NEIL BRUCE
versus
ECONET WIRELESS (PVT) LTD
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
OMERJEE J
HARARE, 18 MARCH 2009 & 6 May 2009

CIVIL CAUSE

Mr. C Venturas, for the plaintiff
Mr. H Nkomo, for 1st defendant
Mr. D Kanokanga, for 2nd defendant

OMERJEE J: THE plaintiff is a private person, residing at Stand 64 of Lot 7A Colne Valley, commonly known as No. 5 Wellburn Drive, Ballantyne Park, Harare. The 1st Defendant, is Econet Wireless (Pvt) Ltd, a company duly incorporated in accordance with the laws of Zimbabwe and the 2nd defendant is the authority responsible for and in charge of the Council area within the city of Harare.

On 8 January 2008 the plaintiff issued summons and a declaration against both defendants seeking an order -

(a) Declaring the lease agreement entered into, on or about 27 February 2007, between 1st and 2nd defendants to be of no force or effect.

(b) Requiring 1st defendant, on the basis that its cell phone base station encroaches on his land and constitutes a nuisance to:

i. vacate stand 648 Ballantyne Park.
ii. remove its cell phone base station.
iii. restore stand 648 to the condition it was in, prior to erecting the base station.

ALTERNATIVELY:

Requiring 1st and 2nd defendants to comply with the requirements of Part V of the Regional, Town and Country Planning Act *[cap.* 29:12*]* ("the Planning Act").

(c) Costs of suit.

The facts bringing rise to this suit can conveniently be summarised as follows-

1. Sometime in January 2006, the 1st defendant approached the 2nd defendant with a view to leasing from the latter, a certain piece of land measuring 140 square metres, known as Stand No. 648 Ballantyne Park, Colne Valley, Harare ("the Stand").
2. The 1st defendant wished to lease the Stand for purposes of erecting and subsequently operating a Cellular Base Station ("Mast") thereon.
3. In compliance with the provisions of *s.* 152(2) of the Urban Councils Act *[cap.* 29:15*]* the 2nd defendant caused to be published notices of its intention to lease the Stand to the 1st defendant, in both the Business Herald and the Herald newspapers of 13 and 20 October 2006 respectively.
4. The twenty-one day limit for lodging objections as required by *s.* 152(2)(b) having elapsed without receipt of any objections, 1st and 2nd defendants, on or about 27 February 2007 proceeded to conclude a lease agreement pertaining to the Stand.
5. Of significance clause 5 of the lease agreement stipulated that the Stand was to be used for the installation and operation of a Cellular Base Station.
6. On the basis of this lease agreement the 1st defendant commenced to construct or erect a Mast on the Stand.
7. When plaintiff, whose premises is directly adjacent to the Stand, noticed what was transpiring, he addressed letters of protest, dated 24 April 2007, to, *amongst others*, the 2nd defendant and in particular for the attention of the Acting Town Planner, a Mr. A. Kasiwamhura. This letter read -

> *"Re: Cellphone Mast in Ballantyne Park*
>
> *I note with concern that a cellphone mast is being erected in Ballantyne Park adjacent to my boundary wall. I have not had any notification of this at all and I have checked with the two neighbours directly opposite who say they have not been notified either.*
>
> *I would like work on this structure stopped with immediate effect as correct procedures have obviously not been followed. This structure also extends within the building line on my boundary wall.*
>
> *Further to this, there are severe health hazards caused by E.M.R. [electromagnetic radiation] associated with cellphone masts and they should not be erected in such close proximity to residential properties, especially if these house children.*
>
> *I should be grateful if you would give this matter your urgent attention."*

8. Neither defendant was moved by these protestations, as both held the view that adherence to and compliance with all the necessary legal formalities had been met and therefore under the circumstances halting the erection of the mast was not warranted.

Faced with this scenario the plaintiff, on 8 June 2007, filed with this court, what he purported to be an urgent chamber application seeking interim relief compelling the removal of the mast and restoration of the Stand to its original condition, by the 1st defendant.

The matter was placed before my brother HLATSHWAYO J who in declining to hear it on an urgent basis, ruled that -

> *"the matter is not urgent because of the delay in instituting legal proceedings after the encroachment was noticed and because of the final nature of the interim relief sought. The matter should be set down on the normal opposed roll."*

This prompted the plaintiff to enrol it on the opposed roll of 31 October 2007 using the same set of papers as originally filed.

In his initial papers the plaintiff had predicated his case on an alleged non-compliance with the provisions of *s.* 152 of the Urban Councils Act, but subsequently in his answering affidavit he introduced the matter of non-compliance with the requirements of the Planning Act. My brother CHITAKUNYE J who presided over the opposed application ruled that this latter aspect be "struck out" on the basis that it introduced a new cause of action. He proceeded to dismiss the application in its original form, on the grounds, *inter alia* that it was incapable of resolving without hearing evidence.

Following this the plaintiff, on or about the 8 January 2008, filed this action predicated on the ground that was earlier struck out, namely, that the defendants had failed to comply with and or had totally ignored the requirements of the Planning Act.

At a pre-trial conference held on 23 October 2008 the following issues were identified as requiring determination -

1. Was the 1st defendant required by the law to obtain a development permit?
2. Was plaintiff given the required notice to object to the development?
3. Does 1st defendant's Base Station constitute a nuisance?

Prior to the commencement of the trial the parties agreed that issues 1 and 2 predominately involved questions of law and would not therefore require the adduction of evidence. In addition the plaintiff, on his own volition, formally withdrew the third issue. The result was that the case effectively proceeded on the basis of an opposed application.

On the date of hearing the 1st and 2nd defendants raised certain points *in limine* that, in my view, can more conveniently be dealt with together as opposed to separately.

My understanding of the points raised *in limine* is as follows -

a. That this court lacks jurisdiction to hear the matter because *s.* 38 of the Planning Act stipulates that any person aggrieved by a decision of a local planning authority has one month in which to lodge an appeal with the Administrative Court. In *casu*, the plaintiff, apart from instituting proceedings in the wrong fora was also now out of time to appeal against the decision made by the 2nd defendant.
b. That even if it were accepted that this court possesses review jurisdiction over decisions made by inferior bodies, in *casu* the court is precluded from exercising its review powers by reason of non-compliance with Order 33 of the Rules of Court.

I consider that both points *in limine* are ill conceived and without merit. Firstly, an appeal lies with the Administrative Court, only if the decision being challenged is one, which was made or deemed to have been made in terms of the Planning Act. Put differently, not all challenges against decisions made by a local authority lie with the Administrative Court unless they are made in terms of the Planning Act. This is made abundantly clear when regard is had to the wording of *s.* 38. It reads in relevant part -

> "38(1) Any person
> (a) Who is aggrieved by any decision made or deemed to have been made by a local authority in connection with an application for -

(i) a permit or preliminary planning permission; or
(ii) any permission required in terms of a development order, building preservation order or tree preservation order; or
(iii) an extension of time as contemplated in paragraph *(d)* of subsection (1) of section *twenty-two* or subparagraph (ii)of paragraph *(a)* of subsection (2) of section *twenty-four*

may, within one month from the notification of such decision, … , appeal to the Administrative Court …"

All the matters stated in *subparas* (i) to (iii) above are provided for by the Planning Act i.e. *s.* 26 provides for a planning permit, *s.* 24 for a development order, *ss.*30 and 31 for building and tree preservation orders, respectively.

It is not in dispute that what transpired in *casu* is that the 2nd defendant by virtue of the powers conferred on it by *s.* 152 of the Urban Councils Act took a decision to lease the Stand to the 1st defendant. It is obvious that this decision was neither made nor can it be deemed to have been made in terms of the Planning Act.

In my understanding the plaintiff is not complaining against the decision made by the 2nd defendant to grant a lease to the 1st defendant but rather that after obtaining the lease the 1st defendant in complete disregard of the mandatory requirements of the Planning Act went ahead to erect or construct a mast on the Stand. It is in this latter respect that the plaintiff is seeking redress.

Needless to say this is not the type of complaint contemplated by *s.* 38 of the Planning Act and therefore no appeal can be said to lie with the Administrative Court.

The above also puts paid to the second point *in limine* in that the plaintiff has not alleged any procedural irregularity in the manner 2nd defendant

arrived at its decision to grant the lease, but simply alleges that by omission and commission he has been deprived of his rights through the defendants disregard of the mandatory requirements of the Planning Act.

In the circumstances it cannot be said that the plaintiff is asking this court to review the decision made by the 2nd defendant. It must here be remembered that a review pertains to an alleged irregularity or illegality that is said to have occurred or been occasioned during the decision making process of a body inferior to the High Court (*s.* 27 of the High court Act).

Before dealing with the merits of the case I wish to make the following observation. A local authority, such as the City of Harare, is empowered by *s.* 152 of the Urban Councils Act to alienate any land it owns through sell, exchange, lease, donation or otherwise dispose of or permit the use of it. In doing so the local authority is obliged to comply with the requirements as stipulated in that provision.

In *casu* this is exactly what the 2nd defendant did and no criticism can be warranted in that regard. However, it must be remembered that the fact that a local authority or Council is so empowered should not be construed as exempting it or any other person from complying with the requirements of Part V of the Planning Act. Thus where it is intended to develop the land alienated by a local authority, all provisions of Part V aforesaid must be adhered with. This includes applying for a planning permit in terms of *s.* 26 of the Planning Act.

I now turn to determine the case on the merits. The first issue for determination is whether the 1st defendant was by law required to obtain permission to erect or construct the mast? The resolution of this issue

depends on whether the erection or construction of the mast constitutes development as defined by the Planning Act.

Part V thereof provides for the control of development of land and buildings and *s.* 22 defines what is meant by the term "development". In terms of *subs.* 1(a) thereof, the carrying out, on land of any building constitutes development and in terms of *subs.* 1(b) the altering of the character of the use of any land also constitutes development.

The facts in *casu* show that 1st defendant erected a cellular base station or mast on the Stand. To my mind a structure such as this falls within the definition of a building as provided for by the Planning Act. In this regard *s.* 2 thereof defines "building" as including *'any structure or erection or part thereof, including a swimming pool'*.

It thus follows that by virtue of *subpara.* (a) of *subs.* (1) of *s.* 22 of the Planning Act the construction of the mast constituted development and was therefore subject to the requirements of Part V of the Planning Act.

Additionally and in any event the facts as can be gleaned from the papers reveal that the Stand, measuring 140 square metres, is part of a piece of land that is designated for use as a recreational park. As already alluded to *s.* 22(1)(b) stipulates that the altering of the character of the use of land constitutes development within the meaning of that term in the Planning Act, save if the new use and the old use both fall within the same prescribed group of land uses (*subpara.* (b)(i)).

The erection or construction of a cellular mast on land designated for use as a recreational park can hardly

be described as simply change of use falling within the same prescribed group of uses of land. It is more than that. It amounts to the altering of the character of the use of land and therefore is development as defined by the Planning Act. (See generally Mutare City Council v. Wildlife Society of Zimbabwe 2001(2) ZLR 275(S)

What this means is that, in *casu*, 1st defendant was required by law to obtain a planning permit *i.t.o. s.* 26 of the Planning Act

Section 24 thereof proscribes the carrying out of any development unless permitted in terms of a development order or in accordance with a permit issued in terms of *s.* 26. I therefore find that the erection of the cellular mast on the Stand was not carried out in terms of any development order nor was it done in accordance with a permit issued in terms of *s.* 26 of the Planning Act.

It follows that the cellular mast erected by 1st defendant on the Stand is an illegal structure and ought not to have been erected without first obtaining a development order or planning permit.

From the foregoing it is obvious that the second triable issue as identified at the pre-trial conference must be answered in the negative. This is so because on receipt of an application for a planning permit *s.* 26(3) obliges the local planning authority to require the applicant to give public notice of his application and to serve notice of the application on every owner of property adjacent to the land to which the application relates. None of this was done.

<u>The appropriate remedy</u>

The plaintiff seeks as the main remedy the removal of the mast and restoration of the Stand to its original

condition before the impugned development took place. In my view such an order is, at this stage, both incompetent and pre-mature. This is so because *s.* 27 of the Planning Act permits for an application to be made to regularise any development that has been carried out without the requisite development order. It reads -

> "**27 Regularisation of buildings, uses or operations**
>
> Where any development has been carried out in contravention of section *twenty-four* an application may be made in terms of section *twenty-six* in respect of that development and the local planning authority shall deal with that application in terms of that section but any permit granted thereunder shall take effect from the date on which the buildings were constructed, the operations were carried out or the use was instituted, as the case may be."

The 1st defendant, therefore, has open to it recourse to this provision. It is for this reason that, although finding in favour of the plaintiff, I decline to issue the main order sought but instead will issue the alternative order prayed for.

In the result the application succeeds and it is ordered as follows -

1. That 1st and 2nd defendants comply with the requirements of Part V of the Regional, Town and Country Planning Act *[cap.* 29:12*]*.

2. That 1st and 2nd defendant jointly and severally, the one paying the other to be absolved, shall pay the costs of suit.

Byron Venturas & Partners, for plaintiff
Mtetwa & Nyambirai, for 1st defendant
Kanokanga & Partners, for 2nd defendant