIBUTABLE

NEW LIFE COVENANT CHURCH

v

(1) TRUSTEES OF THE HARARE WETLANDS TRUST (2) DIRECTOR OF WORKS CITY OF HARARE (3) CITY OF HARARE

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, CHATUKUTA JA & MWAYERA JA
HARARE, 7 & 20 OCTOBER 2021

CHATUKUTA JA: This was an appeal against the whole of the judgment of the Administrative Court of Zimbabwe handed down on 7 September 2020 as case number ACC87/19, judgment number AC 9/20. The appeal was heard on 20 October 2021. The court proceeded to give an ex tempore judgment. It dismissed the appeal with costs on a legal practitioner and client scale. Written reasons have been requested by the appellant. These are they.

BACKGROUND FACTS

The facts of the matter are common cause. The appellant owns a piece of land known as stand number 18692 Boundary Road, Harare Township in the District of Harare, which lies within the second respondent`s area of jurisdiction. The first respondent is a trust that advocates for the protection and preservation of wetlands for sustainable water provisioning within Harare.

The second respondent is the official of the third respondent which is the local planning authority for Harare.

The appellant intended to develop the site to build a church, a school and a conference centre. It relied on a development permit issued by the third respondents. The first respondent was opposed to the developments, hence it noted an appeal in the court *a quo.*

SUBMISSIONS MADE IN THE COURT *A QUO*

The first respondent submitted in the court a quo that the development permit was unprocedurally issued in violation of its justice rights. It argued that the development permit was unlawful for the following reasons:

i. That the second respondent was a local authority and had no power to issue the permit in terms of the tenets of the Regional, Town and Country Planning Act [*Chapter 29:12*].

ii. That the request for the permit was not made in accordance with the application procedure prescribed by the same Act.

iii. That the application for the same had expired after three months and could not be relied upon for the current permit.

iv. That there was no public notice of the development permit application and consultation of the relevant stakeholders.

v. That the permit was vague because it did not clarify the description of the development making it impossible to ascertain the nature of the development proposed.

vi. That the development violated the beneficiaries` Constitutionally protected environmental rights and:

vii. That it violated the Environmental Impact Assessment Certificate issued by the Environmental Management Agency which restricted the development to 0.8169 hectares of the wetland area.

In opposition of the appeal, the appellant argued that all the requisite consultations and processes for obtaining the development permit were complied with. It contended that the development permit was therefore procured in terms of the law. It further argued that the site for the intended construction is not ecologically sensitive and is therefore suitable for construction.

DETERMINATION BY THE COURT *A QUO*

The court *a quo* made the following findings:

The conditions spelt out in the development permit had nothing to do with the location of the proposed conference centre and they lacked specificity and precision. The appellant did not submit an application for a development permit as prescribed by the Regional, Town and Country Planning Act. The appellant instead applied for permission to change the use of stand 18692.

The appellant did not give public notice of the application for a development permit or serve any such notice on every owner of the property adjacent to stand 18692 as is required in the Regional, Town and Country Planning Act. The development permit issued to the appellant contradicted the environmental impact assessment certificate which preceded and authorised the

issuance of the purported development permit. The development permit authorised erection of the buildings on 4.633-hectares whereas the environmental impact assessment certificate permitted development on only 0.8169 hectares of the property.

The court *a quo* consequently upheld the first respondent`s appeal.

Aggrieved by that decision, the appellant noted the present appeal on the following grounds:

GROUNDS OF APPEAL

1. The learned judge in the court *a quo* erred in finding that there was no application for a development permit.
2. The learned judge in the court *a quo* erred in not taking into account that the development permit would necessarily have to be read with the plans and drawings and would be subject to conditions imposed for the purposes of development.
3. The learned judge in the court *a quo* erred in law in finding that section 26 (3) of the Regional, Town and Country Planning Act [*Chapter 29:12*] was applicable and erred in finding that it was a requirement to give public notice of an application for a development permit.
4. The learned judge in the court *a quo* erred in finding that the development permit contradicted the environmental impact assessment certificate and failed to place any emphasis or sufficient emphasis on the fact that the plans and drawings had been submitted.

5. The learned judge in the court *a quo* erred in finding that the fact that there was no acknowledgement of the application was fatal to the grant of the permit.

PROCEEDINGS BEFORE THIS COURT

Grounds 1, 2, 3 and 5 raised by the appellant challenge the court *a quo'*s finding that there was no application for a development permit.

Ground 4 challenges the court *a quo*'s finding that the development permit contradicted the environmental assessment certificate.

Ground 6 raises the issue of the first respondent's *locus standi* to participate in the matter before the court *a quo* and by extension, in this appeal.

SUBMISSIONS BY COUNSEL FOR THE APPELLANT

Mr. *Hashiti*, for the appellant, submitted that an application was made to the third respondent in compliance with s 26 of the Regional, Town and Country Planning Act. He further submitted that in the event that the court finds that s 26 was not strictly complied with there was substantial compliance and s 5 of the Interpretation Act [*Chapter 1:01*] would save the application.

Regarding the alleged contradiction between the environmental impact assessment certificate and the development permit, counsel submitted that the conditions specified in the certificate were by implication, incorporated in the development permit.

The appellant's submissions on ground number 6 were that the first respondent, not having participated in the antecedent proceedings, had *no locus standi* to appeal against the grant of the permit. Furthermore, that the first respondent's Deed of Trust does not empower it to act on behalf of the persons that it sought to represent.

SUBMISSIONS MADE BY COUNSEL FOR THE FIRST RESPONDENT

Per contra, Miss *Mahere*, for the first respondent, submitted as follows:

The issue of the *locus standi* of the first respondent was not raised in the court *a quo* by the appellant. The court *a quo* therefore, cannot be faulted for not determining an issue that was not before it. Furthermore, the High Court per CHINAMORA J, in *Harare Wetland Trust & Anor v New Life Covenant Church & Others* HH 819/19 determined that the first respondent had *locus standi* to challenge the developments that the appellant was undertaking without a development permit.

The application relied on by the appellant did not comply with the peremptory requirements of the Regional, Town and Country Planning Development Regulations RGN 927/1976 as regards giving the public notice of the development and serving such notice on the property owners adjacent to the site.

Furthermore, and in any event, the application, not having been determined within the stipulated 3 months period, had been deemed refused by operation of law in terms of s 26 (7) of the Regional, Town and Country Planning Act.

There were contradiction between the Environmental Impact Assessment Certificate (the EIAC) and the development permit as to the area of the property on which construction would be undertaken. Further, the conditions set out in the EIAC were not included in the development permit, thereby creating the impression that there were no such restrictions imposed.

ANALYSIS

The sixth ground of appeal related to the question of the first respondent's *locus standi*. The court *a quo* did not make any pronouncement on the question. The point is not properly before this Court. This is so because firstly, the matter was not raised *a quo* despite the first respondent's contention that it had been raised. The issue which Mr *Hashiti* alluded to as having been raised by the appellant in the court *a quo* relates to the jurisdiction of the second and third respondents and not to the first respondent's *locus standi*. The appellant's contention on the first respondent's *locus standi* therefore seeks to make this Court a second court of first instance. This court cannot do so as it is an appellate court. (see *Lungu & Others* v *RBZ* SC 26/2021). The circumstances of this case do not warrant such a course of action.

Furthermore, and significantly so, in the related judgment by CHINAMORA J in *Harare Wetland Trust & Anor v New Life Covenant Church & Others* (*supra*) it was determined that the first respondent had the requisite *locus standi* to challenge the developments in issue as they were being undertaken without a development permit. The appellant had challenged the first respondent's *locus standi* to apply for an order declaring the developments on Stand 1892 Boundary Road unlawful. CHINAMORA J remarked at p 9 that:

> "In light of the objectives stated in their constituent documents, I am satisfied that the applicants have a direct and sufficient interest in the subject matter and outcome of the litigation before me, and are not mere meddlesome busybodies. The first applicant's principal concern is the conservation of the wetland area where construction work is being undertaken. That concern, in my view, implies a genuine interest in the health and well-being of the residents proximate to the construction area who may be affected by any interference with the riverbank or public stream that flows near the site. The *locus standi* of the second applicant has not been challenged. I will not dwell on that since the first respondent seems to have accepted that the second respondent has the right to represent the interests of residents in the neighbourhood of Newlands."

It is the court's view that the core issues before the learned Judge emanated from the appellant's conduct of commencing developments on the property without a development permit. The appellant had challenged the application, arguing that it was in possession of a development permit issued by the third respondent. The court remarked at p 15 that:

> "Consequently, I do not find anything in the letter of 9 May 2016 which authorizes the development."

The question of a development permit was therefore one of the issues at the core of the application before CHINAMORA J. Such an issue is a town planning issue and not just an environmental issue. The pronouncement by CHINAMORA J on the first respondent's *locus standi* therefore related to the existence of a development permit. The submission by Mr *Hashiti* that the learned Judge had been called upon to determine only environmental issues and that the question of the first respondent's *locus standi* related to that issue only therefore lacks merit. The judgment by CHINAMORA J is extant. It has not been appealed against. The appellant cannot therefore be seen to be challenging the finding in HH 819/19 in this appeal.

On the, merits, we are persuaded by Miss *Mahere'*s submissions that the appellant did not possess a development permit. The record shows that no competent application for a development permit was made. The document the appellant sought to rely on as a permit was an incomplete, unstamped form dated 5 January 2018. The form was signed by one "Jabula". There is no indication on the form who Jabula is and that he was signing the form on behalf of the appellant. A stamp for the third respondent appears on the form and bearing the date 5 December 2019 as reflecting the date of approval of the application. The record also shows that an application for the approval of building plans was submitted to the third respondent sometime in November 2017. The application preceded the alleged date of approval of the application for the development permit. It would not be conceivable that the appellant would seek approval of development plans before it had been issued with a development permit. It is therefore apparent that the appellant did not have a development permit.

Assuming that a permit was granted, the purported application for a development permit did not comply with the peremptory provisions of the Regional, Town and Country

Planning Act. The appellant did not give public notice of its intended developments neither did it notify the interested persons as is required in terms of s 26 (3). The appellant did not produce before the court *a quo* proof of such public notice. The public notice produced before the court *a quo* related to the change of reservation application and not the development permit application.

We furthermore agree with the first respondent's submissions that, assuming that there was a proper application for a permit before the third respondent, it was in any event deemed refused in terms of s 26 (7) of the Regional, Town and Country Planning Act. Section 26 (7) reads:

> "If the local planning authority has not determined in terms of subsection (6) an application in terms of subsection (1) within three months of the date of acknowledgement in terms of subsection (2) of the receipt of the application or any extension of that period granted by the applicant in writing, the application shall be deemed to have been refused by the local planning authority.

The application for a permit being relied on by the appellant was purportedly made on 5 January 2018. The purported grant of the permit was on 5 December 2019. This was clearly in excess, by almost two years, of the 3 months' period within which the application ought to have been considered. The application had therefore been deemed refused by operation of law.

Under the circumstances, the court *a quo* cannot be faulted for holding that the appellant did not have a development permit and neither was the purported application for the permit valid. Having found that there was no application before the third respondent, and that if there was one, it had been deemed refused by operation of law, it is in our view not necessary to determine the issue of the contradiction between the certificate and the permit.

It was on this basis that it was the finding of the court that the appeal had no merit.

Regarding the issue of costs, it is our view that costs on a higher scale are warranted. The appellant belatedly raised the issue of *locus standi* which had already been determined in a judgment that it has, to date, not appealed against. In addition, that issue was not raised before the court *a quo*. The first respondent was unnecessarily put out of pocket and thus unnecessarily prejudiced.

It was for the above reasons that the appeal was dismissed with costs on a legal practitioner and client scale.

Gill Godlonton & Gerrans, appellant's legal practitioners
Zimbabwe Lawyers for Human Rights, first respondent's legal practitioners