PHILDA MOLLY CHIKEREMA
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 17 and 25 January 2023

Opposed Application

T Mazikanwa, for the applicant
A Moyo, for the respondent.

TAGU J: This is a court application for a Declaratory Order and Consequential relief made in terms of s 14 of the High Court Act [*Chapter 7.06*]. The application is for an order declaring that the amendments made by respondent on 18 November 2015 to Permit No. SD/381 issued by respondent on 7 April 1999 are null and void. The application also seeks that the amendments made by respondent to para 2 of the Subdivision Permit No. SD/381 regarding the status of the road on 18 November 2015 be and are hereby set aside.

BACKGROUND

The basis of the application as captured in the applicant's founding affidavit is that at all material times the applicant was a duly registered owner of certain piece of land situate in the District of Salisbury called Subdivision E of Lot H of Borrowdale Estate measuring 42.5250 hectares registered under Deed of Transfer 7544/85(the property). On 24 September 1997 applicant applied to the City of Harare (the respondent) for a subdivision permit for the property mentioned above and the application was granted on 7 April 1999 under Permit to subdivide property No. SD/381. The property was subdivided into 62 stands pursuant to Permit No. SD/381. Applicant became an owner of Stand 19 among the 62 stands under Certificate of Registered Title Reg Number 6963/2007. The permit came with a number of conditions, the material conditions being set out in para 2 of the subdivision permit which was to upgrade the road which would be used on the property. This road was supposed to be upgraded and function

as a public road. Applicant upgraded the road in terms of the requirements set by respondent. On 27 January 2007 applicant was granted a certificate of compliance from the respondent which indicated that all the requirements set out in the permit had been met. In 2015 a Homeowners Association (the Association) known as Mount Breezes Home Owners Association (Mount Breezes) applied for part of that property to become a gated community. On 18 November 2015, the respondent granted this application without applicant's knowledge or consent as permit holder. This resulted in the upgraded road becoming closed off within the gated community. In effect turning the road from a public road to a private road. This amounted to the amendment of conditions set out in para 2 of the permit issued in 1999 without applicant being consulted. Applicant wrote to the respondent and expressed that there was no basis for the respondent to act in this manner as the City Council's approval of the Mount Breezes application had altered the 1999 subdivision permit. On 21 April 2021 the respondent in a letter confirmed that it granted the amendment on the assumption that applicant by virtue of owning stand 19 in the property was aware and consented to the application for amendments to the subdivision permit SD/381. Several correspondences were exchanged and in its latest letter dated 30 June 2021 the respondent shut the door on the applicant and indicated that applicant should escalate her issues further. Following the amendments Mount Breezes erected boom gates at the intersection of Luna Road and Crowhill Road thereby coding off the road that links Subdivision E of Lot H of Borrowdale Estate commonly known as Mt Breezes up to Lot J of Borrowdale Estate commonly called Crowhill. As a result of the erection of the boom gates applicant was sued by the residents of Crowhill under case HC 7052/21. It is applicant's contention that the decision made by the respondent is illegal in nature as it infringes on her right, guaranteed by s 40 (10) of the Regional, Town and Country Planning Act [*Chapter 29.12*], to be consulted in the event of an amendment to her subdivision permit. Finally, she contended this unlawful amendment materially alters the effect of the original permit, as the privatization of the road is contrary to the original intention set out in p 2 of the subdivision permit.

The Applicant now seeks the following order-

"IT IS ORDERED THAT

1. The Application for a declaratory Order and Consequential Relief be and is hereby granted.
2. The amendments made by respondent to permit No. SD/381 on 18 November 2015 be and are hereby declared null and void.
3. The amendments made by respondent to para 2 of the Subdivision Permit No. SD/381 regarding the status of the road on 18 November 2015 be and are hereby set aside.
4. Respondent shall pay costs of suit."

The Respondent's defence is basically that the application sought is in bad faith. The respondent said it was not at fault as it received an application for the confirmation of a gated community status for stands 1-62 of subdivision E of Lot H of Borrowdale Estate. The application was by the Mt Breezes Owners Association, which association the Applicant is a member of. This position is confirmed by the letter written by Mt Breezes Association as well as a Court Order under Case HC 6086/20. Therefore this quashes the allegation that there was a breach of s 40 of the Regional, Town and Country Planning Act. Further, the letter showed how the Applicant and the Association are embroiled in certain internal differences. However this Honourable Court under case HC 6086/20 confirmed Applicant's status as a member of the Association and is bound by the decision of the Association her stand is under the governance of the Association.

In her answering affidavit the applicant disputed that she is a member of Mount Breezes Home Owners Association. She said the respondent never sought the consent of applicant as the subdivision permit holder to amend the subdivision permit. Further respondent never sought applicant's attitude towards the contents of the letter which was sent to it by the said Mount Breezes Owners Association. She disputed that she registered and transferred control of her development to Mount Breezes Home Owners Association and that she is bound by the decision of the Association. Finally she submitted the judgment in HC 6086/20 does not confirm applicant's membership with Mount Breezes Home Owners Association. She said the matter was dismissed on the basis that applicant did not have locus standi in the matter as she was not a party to the proceedings under HC 4174/20. Hence it was never the court's decision or comment that Applicant is a member of the Mount Breezes Home Owners Association.

Certain preliminary points were raised by the respondent. The first one being that the application is bad at law. Applicant is seeking the setting aside of a decision made by an

administrative body. She alleges that there was a procedural irregularity in the decision –making process leading to the amendment of the permit. The procedural irregularity stems from the allegation that she was not consulted in terms of the Regional Town and Country Planning Act. Therefore, what the applicant seeks in terms of the law is a Review of the decision by the respondent. So she should have filed a Review and not a declaratur. The respondent raised a second point *in limine* that cause of action is said to have arisen on 18 November 2015, hence the action has prescribed.

At the hearing of this matter the respondent did not say anything orally in respect of prescription. The point was not taken further in the heads of argument. This means the respondent abandoned the issue of prescription. I will not labour on that point. Both parties addressed the court on the issue that the application is bad at law.

In advancing its argument the respondent maintained that the application is inherently bad at law. The applicant moved for a declaratory order where she was supposed to apply for review – what she seeks is the setting aside of a decision made by an administrative body, a decision allegedly arrived at via procedural irregularities. To the respondent this is an application for Review disguised as a declaratur.

The applicant disputed the allegation that the application is bad at law. Applicant submitted that in the present application the court is being asked to declare that the amendments made by respondent to applicant's subdivision permit are null and void and consequently restore the status *quo ante*. Therefore, according to the applicant the application calls the court to determine whether respondent's action in unilaterally amending Applicant's subdivision permit without considering her rights as enshrined in S40 (10) of the Regional, Town and Country Planning Act [*Chapter 29.12*] is lawful or legal. This cannot be done in review proceedings. She said there is no law that provides that a decision of an administrative body cannot be declared either illegal or null at law through a declaratur. If an administrative body makes a decision that infringes on the enshrined rights of a party the court can declare such decisions illegal and null.

ISSUES FOR DETERMINATION

The court perceives the following as the only issues for determination, that is,

1. Whether or not the application is bad at law.

2. Whether or not Respondent infringed Applicant's right to consent or otherwise to the amendment to her subdivision permit.

IS APPLICATION BAD AT LAW?

In motivating its argument that the application is bad at law, the Respondent referred the court to a number of case authorities. One of them being *ATALIA MUKANGANISE, GRACE MUKANGANISE, SAMUEL MUKANGANISE, LILIAN MUKANGANISE* and LOVENESS *MUKANGANISE* v *SIMANGELE MWALE, THE DEPUTY MASTER* and *THE REGISTRAR OF DEEDS HB* 131/21 at pages 7 and 8, where the court said-

> "Applicants calls their application a declaratur. In considering whether this is a declaratur proper or a review disguised as a declaratur this court looks at the substance of the application rather than what a litigant chooses to call his or her application, or its form. See Econet (Pvt) Ltd v Minister of Information, Posts and Telecommunications 1997 (1) ZLR 342 at 344-345. In Geddes v Tawonezvi 2002 (1) ZLR 479 (S) the Supreme Court said in deciding whether an application is for a declaratur or review, a court has to look at the grounds of the application and the evidence produced in support of them. The fact that an applicant seeks a declaratory relief is not in itself proof that the application is not for review. Setting aside of a decision or proceeding is a relief normally sought in an application for review. *In casu*, the fact that in para 1 of the order sought applicants ask this court to declare the registration of the estate null and void, is not proof that this is an application for a declaratory order."

In the *Geddes Limited* v *Mark Tawonezvi* supra, at p 8 of the cy7 of the cyclostyled judgment the Supreme Court reiterated what the court should take into account when deciding whether an application is for a declaration or review. The Supreme Court was dealing with an appeal against the judgment of the High Court where the following order was granted against the Appellant-

> "1. THAT misconduct proceedings instituted against the applicant, together with his suspension, referred of misconduct charges, determination of these charges and meting (out) of penalty be set aside as null and void.
> 2. THAT the respondent pay to the applicant the salary and other benefits due to him from the date of his suspension, being 10 August 1998, minus whatever sum he is proved to owe the respondent and any other deductions required by law.
> 3. THAT the respondent shall pay the costs of this application."

At p 9 of the same judgment, the Supreme Court made the following remarks-

> "I accept that there are terms used by the respondent in the application which could suggest that the application was for review. The notice of the court application stated that it was a "review court application." In para 20 of the founding affidavit, he said he did not pursue the appeal before the Labour Relations Tribunal because he believed that it did "not have power to deal with

> irregularities of a reviewable nature." the draft order prayed for the setting aside of his suspension and the disciplinary proceedings…."

Having found that the respondent was treating those decisions and proceedings as a nullity, and that he was applying for a Declaratur and not a Review, dismissed the appeal thus confirming the High Court Order.

The Respondent reiterated that hers is an application for a declaratur as opposed to a review since it is a matter of rights where the respondent amended her subdivision permit without her consent in terms of s40 (10) of the Regional, Town and Country Planning Act [*Chapter 29.12].*

In deciding whether it is an application for a declaratur or review application disguised as a declaratur, the court will look at the substance of the application and the evidence led and not only at what applicant call her application. *In casu,* at p 1 of the application the applicant termed her application as "Court Application for a declaratory order and consequential relief ITO S14 of the High Court Act [*Chapter 7.06*]". In para 4 of her founding affidavit she stated that "This is a court application for a Declaratory Order and Consequential relief in terms of Section 14 of the High Court Act [*Chapter 7.06*]". She then gave evidence in her founding affidavit as to how her rights were violated. The main relief is a declaratur. Her prayer in para 2 of the draft order is for a declaratur that the amendments to the Permit No. SD/381 is null and void. The relief that the amendment to the permit be set aside comes as a consequential relief.

This court derives its power from section 14 of the High Court Act [*Chapter 7.06*] in respect to a declaratur. Section 14 reads:

> "The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

On the other hand, s 27 of the High Court Act which deals with the grounds for review states that:

> "**27 Grounds for review**
>
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be-
> (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 or tribunal concerned or on the part of the authority concerned, as the case may be;
> (c) gross irregularity in the proceedings or the decision.

(d) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunal or authorities."

It is apparent from the content of the present application that what the applicant seeks is a declaration of rights hence the appropriateness of the declaratur application and not a challenge of the procedure which call for a review. This is therefore a case for the court to exercise its discretion under s 14 of the Act. The preliminary point is therefore dismissed.

DID RESPONDENT BREACH APPLICANT'S RIGHTS UNDER SECTION 40 (10) OF REGIONAL, TOWN AND COUNTRY PLANNING ACT [*CHAPTER 29.12?*]

This is an application for a declaratur in terms of s 14 of the High Court Act. In such an application the court decides whether an application meets the criteria to qualify as an application for a declaratur. It must meet the requirements for a declaratur.

The court in *Johnson* v *AFC* 1995 (1) ZLR 65 (S) held that,

> "The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must6 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 concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto….
> At the second stage of the enquiry, the court is obliged to decide whether the case before it is a proper one for the exercise of its discretion under s 14 of the Act. It must take account of all the circumstances of the matter."

It is apparent from the content of this application that what the applicant seeks is a declaration of rights hence the appropriateness of the declaratur application and not a challenge of the procedure which would call for a review. Applicant has established that as a permit holder of the subdivision permit granted to her by respondent she has direct and substantial interest in all the alterations to that subdivision permit. She further established that respondent infringed her enshrined rights to grant or decline consent to any amendments proposed to the subdivision permit in her name. This is therefore a case for the court to exercise its discretion under s 14 of the Act.

Section 40 (10) of the Regional, Town and Country Planning Act [*Chapter 29.12*] is clear and unambiguous. The provision states that,

> "A local planning authority may amend a permit granted in terms of this section if – (a) the holder of the permit agrees to such amendment…"

The import of that provision is that when the planning authority (in this case the City of Harare) wants to amend a permit granted to the Permit holder, the Permit Holder's permission must be sought for first. *In casu* the Applicant never agreed to her subdivision permit being amended by the respondent. She was never consulted. In its letter dated 21 April 2021 the respondent confirmed that they granted the amendments on the assumption that applicant by virtue of owning stand 19 in the property was aware and consented to the application for amendments to the subdivision permit SD/381. These facts are not disputed. The letter reads in part that-

> "In your letter of reference you did not relate or clarify the relationship between your client, Mrs Chikerema and Mt Breezes Home Owners Association. **However an application was received from Mt Breezes Borrowdale Brook Estate Home owners Association. I guess your client, Mrs Chikerema is a member by virtue of her owning stand 19 Borrowdale township of subdivision E of Lot H of Borrowdale Estate." (**my emphasis**)**

In essence the Respondent's defence is that it assumed that the Applicant had consented to the amendment by virtue of her owning stand 19 Borrowdale township of subdivision E of Lot H of Borrowdale Estate when in fact it did not consult the Applicant for her consent as envisaged by s40 (10) of the Regional, Town and Country and Planning Act. This was but just an assumption. The respondent knew all along that the Holder of the permit for subdivision E of Lot H of Borrowdale Estate was the Applicant and not the Mount Breezes Home Owners Association. To support the suggestion that the Applicant was a member of the association and therefore must have consented, the Respondent referred the court to the letter written by Mt Breezes on page 36 and the judgment under case HC 6086/20 on p 44 of the record.

Apart from mentioning that the application is for a gated community comprising stands 1 to 62 of Subdivision E of Lot H of Borrowdale Estates, the Mount Breezes Association never stated that the Applicant had consented. She was not specifically mentioned in that letter. I had occasion to read the judgment on p 44 of the record. Nowhere was it held that the Applicant was a member of the association. In relation to the Applicant the court said at p 4 of the cyclostyled judgement-

> "The first applicant's locus standi is tenuous. Her cause of action is premised on the quest to seek rescission of judgment that was granted in case number HC 4174/20. That judgment was not granted against the first applicant. She can only challenge that decision if she is a party in those proceedings. she can only do so if she is joined as a party. There is no jointer indicating that she has sought such joinder. Therefore she is not properly before the court for want of locus standi."

The judgment did not deliberate on her status in the Association.

I find that the applicant as a subdivision permit holder has a right to grant consent or otherwise to amendments to her permit enshrined in s 40 (10) of the Regional, Town and Country Planning Act [*Chapter 29.12*]. I further find that the respondent unilaterally amended applicant's subdivision permit and by so doing violated her right as enshrined in the Act. She therefore satisfied all the requirements for declaratur. The amendments ought to be declared a nullity and the *status quo ante* be restored. Consequently, anything done pursuant to the amendment is a nullity.

Conclusion

The rules of this court permit the granting of an order as prayed for or as varied. (See *Chiswa* v *Maxess Marketing* (Pvt) Ltd & Ors HH 116-20.) While I am satisfied that the applicant has proved her case for a declaratur and consequential relief, I will vary the draft order by deleting paragraph 1, and the addition of the word "Consequently" at the beginning of para 3. Costs follows the result.

IT IS ORDERED THAT

1. The amendments made by respondent to permit No. SD/381 on the 18th November 2015 be and are hereby declared null and void.
2. Consequently, the amendments made by respondent to para 2 of the Subdivision Permit No. SD/381 regarding the status of the road on 15 November 2015 be and are hereby set aside.
3. Respondent shall pay costs of suit.

Lunga Attorneys, applicant's legal practitioners
Gambe Law Group, respondent's legal practitioners