

REPORTABLE (39)

(1) LINDA KOPECKY (2) MARK KOPECKY
(3) TSHOLOFELO TRUST (4) DIANE THORNTON (5)
SLIPPER SHELL INVESTMENTS (PRIVATE) LIMITED
v
(1) CITY OF HARARE (2) SPIRIT LIFE CHURCH

**SUPREME COURT OF ZIMBABWE
BHUNU JA, MAKONI JA & MWAYERA JA
HARARE: 6 OCTOBER 2022**

T. Zhuwarara, for the appellants

A. Moyo, for the first respondent

S. A. Murondoti with Miss *S. Dizwani*, for the second respondent

Judgment No. SC 39/23
Civil Appeal No. SC 233/22

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MAKONI JA:

1. This is an appeal against the whole judgment of the Administrative Court handed down by Mandeya J on 13 May 2022. After hearing submissions from counsel for the parties the court dismissed the appeal with costs indicating that reasons for the order would be given in due course. These are the reasons.

THE FACTS

2. The second respondent is the owner of a certain property known as No 1 Petersham Road Malborough Harare (the “property”). The appellants are residents of the

neighbourhood within which the property is located. The first respondent is a Municipality, Local Planning Authority and an administrative body tasked with the mandate of rendering services to the residents of Harare.

3. The second respondent, on 9 December 2021, made an application to the first respondent for change of use of its property from residential to use as a church. The application was opposed by the appellants who feared that the use of the property as a church would cause noise pollution thereby disturbing the peace and tranquillity of the neighbourhood. They accordingly filed their objections with the first respondent.
4. After considering the objections from the appellants, the first respondent granted the application subject to certain conditions. These conditions included, *inter alia*, a prohibition of the use of certain musical instruments in a way that would disturb the peace of other neighbours. The permit stipulated that the second respondent would construct a sound proof auditorium which was to be inspected by the first respondent's Department of Works.

PROCEEDINGS IN THE COURT A QUO

5. Dissatisfied by the decision of the first respondent the appellants lodged an appeal in the Administrative Court (“the court *a quo*”). They were challenging the decision of the first respondent on the basis that the provisions of the Regional Town and Country Planning Act [*Chapter 29:12*] (“the Act”) were not complied with before the application was granted. They averred that the second respondent neglected to provide all the relevant

information required in applications of that nature, in particular, they alleged that it neglected to provide information relating to the external area to be covered by the building, the number of floors of the building, the extent and location of parking facilities for motor vehicles.

6. Furthermore, they queried the citation of the name of the second respondent in the application. They submitted that the Act requires that the owner of the property makes the application or it be done with the consent of the owner. Their argument was that the owner of the property in question is Spirit Life Church International yet the application before the first respondent was launched by Spirit Life Church. It was their case that Spirit Life Church is a non-existent entity.

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7. The appellants further argued that all the interested parties were not notified of the application for the change of use of the property. It was their case that the large number of people who would attend church service would result in noise pollution despite the stipulated precaution.
8. They contended that the permit did not make provision for the costs associated with connection of a sewer system for the church. They also argued that the application was granted after the time frame within which to consider it had lapsed.
9. In response to the appeal, the respondents argued that, due process of the law was followed before the application was granted. They disputed the allegation that the notice was not given to all the interested parties and that the application was considered out of

time. With regards to the citation of the second respondent, it submitted that the omission of the word 'International' did not render the second respondent non-existent. They argued that there was no confusion as to the identity of the second respondent. Further, it was argued that the application form contained all the relevant information to enable the first respondent to consider the application.

10. The court *a quo* dismissed the appeal. It found that the argument that the application was considered outside the time frame provided for by the law was unmeritorious as the time frame was extended by a letter written by the second respondent to the first respondent dated 30 November 2021. It also dismissed the argument that the respondent did not provide all relevant information. The court held that the application form was to be filled to the extent appropriate. It found that all the interested parties were notified. The court *a quo* dismissed the argument that the first respondent could appeal under Section 23/22 associated with constructing a sewer line for the church on the basis that the appellants had not motivated that argument.

11. Aggrieved by the decision of the court *a quo* the appellants appealed to this Court on the following grounds:

GROUND OF APPEAL

1. The court *a quo* misdirected itself when it determined the matter on the mistaken basis that the party that had applied for the permit had granted an extension of the period during which the first respondent herein was obliged to determine that application.

2. The court *a quo* erred when it failed to determine that the second respondent's failure to provide the information that was required under ss 10, 11 and 12 of the application form invalidated the application on the basis that it violated the peremptory provisions of s 26 (1) of the Regional Town and Country Planning Act.
3. The court *a quo* erred when it failed to determine that the application for the development permit was invalid for the reason that the purported applicant therein, Spirit Life Church does not exist.
4. The court *a quo* erred when it failed to determine that the permit that was purportedly granted to the second respondent was invalid for failing to make a provision for the cost of connecting the proposed development to the sewer line.
5. The court *a quo* erred when it failed to nullify the permit on the basis that the same had been granted on the basis of falsehoods which were contained in the application.

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RELIEF SOUGHT

12. The appellants pray that the appeal be allowed with costs and the decision of the court *a quo* be set aside and substituted with a decision setting aside the decision of the first respondent to grant the permit, and that the first respondent dismisses the application for the permit. They also prayed for costs of suit.

ISSUES FOR DETERMINATION

- 1) Whether or not the court *a quo* erred in failing to find that due process was not followed before the first respondent granted the permit to the second respondent.

- 2) Whether or not the incorrect citation of the name of the second respondent in the application before the first respondent was fatal.

PROCEEDINGS BEFORE THIS COURT

APPLICATION OF THE LAW TO THE FACTS

- 1) **Whether or not the court *a quo* erred in failing to find that due process was not followed before the first respondent granted the permit to the second respondent.**

13. In motivating the appeal, counsel for the appellants, Mr *Zhuwarara*, argued that s 26(1) of the Act was not complied with in that the second respondent omitted to fill in part 2 and 3 of the application form. His argument was that the permit was granted in the absence of all the relevant information required. He further argued that the application was made by a non-existent entity. His argument was that the Act makes it clear that the application ought to be made by the registered owner of the property or with the consent of the owner. He based his argument on the authority of *John v Delta Beverages Ltd SC 40-17* wherein it was held that the omission of the word “Pvt” was fatal as there was no party called Delta Beverages Ltd. Further he submitted that the permit was a nullity as it did not make provision for the costs associated with construction of a sewer system.

14. In response, counsel for the first respondent Mr *Moyo* argued that s 26(1) does not prescribe the information that ought to be contained in the application form. He submitted that the form was filled to the satisfaction of the first respondent hence the argument that s 26 was not complied with lacks merit. It was his argument that the

application form was complemented by the justification report which contained the full information required hence it cannot be said that insufficient information was supplied when the application for the permit was made.

15. Mr *Moyo* further argued that the decision by the first respondent involves an exercise of discretion. He submitted that this Court should be slow to interfere with an exercise of discretion. His case was that the appellants do not allege that the discretion was exercised injudiciously warranting interference by this Court. With regards the citation of the second respondent, he argued that the omission of the word “International” was not fatal. His case was that unlike the omission of the words “Pvt Ltd” the omission of the word International does not have legal connotations. He argued that the *John v Delta* case *supra* was distinguishable from this case. In addition, he submitted that there was already a sewer line in place which the church could connect to.

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NON-COMPLIANCE WITH S 26(7)

16. The appellants’ first ground of appeal attacks the decision of the court *a quo* on the basis that it failed to find that the permit was granted after the time limit within which it ought to have been granted had lapsed. Section 26(7) of the Act provides that:

“If the local planning authority has not determined in terms of subsection (6) an application in terms of subsection (1) within three months of the date of acknowledgement in terms of subsection (2) of the receipt of the application **or any extension of that period granted by the applicant in writing**, the application shall be deemed to have been refused by the local planning authority.” (my emphasis)

17. The above section makes it clear that if the application is not determined within three months of the date of the receipt of the application or any extension of the period granted

by the applicant it will lapse. In *casu*, the extension was granted by the second respondent, by making the requisite application for extension, on the basis of the pervasive impact of the Covid 19 pandemic. The extension was granted on 30 November 2021 and the permit was granted on 21 December 2021 within a month from the date of extension. Consequently, it cannot be said that the permit was granted outside the prescribed time frame. The court *a quo* was therefore correct to find that the permit was granted within the prescribed timeframe.

FAILURE TO COMPLY WITH S 26 (1) OF THE ACT

18. The second ground alleges that an alleged failure to provide certain information in ss 10, 11 and 12 of the application form amounts to a violation of s 26 (1) the Act. Firstly, s 26 does not contain any mandatory provision to provide any specific information in an application form. As correctly argued by counsel for the second respondent, the same form is used when one is making an application for conversion of use or when one is making an application for regularization of buildings which would have been erected without the approval of the first respondent. It follows, therefore, that all sections need not be filled unless they are relevant. Section 27 of the Act provides that:

“Regularization 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.”

19. From the above it is clear that the argument that all the portions of the form must be filled has no legal basis. More so, the Act gives the first respondent authority to reject the application in circumstances where it is of the view that the information supplied is insufficient. Section 26(2) provides that:

“(2) On receipt of an application in terms of subsection (1) the local planning authority

shall examine it and shall:

a) within two weeks acknowledge receipt of the application **unless the application is incomplete in which case it shall acknowledge receipt thereof as soon as the application is satisfactory; and ...”**

20. The acceptance of the application by the first respondent creates a presumption that the information supplied was sufficient, within its discretion, to enable it to consider the application. The appellants failed to successfully rebut the presumption. Suffice to note is the point that the application form provides that it shall be **Judgment No. SC 39/23** completed to the extent **Civil Appeal No. SC 233/22** appropriate. This is clearly stated on the face of the application form. In addition, the application form was accompanied by a detailed justification report which contained all the relevant information that might be required by the first respondent. In any event, the appellants do not allege any prejudice suffered by them as a result of the alleged missing information. The ground of appeal has no merit.

NON EXISTANT PARTY

21. The court was inclined to agree with the argument advanced by the second respondent. The case relied upon by counsel for the appellants is distinguishable from the present case. In the *Delta* case the omission of the word “Pvt” was fatal because the word has legal connotations unlike the omission of the word International. In any event there is no

confusion as to the identity of the second respondent. The appellants in their letter of objection, in the appeal before the court *a quo* and the present appeal, cites the second respondent as Spirit Life Church without including the word International. They cannot therefore turn around and claim that Spirit Life Church is a non-existent entity.

22. To add on, the appellants never raised the objection when the matter was still before the first respondent. At that stage the second respondent would have been able to amend its documents. In *Marange Resources (Pvt) Ltd v Core Mining & Minerals (Pvt) Ltd & Ors* SC37-16, at p 8 of the cyclostyled judgment, this Court commented as follows:

“As for the legal consequences of wrong citations, understandably very few situations of ‘wrong defendants/respondents’ or ‘wrong plaintiffs/applicants’ have had to be decided in our jurisdiction, as such errors, I believe, are routinely rectified in consultation between the parties. See also, for comparison, Paterson TJM, *Eckard’s Principles of Civil Procedure*, Juta and Company Ltd, 2005, 5th ed (2012) p.184 where it is stated: “In the event of these pleas (non-joinder and mis-joinder) being successful, the court will order a stay in the proceedings so that the pleadings can be amended so as to bring the proper parties before the court.”

23. In any event the application for a change of use of a permit before the first respondent did not constitute proceedings in litigation where the strict rules relating to citation of parties apply.

COSTS ASSOCIATED WITH SEWER LINE

24. Further the appellants contend that the court *a quo* failed to take into account the fact that the permit was granted without making provision for the costs associated with connecting a sewer line for the church. The court *a quo* found that the argument relating to the costs of the sewer line was not motivated hence it ought to be treated as

abandoned. The consequence of not motivating all the grounds of appeal was enumerated in the case of *Equity Properties (Pvt) Ltd v Alsham Global BVI Limited* SC 101-21, in which this Court held that:

“It is trite that a failure to motivate a ground of appeal is treated as an abandonment of that ground. The second preliminary point raised is upheld and ground number 4 is accordingly struck out from the notice of appeal.”

25. In light of the above authority, it can be concluded that the court *a quo* was correct in treating the ground as having been abandoned. The ground of appeal number 4 is therefore not properly before the court. The appellants’ grief before this Court should have been that they argued the issue before the court *a quo* and it erred by finding that they abandoned the ground. Whilst still on this point, I must observe that ground of appeal number 5 was not motivated before this Court. On the authority of *Equity Properties supra*, I take it that it was abandoned and should be dismissed. Judgment No. SC 39/23
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26. Our law yields to a salutary principle that the discretion of a court *a quo* can only be tampered with in limited circumstances. This Court has underscored this point in *Makintosh v The Chairman, Environmental Management Committee of the City of Harare & Anor* SC 12 /14 at p 4 where it held that a decision by the Administrative Court made in terms of s 38(1) of the Act involves a wide discretion which cannot be easily tampered with. *In casu*, the appellants have merely regurgitated the case that was before the court *a quo*, bereft of any meaningful challenge to that court’s discretion. The Appellants do not even allege any of the factors required before a discretion can be

interfered with. In the absence of such allegations, the appeal cannot succeed. See also *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at p 62-6.

COSTS

27. It was the second respondent's prayer that costs be awarded on a punitive scale 'for the reason that the Supreme Court ought to remind appellants that it is not a forum for litigious window-shopping by mulcting appellants with a punitive order of costs.' In my view no basis was established to mulct the appellants with costs on a punitive scale as they had an arguable case.

DISPOSITION

28. On the basis of the foregoing reasons, the court is satisfied that the appellants have failed to establish that the court *a quo* misdirected itself in upholding the decision of the first respondent wherein it granted the second respondent the permit to convert its property from residential use to use as a church. The appeal has no merit and should fail.
29. It is for these reasons that we found that the appeal had no merit and dismissed it with costs.

BHUNU JA:

I agree

MWAYERA JA:

I agree

Gill Godlonton & Gerrans, appellants' legal practitioners
Gambe Law Group, first respondents' legal practitioners
Absolom Attorneys, second respondent's legal practitioners

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