ELENA GONYE
and
JOSEPH TASOSA
and
LOISE CHAILES BELL
and
MAMTA DESAI
and
GAIL COLETTE CLINTON
and
RUSSEL JOHN CLINTON
and
GITA RANCHOD
and
TAWANDA MAPHOSA
and
MARIA ANSARI
and
THEODORE TUMAZOS
and
PERPETUA SANGAZA
and
PRECIOUS CHIDAVAENZI
and
ELAINE DA'QUINO
and
SARAH ANNE COOK
and
TRACEY JACOBS
and
CRAIG MICHAEL ROBERTS
and
TAKURA OBERT TSENZERE
and
KEVIN PHILIP
and
LINDA ANN COOK
and
ANGELA ANDROUNAKOS
and
RUBY MAGOSVONAWE
and
SUSAN ROBINSON

and
E. CHIGU
and
S. YALIAS
and
MATHEW SIBANDA
and
DEEVIA CHOUHAN
and
JUNE DIANE BARNES
and
HEATHER C. SINGLETON
and
VIVON NIGEL GABRIEL
and
GREGORY ROBINSON
and
BEVERLEY ARORA
and
ERIC YORK
and
CANDICE COLLIN
and
TAFADZWA AGNES RANGARIRA
and
ALISON HOLMAN
and
LINDA GIBBONS
and
PETER CONSTAN-TATOS
and
JOANNA PRECIOUS
and
TINOMUDWISHE CHINHENGO
and
CHARLES ROSS BROWNLEE WALKER
and
DESIREE A. CABLE
and
HELENE T.I. TSELENTIS
and
E.M. KOUPARIS
and
A.N. KOUPARIS

and
H.A. LYNDON THOMPSON
and
ELIA JASMINE PLANT
and
IAN GILMOUR
and
ANDREW C. HILL
and
FIONA ATKINSON
versus
REDAN KEROSENE (PVT) LIMITED
and
MARK CAMPBELL HOUNSELL
and
CITY OF HARARE
and
CITY OF HARARE DEPARTMENT OF WORKS (City Planning and Development)
and
TOWN PLANNER MUDZENGERERE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 17 August 2023, 20 August 2023 & 7 September 2023

Urgent Chamber Application

Adv F Mahere, for the applicants
Adv T Zhuwarara with *Mr N Madya*, for the 1st respondent
Mr A Nyamukondiwa, for the 3rd and 4th respondents
No appearance for the second respondent

CHINAMORA J:

Introduction

Before me is an urgent chamber application instituted by 49 applicants, who seek the following relief:

1. That first and second respondents are hereby ordered to immediately terminate all building operations and commercial activities of whatsoever nature at Stand Number 5273 Churchill Avenue.
2. That all contractors, agents and occupants of the first and second respondents are hereby ordered to immediately vacate the property.
3. That should the first and second respondents fail and or neglect to comply with either one or two above that the Deputy Sheriff be and is hereby ordered to enforce the above with the support of Zimbabwe Republic Police.

The applicant's case

The crux of the applicants' case is that they are aggrieved by construction work commenced by the first respondent in their residential area. They aver that the first respondent has begun ground work for the construction of a fuel station and a fast food outlet at Stand Number 5273 Churchill Avenue, Harare (hereinafter called "the property"). Additionally, the applicants contend that a commercial outlet in this residential area would result in the disruption of the peaceful life they enjoy in their neighborhood. In particular, the complaint is that the operation of a fuel station in the area would expose residents to harm from flammable and toxic substances. They also argue that the increased volume of traffic could be a further hazard which they would have to constantly contend with. In their papers, the applicants further submit that the third and fourth respondents turned a blind eye to their plea and colluded with the first respondent when a permit was granted for the construction work. It was their additional argument that their comments were not sought and, consequently, the permit, was irregularly granted.

The case for the first respondent

In response to the application, the first respondent raised some preliminary objections. Firstly, it was argued that the applicants lack *locus standi in judicio* to bring this application. The second point advanced *in limine* is that this matter is not urgent. In this respect, the first respondent submitted that a public notice was published in the Newsday of 22 March 2022. This appears on p 149 of the application bundle and on Annexure "RES2", which appears on p 33 of the opposition bundle. It was contended that, persons who objected to the development were invited to file them with the Director of Works, Eastern Region, Room 307, Third Floor

Cleveland House, 82 Leopold Takawira Street, Harare. The submission continued that no objection was received from the applicants who are before me. Accordingly, the first respondent avers that the applicants should have filed their objections in March 2022, which is over 18 months ago, which it contends is the time when the need to act arose. In other words, the argument is that the applicants should not have waited until now to ask the court for the relief now sought.

Thirdly, the first respondent submitted that the application is fatally defective for not being in the correct form as required by the proviso to Rule 60 (1) of the High Court Rules. That proviso states that, where a chamber application is to be served on an interested party, it shall be in Form No. 23, which advises such a party of his right to oppose the application and to file any opposition within a specified period. The fourth objection was that the certificate of urgency is defective. It was pointed out that the certificate is undated, thus making it difficult to relate to when the cause of action arose. The next argument was that the certifying lawyer did not express an independent opinion, but repeated the averments in the first applicant's founding affidavit. The further attack was that the certificate of urgency did not explain why no objection to the development was made when the public notice came out in May 2022. The first respondent's final preliminary point was that, in so far as the construction work was being done pursuant to a permit given by the City of Harare, with the building plans and road access designs approved by the relevant authorities, the applicants had no basis for interdicting lawful conduct. In addition, the first respondent provided an Environmental Impact Assessment (EIA) certificate issued by the Environmental Management Agency (EMA). This certificate, which is marked Annexure "RES6", appears on p 41 of the opposition bundle.

When parties appeared before me on 20 August 2023, I heard argument on the preliminary points first, and did not render a ruling on the objections. Immediately, I invited the parties to make submissions on the merits and reserved judgment on the entirety of the arguments. After being asked by the court what would happen to the building work at the site, the first respondent undertook to cease all construction work pending my determination. In deciding this matter, let me start by examining the points *in limine* raised by the respondent.

Locus standi

The first respondent argues that, except for the first applicant, the other forty-eight applicants have not stated where their interest in the matter emanates from. The contention proceeds that, none of the applicants besides Elena Gonye, demonstrated why they should bring this application. In this regard, the first respondent contends that these applicants have not disclosed their respective addresses to the court for it to ascertain how proximate they are to the development. The first respondent places emphasis on *locus standi*, because the applicants argue that they ought to have been personally served with notices of the proposed development. In response to this, the first respondent maintains that this right is afforded only to parties adjacent to the development site. Consequently, it was submitted that those forty-eight applicants lack the requisite *locus standi*. It is relevant to note that the law on this subject was stated by this court in *Makarudze* v *Bungu* HH 08-15 in the following terms:

> "*Locus standi in judicio* refers to one's right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a direct and substantial interest in the subject-matter and outcome of the litigation".

See also *Zimbabwe Stock Exchange* v *ZIMRA* 2008 (1) ZLR 181 (S)

Turning to the matter before me, ordinarily, I would have accepted the *locus standi* objection if none of the applicants had not satisfied this requirement. However, the first respondent has conceded that the first applicant has *locus standi* as a resident of a property adjacent to the development. On this admission alone, I find no reason for upholding the point *in limine* since the application would still validly be before the court. Accordingly, the preliminary point is dismissed for lack of merit. I now turn to examine point on defectiveness of the certificate of urgency.

Defective certificate of urgency

The first respondent argues that, in an urgent chamber application the court is triggered to deal with it on an urgent basis by the certificate of urgency. The first respondent avers that the certificate of urgency *in casu* is defective in that the certifying legal practitioner (Mr Ticharwa Garabga) did not take the court into his confidence and disclose everything that enables the court to consider the issue of urgency. I have looked at the certificate of urgency which, admittedly is undated. That certificate repeats averments made in the founding affidavit of Elena Gonye.

However, I am not prepared to hold the objection solely on account of lack of date on the certificate. Thus, I have decided to take the generous view of overlooking the failure to put a date on it, and will not treat it as defective. Nevertheless, that does not preclude me from deciding whether or not urgency has been established by factual allegations in the founding affidavit. (See *Chidawu & Ors* v *Shah* & *Ors* SC 12-13).

I will now move on to examine the objection based on absence of urgency. I will not dwell much on the preliminary points on defectiveness of the urgent chamber application and that one cannot interdict lawful conduct. The first respondent was able to file an opposing affidavit, and I am unable to ignore this factual reality. When I interacted with Counsel for the first respondent on any prejudice which the client might have incurred, he could not point to any. That answer resolved the point *in limine,* which I dismiss for lack of merit. On the issue of that a court cannot interdict lawful action, I observe that there is pending litigation under HC 5215/23, which seeks a declaratory order nullifying the permit which gave rise to the development which is the target of the application *in casu.* Until HC 5215/23 is determined by this court, I refrain from upholding the objection.

Lack of urgency

Before delving into this preliminary point, it is helpful to recall the words of the late CHATIKOBO J in *Kuvarega* v *Registrar General & Anor*, 1998 (1) ZLR, 189 at 193, namely:

> "What constitutes urgency is not only the imminent day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from acting until the deadline draws near is not the type of urgency contemplated by the rules."

In this case, I am called upon to make a finding on when the need to act arose. The first respondent has contended that the need to act arose on 22 May 2022 when the notice of the proposed development was published in the local newspaper (Newsday). The relevant part of the notice is couched in the following terms:

> "Any person wishing to make objections or representations relating to the application must lodge them with the undersigned [Director of Works, Eastern Region, Cleveland House, Harare] within one month of the date of the first insertion of this notice".

Quite relevantly, at this juncture, let me mention that the first part of the notice reads:

> "Notice is hereby given of an application to carry out the following development on Stand 5273 Salisbury Township of Salisbury Township lands (Swan Drive, Alexandra Park, Harare … It is proposed to establish a filling station on the above mentioned stand …"

It is evident that the notice indicated the type of development that was to take place. Secondly, any person wishing to make objections or representations was required to file them as advised by the notice, within the stipulated time. Finally, I observe that the notice did not limit the persons who could object or make representation to residents of adjacent properties. There was no objection or representation made by the applicants as required by the notice of 22 March 2023 until the time the present application was filed. In fact, the case for the applicants is compounded by their failure to comment on why they never responded to the Newsday notice. Unfortunately, the legal practitioner who certified the matter as urgent also omitted to comment on this. The law requires that any delay in acting must be explained. (See *General Transport Engineering (Pvt) Ltd & Ors* v *ZIMBANK Corporation (Pvt) Ltd* 1988 (1) ZLR 301 @ 303). In my view, the applicants did not treat the matter as urgent within the contemplation of *Kuvarega* v *Registrar General & Anor* (*supra*). The matter is therefore not urgent and cannot jump the queue.

As have decided this matter on the basis of the point *in limine* on lack of urgency, it is unnecessary for me to go into the merits of the dispute. In view of my conclusion on the issue of lack of urgency, it is unnecessary for me to go into the merits of the case. In relation to costs, the first respondent has asked for costs on an attorney and client scale in the event of the application not succeeding. Even though I have upheld the preliminary point (on urgency) which disposed of the matter, I do not believe that the applicants litigated *mala fides*. In the circumstances, I am in agree with the position taken by CHITAPI J in *Netone Cellular (Pvt) Ltd* v *Reward Kangai* HH 441 19, that a party should not be penalized with punitive costs for holding a contrary legal position, since opposing arguments on the law enhance our jurisprudence. My view is that there is no demonstrable abuse of court process to justify costs on the higher scale. Therefore, in the exercise of my discretion I will award costs on the ordinary scale.

Disposition

Accordingly, I grant the following order:

1. The points *in limine* on *locus standi*; defective certificate of urgency; defective urgent chamber application and that the court cannot interdict lawful conduct, be and are hereby dismissed.
2. The preliminary point on lack of urgency be and is hereby upheld.
3. The present urgent chamber application be and is hereby struck off the roll.
4. The applicants shall pay the first respondent's costs on the ordinary scale, jointly and severally, the one paying the others to be absolved.

Honey & Blanckenberg, applicants' legal practitioners
Wintertons, first respondent's legal practitioners