FISHROD INVESTMENTS (Private) Limited
versus
CITY OF HARARE
and
MINISTER OF LOCAL GOVERNMENT, RURAL DEVELOPMENT AND NATIONAL HOUSING N.O
and
SAMUEL NYABEZI
and
NESBERT MUKORA
and
LIANGMING JIN

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE, 23 December 2022

Opposed Application

T W Nyamakura for the applicants
N B Nyathi for the 1st respondent
No appearance for the 2nd and 3rd respondents
Ms *G Dzitiro* for the 4th and 5th respondents

Introduction

BACHI MZAWAZI J: On the 26th of July 2022, the parties appeared before me and made submissions on the preliminary points which had been raised by the 4th and 5th respondents. After hearing arguments from both sides, a judgment, number HH620/22, on the technical objections was subsequently delivered on the 15th of September the same year herein incorporated as part of this judgment. An application for leave to appeal was immediately noted in terms of the governing rules resulting in the filing of the same within the prescribed period. After several false starts the respondent opted to withdraw their application for leave to appeal which they did on the 26th day of December 2022, leading to the resumption and continuation of the main matter on the merits on the same day. This is the ruling on the merits.

Relief Sought

Applicants are seeking a declaratory relief in the following terms;

It is ordered that,

a. The disposal of the open space adjacent to the Applicants' properties (now known as Stand 40684 and 40685 Salisbury Township lands) by 1st Respondent to the 4th and 5th Respondents be and is hereby declared null and void.
b. In the event that the transfer of the open space to the Applicants' properties (now known as Stand 40684 and 40685 Salisbury Township Lands) has been done, such transfer be and is hereby cancelled.

Brief Background

A brief factual background to refresh the memory is necessary. The source of dispute is an open space measuring 8 500 square metres in Carlisle Drive, Alexandria Park Harare, which was sold to the 4th and 5th Respondents without notifying the occupiers and owners of the adjacent properties in breach of s49(3) of the Regional, Town and Country Planning Act [Chapter 29:12].The applicant herein acting in its own capacity and those of other occupiers of the community facing and surrounding the open space in case number HC10651/17 , whose pleadings have been incorporated by reference are the aggrieved parties, whilst the 4th and the 5th respondents are the opposing faction.

The 1st to 3rd respondents is the, City of Harare, Minister of Local Government, Rural Development and National Housing and Chief Regional Planner, respectively. The 1st and 2nd Respondents are the land authorities in different respects, whilst the third is in charge of town planning. It is of importance to highlight that the 1st to 3rd respondent did not file any opposing papers but where in audience throughout the hearings in this matter. Their position is stated in the written correspondence, in response to the challenges made by the applicants to the infringement of the Regional, Town and Country Planning Act [Chapter 29:12], which has also been made part of these proceedings.

Applicant's case

It is the applicant's contention that 1st and 2nd respondents disposed the piece of land in question in violation of s49(3) of the said Act. In that they did not give notice of the intended change of use to them as owners of the properties adjacent to the reserved land in question

thereby failing to accord them the opportunity to lodge their objections and make representations to that effect.

The applicant asserts that the non-observance of the law as embodied in clear statutory provisions of the violated Act nullified all transactions including the agreements of sale entered between the 1st, 4th and the 5th respondents in respect to the contentious piece of land.

Mr Nyamakura for the applicant citing the case of *Upset Investments (Private) Limited v Chitungwiza Municipality* SC110/21, argued that s49(3) is couched in pre-emptory language and demands strict adherence and obedience. Thus, the failure by the 1st and 2nd respondent to comply with the provisions in respect to the change of use of reserved land was fatal to any subsequent disposal transactions they had entered into.

It is their further submission that the defence proffered by the 4th and 5th respondents that they are bona fide purchasers is untenable as dictated in the case of *Macfoy v United Africa Co. Ltd* [1961] ALLER 1169(PC) at page 1121.

In the justification of the relief sought, the applicant advanced that it is an interested party, with direct and substantial interest as its community is about to be deprived of the benefits of the open recreational park adjacent to its own property by the purported sale transaction between the 1st, 2nd and 3rd respondents. They relied on the case of *Johnsen v AFC 1995* (1) ZLR65 in support of that position amongst several other authorities.

Respondents case

As already indicated, the 1st and 2nd respondents did not oppose the application. It is crucial to note that they had stated their position in the letters which have been incorporated to these proceedings, written soon after they were notified of their non-compliance with the specific express provisions of s49 of the Act in question.

In their counter argument to the merits the 4th and 5th respondents stated that, reliance should not be placed on the said letters by the 1st and 2nd respondents as their contents amounted

to hearsay. They argue that for the contents of the letters to be of probative value there was need for them to be placed before the court in affidavit form or in the founding affidavit. However, they do not deny the authenticity of the contents and the fact that they retracted the sale. For this averment, they cited the case of *Pountas' Trustee v Lahanas* 1924 WLD 67 and Section 27 of the Civil Evidence act [Chapter 8;01].

The 4th and 5th respondent, relying in the cases of *Guga v Moyo & Others* 2000 (2) *ZLR (S) 458, Zaranyika v Gusha and Others HH481/18* and several others, further posit that as innocent *bona fide* purchasers they should not be penalized for the infringement of the law by the 1st respondent.

Common cause facts

The common cause facts are that an open space measuring 8 500 square metres in Carlisle Drive, Alexandria Park Harare is designated as a reserved open space on the Town Master plan of the land in issue. It is a fact that the 1st respondent does not deny selling the mentioned open space the 4th and 5th respondents. It is also clear from the record that the property in question was sold without complying with statutorily set down procedures. It is an undisputed fact that when the applicant discovered that the land hand been sold to the 4th and 5th respondents after diligent search, they raised the issue with both the 1st and 2nd respondents through several correspondence culminating in litigation through this court. Another common feature is that there are letters that were written in response to the applicant's quest for answers acknowledging the non-compliance and suspending any purported sales.

It is also a given that in their search for answers, had the 1st respondent complied with the provisions of s152 of the of the Urban Councils Act [Chapter29:15] which mandatorily impresses on the publication of a notice for any proposed sale of land which is owned by the local authority the applicant's attention would have been drawn, enabling them to file their objections and make their representations in accordance with s49(3) of the Regional, Town and Country Planning Act [Chapter 29:12.

The law

In terms of the law both the Minister and the Local Municipality , in this case the 1st and 2nd respondents are empowered to change the use of reserved or any land from what is reflected in the Master or Municipal plan and to sale or dispose of the same, but they have to do so within the precincts of the governing laws, that is in terms of s49 of the in Regional, Town and Country Planning Act [Chapter 29:12] and s152 of the of the Urban Councils Act [Chapter29:15] respectively.

Put differently, where land belonging to a municipality is reserved for a specific purpose in the Master plan, the procedure for changing the use is as outlined in the above legislative provision that is in terms of s49 of the Regional, Town and Country Planning Act [Chapter 29:12]. However, to enable the Local Authority to do so they have to obtain the approval of the Minister of Local Government. But the Minister may not give such consent until he has given public notice inviting objections and presentations and has given the municipality concerned an opportunity to respond to the objections and representations.

The case of *Delta Corporations & Others v Harare City Council & Others* 2002 ZLR 182 H details the purpose of and procedures to be followed when disposing land or changing its use in terms of s49 of the said enactment, be it by the local council or the relevant Minister.

The crucial excerpt of that judgment, which I need not repeat, was extrapolated in the Supreme Court case of *City of Harare v Wonder Munzara & Others* SC239/22.

For the record, s49(3) of the in Regional, Town and Country Planning Act [Chapter 29:12] reads;

"Notwithstanding an operative master plan or local plan or an approved scheme or the terms of any permit or any approval issued in terms of Part III, IV, or V of the repealed Act, the Minister may authorize the use of any reserved land for a purpose other than that which it was so reserved:

Provided that the Minister shall not authorize any use in terms of this subsection until: -

(a) he has served notice thereof for the local planning authority, the owner of the land concerned and every owner of property adjacent to the reserved land and afforded them an opportunity of lodging objections or representations.

S152(2) of the Urban Councils Act Chapter 29:15 which prescribes the procedure to be followed by a municipal authority intending to sale land owned by it provides as follows,

"**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 council for a period of twenty-one days from the date of the last publication of the notice in a newspaper, and
c) 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)"

Applying The Law To Facts

Hence, the law is very clear, it is couched in mandatory terms and has to be complied with. Anything unjustifiably outside the scope of the law is of no legal consequence. See, *Chenga v Chikadaya* SC7/2013. It is also important to note that the applicant did not vigorously pursue their argument in respect to s152 of the Urban Councils Act both in their founding affidavit and heads of argument in the current application but by incorporation of their averments in case HC10651/17 wherein they made submission in detail on that aspect. In turn the applicant interestingly did not make any submissions in respect to both sections. Thus, the said section is only included for completeness.

Issues

That being the case the issues for interrogation are,

a. Whether or not the 1st respondent complied with s49(3) of the in Regional, Town and Country Planning Act [Chapter 29:12], when it sold the land in issue to the 4th and 5th respondents,
b. Whether or not the applicant is entitled to the relief sought?

In interrogating the first issue, the two letters written by the 2nd respondent need to be copied verbatim. The letters are on official letter heads and the originals bore the stamp from the relevant Ministry. These read as follows;

MINISTRY OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING

The Principal Director of Physical Planning
P.O Box CY 968
Causeway

Ref: T/59/61

DEPARTMENT OF PHYSICAL PLANNING, HEAD OFFICE
6TH Floor, Makombe Building
Corner L Takawira/H Chitepo
HARARE

09 November 2017

The Acting Director of Works
City of Harare

Dear Sir /Madam

ILLEGAL LAND OCCUPATION ON OPEN SPACE ALONG CARSILLE DRIVE: ALEXANDRA PARK, MT PLEASANT, HARARE

The above matter refers.

Please be advised that this office has observed an unauthorised development on the above-mentioned property after undertaking a site investigation. The investigation which was prompted by complaints received from aggrieved neighbouring residents revealed that there is an attempt to start unsanctioned construction on the above property, which is zoned open space and recreation in terms of the operative Salisbury Phase 4 Section 2Town Planning Scheme, As evidenced by the presence of piles of bricks on site.

According to our records there is no evidence that change of reservation procedures were invoked as required by Section 49(3) and (4) of The Regional, Town and Country Planning Act (Chapter29:12).

Given the foregoing, I advise that you take necessary steps forthwith, to further interrogate the person(s) behind this development and remove the bricks from the site. Thereafter, please furnish this office with a report detailing your findings. Make sure you submit the said report accompanied by evidence that the task has been undertaken by the 17th of November 2017.

Yours faithfully

E.Mlalazi
PRINCIPAL DIRECTOR OF PHYSICAL PLANNING
cc. Carllsile Drive Residents Association (for your information)

MINISTRY OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING

The Principal Director of Physical Planning
P.O Box CY 968
Causeway

DEPARTMENT OF PHYSICAL PLANNING, HEAD OFFICE
6TH Floor, Makombe Building
Corner L Takawira/H Chitepo
HARARE

Ref: T/59/65

29 January 2018

The Chairperson
Carlisle Drive Residents Association
Alexandra Park
Mount Pleasant, Harare

Dear Sir:

ILLEGAL LAND OCCUPATION ON OPEN SPACE ALONG CARSILLE DRIVE: ALEXANDRA PARK, MT PLEASANT, HARARE

Our minute T/59/61 of 09 November 2017 written in connection with the above captioned matter, which was directed to City of Harare and copied to yourselves.

Please be advised that the Local Authority (City of Harare) supports this Department's position that the above piece of land should maintain the current use as public open space and recreation, as provided for by the operative Avondale Local Development Plan Number39. It is also confirmed that no application has been processed in terms of Section 49(3) and (4) of the Regional, Town and Country Planning Act (Chapter 29:12) to change the current use of the land.

The above position has since been communicated to the relevant Council Department to stop any development on the piece of land in question. We are reliably informed that the occupiers have taken heed of the communication of Council. The Local Authority shall execute that task to remove the bricks should the occupiers fail to immediately comply with that instruction, however, at the cost of the accused.

Yours faithfully

E.Mlalazi(Mrs)

PRINCIPAL DIRECTOR OF PHYSICAL PLANNING

The contents of these letters are self-explanatory. They need no further comment save to say that the 4th and 5th respondents though not challenging the contents are saying they are hearsay and need not be considered. The letters confirm that the law was not followed in the change of use and sale of the said stands. As such the whole sale done contrary to the law is a

legal nullity as rightly acknowledged by the 2nd respondent. The 4th and 5th respondent's argument in this respect lacks merit. It is settled law that government and or official documents are valid upon production until proven otherwise. There is a presumption of regularity and validity of a government document on its face until lawfully invalidated. on the validity. This position was clearly enunciated in the case *of Mhandu v Mushore & Others* HC 2853 of 2011, though speaking to offer letters.

The 4th and 5th respondent's argument on the bona fides of their sale with the 1st respondent is out of question. Their agreements where borne out of a legal nullity. It has nothing to stand on. Its foundation was on quicksand and it sunk in a sinkhole. See, *Chenga v Chikadaya* SC7-2013, *Agson Mafuta Chioza v Smoking Williams Siziba* SC4/15 and *Dube v Khumalo* 1986(2) ZLR 103 (SC)

MATHONSI JA in *City of Harare v Wonder Munzara and Others* above, faced with a similar matter stated that,
"…to the extent that the said agreements did not satisfy the requirements of s49(2) and (3) which are mandatory, they were invalid and unenforceable at law….it was mandatory that the approval of the Minister be sought and obtained prior to any change of use of the open space reserved for recreational purposes to residential stands… It is trite that illegal agreements are *void ab initio*. They are invalid and they do not create any obligations.

In addressing the second issue, the requirements for the relief of a declaratory order are well established.

In *Munn Publishing (Private Limited V ZBC* 1994 ZLR 337, the court pronounced that,
'the condition precedent to the grant of a declaratory order is that the applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court…The interest must relate to an existing, future and contingent right. ".
See united *Watch & Diamond Co (Pty) Ltd & Others v Disa Hotels Ltd & Anor* 1972(4) SA 409.

Section 14 of the High Court Act [Chapter 7.06] also stipulates the requirement for a declaratory order. The applicant has illustrated that it has a direct and substantial interest in this public interest matter which affects the rights of people occupying and owning properties adjacent to the recreational park in question. This is evinced in the letters from the Ministry

themselves directed to its chairperson and his interests have not been put in issue in all preceding litigation.

This court is satisfied that the applicant has satisfied the requirements of the relief sought as stated in s14 of the High Court Act [Chapter 7.06] over and above the authorities above.

Disposition

Accordingly, the 1st and 2nd respondents did not comply with the law governing the change of use of land reserved for recreational activities and the sale thereafter, in violation of s49(3) the in Regional, Town and Country Planning Act [Chapter 29:12] as read with s152 of the of the Urban Councils Act [Chapter29:15] respectively. It therefore follows that the sale that was entered between the 1st ,4th, and 5th respondent is a legal nullity. The 4th and 5th respondents can pursue other legal recourses to recover any monies lost in the process.

With regards to costs, this court is of the view that costs should follow the established route. There is no justification for punitive costs given the history and duration of the dispute between the parties.

As a result,

It is ordered.

a. The disposal of the open space adjacent to the Applicants' properties (now known as Stand 40684 and 40685 Salisbury Township lands) by 1st Respondent to the 4th and 5th Respondents be and is hereby declared null and void.
b. In the event that the transfer of the open space to the Applicants' properties (now known as Stand 40684 and 40685 Salisbury Township Lands) has been done, such transfer be and is hereby cancelled.
c. Costs follow suit.

Mawere Sibanda, Applicants Legal Practitioners.
Gombe law Group, 1st Respondent Legal Practitioners.
G Dzitiro Attorneys, 4th and 5th Respondent Legal Practitioners.