PAZA BUSTER COMMODITY BROKERS (PVT) LTD
versus
THE CITY OF HARARE, ENVIRONMENTAL MANAGEMENT COMMITTEE
and
ACTING DIRECTOR PF WORKS CITY OF HARARE
and
THE CITY OF HARARE
and
DEVELOPMENT STUDIO AFRICA (PVT) LTD

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 18 January, 30 March, and 31 May, 2023

Opposed Matter

Adv *T Mpofu with Mr T Makamure*, for the applicant
Mr *T Zinhema*, for 1st – 3rd respondents
Ms *T Mapota*, for 4th respondent

MANGOTA J: On 8 March, 2022 the fourth respondent, a legal entity, was granted a permit to use Stands 961 and 962 ("the stands"), Pomona Township of Stand 875 Pomona Township, Pomona, Borrowdale, Harare for a funeral parlor. The grant of the permit to the fourth respondent constitutes the applicant's cause of action. It alleges that it owns Stand numbers 955, 959, 966, 967 and 968 in the same mentioned area and that a permit granting a change of use of land will adversely affect its operations. It impugns the decision in terms of which the permit was granted to the fourth respondent on three grounds. These are that:

i) the first respondent, a committee of the third respondent, which granted the permit to the fourth respondent does not have the jurisdiction to permit the latter to establish a funeral parlor on the stands;
ii) the first respondent violated the *audi alteram partem* rule when it granted the permit to the fourth respondent without hearing it;

iii) the first respondent did not make a reasonable and impartial decision which is substantively and procedurally fair and it, in the process, violated sections 3(1) and (2) of the Administrative Justice Act as read with section 68 (1) of the Constitution of Zimbabwe (No.20) of 2013.

All the four respondents filed notices of opposition to the application. The first and second respondents who are respectively a committee and an official of the third respondent, a body corporate which is established in terms of the Urban Councils Act, all speak with one voice. They state that the third, and not the first, respondent granted the permit for change of use of land to the fourth respondent. The fourth respondent's narrative on the same matter is to the contrary. It states that the first respondent granted the permit to it.

The application which the applicant filed in terms of s 26 of the High Court Act ("the Act") as read with Rule 62 of the High Court Rules, 2021 cannot fail to succeed. The section confers authority or power upon me to review all proceedings and decisions of all inferior courts, tribunals and such administrative authorities as the third respondent herein. My role in reviewing the decision of the third respondent is not to take over the latter's work. My role is only to ensure that fairness and transparency is achieved. Where therefore the third respondent has acted fairly and transparently, I will be constrained to interfere with its decision on the basis that I do not agree with the conclusion which it reached. I, in short, expect the third respondent to make a decision which is within, and not without, the law. A decision which is rational, procedurally proper and justifiable cannot be interfered with: *Affretaire (Pvt) Ltd & Anor* v *M.K. Airliens (Pvt) Ltd*, 1996 (2) ZLR 15 (S).

The letter, Annexure PZ11, which the second respondent wrote to the fourth respondent on 21 March, 2022 is relevant. It appears at p 38 of the record. It states, in clear and categorical terms, that the decision to grant the permit to the fourth respondent was not that of the third respondent. It states that it was that of the first respondent. It reads, in the relevant part, as follows:

> "You are hereby notified in terms of section 26(3) of Regional, Town and Planning Act [*Chapter 29:12*] of 1996, that the City Council of Harare's Environmental Management Committee as a local planning authority on 8 March 2022 (Minute Item 50) GRANTED a permit for use of stands 961 and 962 Pomona Township for Funeral Parlor purposes only, subject to the following conditions……".

It is evident, from a reading of the foregoing, that a committee of the third respondent and not the latter issued the permit for change of use of land to the fourth respondent. The above-cited words have all the footprints of the first respondent to the total exclusion of the third respondent.

The first respondent claims to have acted as a local planning authority which it is not. It makes reference to its deliberations of 8 March, 2022 in which it took the decision, under its Minute Item 50, to grant the permit to the fourth respondent. The letter which the second respondent wrote to the fourth respondent advising the latter of the Committee's decision to grant the permit to it does not state that the decision to grant the permit was taken by the third respondent. It asserts that the first respondent took the decision and granted the permit to the fourth respondent.

The fourth respondent was not mistaken as to the identity of the entity or organ which granted the permit to it. It told its story on that aspect of the case in a clear and lucid language. It states that the first, and not the third, respondent granted the permit to it. The third respondent's statement which is to the effect that it granted the permit to the fourth respondent is, therefore, a complete lie. This is *a fortiori* the case when regard is had to the fact that the third respondent does not produce any evidence in the form of a resolution of its members granting the permit to the fourth respondent.

The grounds for review which are stipulated in s 27 of the Act are relevant to this application. These are:

a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court, tribunal concerned or on the part of the authority concerned, as the case may be-and/or
c) gross irregularity in the proceedings or the decision.

The applicant for review must prove, on a preponderance of probabilities, allegations of gross irregularity, malice, bias, corruption or absence of jurisdiction on the part of the court, tribunal or administrative authority. Where he fails to prove his allegations, his application will not see the light of day.

The applicant's statement is that the first respondent does not have the jurisdiction to grant the permit to the fourth respondent. The statement is, in my view, well made. The fact that

the first, second and third respondents assert one thing which is diametrically opposed to the statement of the fourth respondent on the same matter reveals the veracity of the allegations of the applicant. The respondents are, in short, speaking in tongues on the issue of whether or not the first respondent has the jurisdiction to grant the permit. If it has, as the fourth respondent would have me believe, the third respondent would simply have made an assertion to the stated effect. Such a statement would have sealed the case of the respondents to a point where no further debate of the same would have been necessary. This would have, *a fortiori*, been the case where the third respondent made reference to the law which allowed or allows the first respondent to grant the permit to the fourth respondent or, alternatively, where it referred or refers to a law which allowed/ allows it to delegate its authority in an application for change of use of land to the first respondent. The fact that it does not refer to any such law which allows the first respondent to grant the permit or which allows it to delegate its power to the first respondent to act in its place and stead means that the first respondent acted *ultra vires* the Regional, Town and Country Planning Act. It, in short, granted the permit to the fourth respondent when it did not have the jurisdiction to do so. This makes its decision to be impugnable. This is *a fortiori* the case when regard is had to the fact that the respondents are blowing both hot and cold on one and the same matter.

That the first respondent does not have the jurisdiction to grant the permit which it purportedly granted to the fourth respondent is evident from a reading of the Regional, Town & Country Planning Act. The definition of the phrase local planning authority appears in section 10 of the Act. A local planning authority, according to the section, is every municipal council or town council for the area under its jurisdiction and/or every rural district council or local board for the area under its jurisdiction and/or local board for the area under its jurisdiction among such other authorities as may be established by the Minister of Environment and Tourism. The section, it is evident, does not include in its definition, the first or the second respondents or both. It is therefore a miss-statement for the second respondent to write, as it did, that the first respondent, as a local planning authority, granted the permit to the fourth respondent. Neither the first nor the second respondent has the jurisdiction to deliberate upon the issue of, let alone grant, the permit to the fourth respondent. Their work on the matter starts and ends at recommending to the third respondent to grant the permit to the fourth respondent. Anything which they performed

beyond the stated matter would be acting outside the law by them making the permit which the first respondent issued without the requisite jurisdiction on its part to be a complete nullity: *Manning* v *Manning,* 1986 (2) ZLR 3E-4B; *Folley Collins (Pvt) Ltd* v *Takomba*, SC 26/14; *ZIMASCO (Pvt) Ltd* v *Marikano,* SC 6/14.

The fact that it is the third respondent which has the authority to consider as well as grant such a permit as the fourth respondent was purportedly granted by the first respondent is evident from a reading of section 26 (1) of the Regional Town & Country Act. The section states, in clear language, that an application for a permit…shall be made to the local planning authority. The local planning authority cannot, in terms of the relevant law, delegate its powers to deliberate upon and/or grant a permit where, as *in casu*, the fourth respondent's application relates to change of use of the land. The claim of the fourth respondent which is to the effect that the first respondent used the power or authority which the third respondent delegated to it when it granted the permit to it is misplaced. It is misplaced in the sense that it does not have the support of the law and, in any event, neither the first nor the third respondent ever suggested to the applicant or to myself that the permit was granted to the fourth respondent through delegated authority of the third to the first respondent.

The applicant states in para 11 of its founding affidavit that its stands comprise numbers 955, 959,966, 967 and 968. It inconsistently states in para 12.1 of the same that its stands are numbers 955, 956,957,958 and 959. Its two statements placed its application into a quandary which made it difficult for me to ascertain the correct position of its stands within the area which is under consideration. The observed matter compelled me to invite the parties to submit supplementary Heads with a view to answering two questions which were important to the accurate determination of the application which had been placed before me.

It is disquieting to observe that the applicant decided to maintain its initial position as to the location of its stands *vis-à-vis* those of the fourth respondent. It is misleading the respondents and me when it asserts, as it does, that it owns stands 955, 959, 966, 967 and 968. The statement which it makes in para 12.1 of its affidavit is a correct reflection of the matter. The certificate of consolidated title which it filed as Annexure PZ 2, p 22 of the record, bears testimony to the observed fact.

Given that the applicant's stands are not adjacent to Stands 961 and 962 which the first respondent granted the permit to the fourth respondent to use for purposes of establishing a funeral parlor, the question which begs the answer is whether or not service of the latter's application for change of use of land should have been effected upon the applicant by personal service or by registered post as is stipulated in the Regional, Town & Planning Act. The answer to the question is, in my view, in the negative. It is in the negative for the simple reason that the operations of the fourth respondent on the stands would appear not to have the remotest chance of adversely affecting the operations of the applicant at the latter's stands because these are far removed from the stands.

The applicant, for obvious reasons, made every effort to confuse the position of its stands in the area with a view to bringing its case within the purview of those persons whose stands were/are adjacent to the stands so that it would complain, as it is doing, that the fourth respondent did not serve its application upon it by personal service or by registered post. Its claim that it should have been served by personal service or by registered post because its stands are adjacent to the stands is misplaced. It is misplaced because its stands are not adjacent to the stands. Service of the fourth respondent's application upon it by advertisement in the newspaper which circulates in the area of the fourth respondent's application was/is proper service.

How the applicant became aware of the fourth respondent's application for change of use of the land should not detain my mind. Whether it became aware of the application of the fourth respondent from its reading of the advertisement which circulates in the area of the application or from some other source which was/is reliable to it is not the issue. The issue is that it became aware of the same and it objected to the application which the fourth respondent filed with the respondents. Reference is made in the mentioned regard to Annexure PZ 4 which appears at p 30 of the record. The annexure is the applicant's notice of objection to grant a permit to the fourth respondent to establish a funeral parlor at the stands. It is dated 10 July, 2021.

The first, second and third respondents do not deny that they received the applicant's letter of objection. Nor do they deny that they received other objections from Valley Seeds, FPG Capital (Private) Limited and Luscious which letters of objections the applicant attached to its application as Annexures PZ 5, PZ 6 and PZ 7 respectively. Whilst the letters of objections were all addressed to the second respondent, there is no evidence which shows that the first, second or

third respondent acknowledged the letters in question let alone responded to them save for the objection of Luscious.

The applicant is therefore not out of order when it alleges, as it does, that a decision which adversely affects its rights and interests was taken without it having been heard. The very fact that the law enjoined the fourth respondent, in addition to personal service of its application or service of it by registered post, to insert an advertisement in the newspaper which circulates in the area of the application serves the dual effect of arresting corruption by public bodies and having those whose rights may be adversely affected by the application to file objections. Where an objection, such as the applicant filed, has been filed, it is only salutary for the first, second and third respondents not only to acknowledge the same but also to hear the person who is objecting to a particular course of action and avail the same with reasons for their decision. Where the rights of a person in regard to his property are to be affected by a decision made by a public body, even if the statute under which the public body is established or makes the decision, makes no mention of the notice of the application or the decision or the provision of reasons to the affected person, natural justice requires at the very least, that the person affected be told of the impending decision, given an opportunity to make submissions in regard to it and, when the decision is made, told of the nature of the decision and the reasons for the decision. It is only if the statute establishing the public body or empowering it to make the decision, expressly excludes the need to give notice and reasons or either of them, that the public body is excused from those duties and then only to the extent expressly set out in the statute: *Holland & Ors* v *Minister of the Public Service*, 1997 (1) ZLR 186 (S) at 192 F-G.

The respondents made the decision which affects the rights and interests of the applicant without hearing it. They violated the *audi alteram partem* principle in an irredeemable manner. Their conduct stands impugned by the applicant. This is *a fortiori* the case given that they acted outside the law in some very disquieting circumstances. I have no choice but to subscribe to the principle which was stated in *Taylor* v *Minister of Higher Education and Others*, 1996 (2) ZLR 772 (S) wherein it was stated that:

> "when a statute empowers a public officer or body to give a decision which prejudicially affects a person in his liberty or property or existing rights, he or she has a right to be heard in the ordinary course before a decision is taken".

In casu, a decision was taken without hearing the applicant. The applicant correctly alleges that the decision adversely affects its rights. Its allegations remain uncontroverted. It is trite hat what is not denied in affidavits is taken to have been admitted: *Fawcett Security Operations* v *Director of Customs & Excise,* 1993 (2) ZLR 121 (SC); *DD Transport (Pvt) Ltd* v *Abbot,* 1988 (2) ZLR 92.

The applicant's third ground of review is a corollary of the first two grounds which have already been considered. It cannot be suggested that the first respondent acted in a fair and regular manner when it received the applicant's objection and ignored it. It cannot be suggested that the first respondent's conduct complied with subsections (1) and (2) of s 3 of the Administrative Justice Act as read with s 68(1) if the Constitution of Zimbabwe (No.20) of 2013 when it did not give reasons to the applicant for its decision. Its decision was not reasonable, was impartial and was not substantively and procedurally fair. It left and leaves a lot to be desire. It is, in short, impugnable and it stands impugned.

The applicant proved its case on a balance of probabilities. The application is, in the result, granted as prayed in the draft order.

Rubaya & Chatambudza Legal Practitioners, applicant's legal practitioners
Gambe Law Group, first to third respondent's legal practitioners
Gwaunza & Mapota, fourth respondent's legal practitioners