KENIAS CHIVUZHE
and
HOWARD MAZANI
and
STEVEN KISI
and
TENDAI MURENJE
and
CLEMENT HODERA
and
TARUSENGA HODHERA
and
EDMORE MUDUKUTI
and
COSMAS MACHEKWA
and
WATSON MASAITI
and
STEVEN GUSHAKUSHA
and
TAKADII G. CHOTO
and
SHAKESPEARE NYAMBI
and
PRODE BESA
and
FRANCIS CHINYEPE
and
DOWART KUFUMANI
and
N. MAKUMBE
and
JACKSON MARWISA
and
DAVISON CHIGUMBU
and
CHOSINA CHARE
and
WONGAI CHATIZA
and
SUSAN NYAMUKAPA
and
PAUL S. CHABATA
and
TENDAI MUTAMBANESHIRI
and
FUNGISAI MANOMANO
and
TENDAI MASARURE

and
ANDREW CHAVENGWA
and
NOMSA TIMIRE
and
THOMAS MUGADZA
and
LINAH MUTAMISWA
and
NEVERITY MANYANGADZE
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 27 January 2015 & 5 August 2015

Opposed Application

S.K. Chivizhe, for the applicants
C. Kwaramba, for the respondent

MUREMBA J: This is an application for an interdict. The applicants are employees of the respondents who are employed in various capacities. They aver that on 5 December 2005 Council made a resolution to allocate 120 residential stands to its employees. 120 employees were interviewed and qualified for the stands. The applicants are part of the 120 employees who were successful. The applicants attached the Council resolution to that effect. The resolution is dated 6 December 2005. They also attached a full list of the 120 employees who qualified for the stands. They qualified for what is called Crowborough North Housing Project (Valley Lane Plan TPX 1290).

The applicants aver that there was a subsequent resolution by Council to allocate stands to 59 Valley Lane beneficiaries. However, it is not indicated when exactly this resolution was made. These 59 Valley Lane beneficiaries were not Council employees and they were not part of the 120 employees who had qualified for the 120 stands for Crowborough North Housing Project. The applicants aver that on 17 January 2013 the Acting Director of Housing and Community Services, J.M Chiyangwa, wrote a memorandum to the

Director of Urban Planning Services requesting him to relocate beacons at Crowborough (Valley Lane) for the purpose of allocating stands to the Council employees who had not yet been allocated. In that memorandum it is stated that out of 120 stands only 64 had had beacons relocated. It states that the remainder of the stands were supposed to have their beacons relocated. Attached to the memorandum was the list of the beneficiaries. The memorandum in question is attached to the application. Beacon relocation is the process of pegging the stands allocated to the beneficiaries.

The applicants said that out of 120 stands, beacon relocation was done piecemeal and it was only done in respect of 87 stands. So it is only 87 Council employees who were shown and given possession of their stands. They said that beacon relocation was done upon payment of the beacon relocation fee of US$115 by each allottee. The applicants said that the remaining 33 employees who include themselves also paid the beacon relocation fee of $115-00 per person. They attached receipts which were issued to them as proof of payment. They said that when they paid beacon relocation fees they had already been allocated stand numbers on paper. The receipts indeed show that the applicants paid beacon relocation fees of US$115-00 per person. The receipts also bear the stand numbers of the allottees.

The applicants stated that while they were awaiting their turn for beacon relocation, the Department of Housing and Community Services then sought to rescind the allocations by re-allocating the same stands to the 59 Valley Lane beneficiaries. This prompted the applicants to approach their legal practitioners querying the move. On 24 June 2013 the applicants' legal practitioners wrote to the respondent's Town Clerk reminding the respondent not to violate the Council resolution to allocate stands to 120 employees. The letter is attached to this application. It was received by the respondent's Department of Housing on 26 June 2013.

Apparently on 25 June 2013 the Director of Housing and Community Services, J.M. Chivavaya, had written a letter to the Director of Urban Planning Services to the following effect.

> "Handover of Stands at Valley Lane Crowborough Pay Scheme
>
> My previous correspondence concerning the above mentioned matter refers.
>
> You are advised that I have rescinded the allocation list as indicated in my memo to you dated 17th January 2013. I have replaced the list with the current list in my memo dated 11th June 2013. Kindly handover beacons to beneficiaries listed therein.
>
> Please note that previous beneficiaries who have paid beacon indication fees pursuant to the previous allocation should be refunded.

Please be guided accordingly.

J.M. Chivavaya
Director of Housing and Community Services

cc. City Treasurer – Please refund beneficiaries who have proof of payment of beacon indication fees. I have attached the list for easy reference".

The applicants said on 2 July 2013 their legal practitioners wrote again to the Director of Housing and Community Services telling him that as an individual he could not purport to reverse a Council resolution which remained extant and binding on the Council. They asked him to comply with the Council resolution and proceed to take steps to ensure beacon relocation by the Department of Urban Planning Services so that the remaining 33 Council employees would be allocated stands. In that letter the applicants' legal practitioners threatened to take legal action if the Director of Housing and Community Services did not withdraw his position as contained in his letter of 25 June 2013 to the Director of Urban Planning Services.

In response, J Ncube, the Chamber Secretary of the respondent wrote to the applicants' legal practitioners on 17 July 2013 saying that Council was not reneging on its resolution to allocate its employees stands. He said that the Director of Housing and Community Services was the one mandated with actioning council resolutions and had taken steps to implement the Council resolution to allocate stands to the 59 Valley Lane beneficiaries on plan TPX 1290. He indicated that after the Director of Housing had finished dealing with Valley Lane beneficiaries he was going to proceed to implement the other Council resolutions which included the allocation of stands to the remaining 33 employees. The letter in question is attached to the application. The applicants argue that the decision to allocate stands to 59 Valley Lane beneficiaries first before allocating the remaining 33 Council employees is a breach of the Council resolution to allocate them stands. They said that Council never resolved to strip its employees of the stands already allocated to them. They said in any case the resolution to allocate stands to Council employees was an earlier resolution than the resolution to allocate stands to 59 Valley Lane beneficiaries.

The applicants averred that on 3 August 2013 the respondent proceeded to the site to show the 59 Valley Lane beneficiaries the same stands that had already been allocated to them. This prompted the applicants to file the present application for an interdict. It was filed

on 27 August 2013. They want the respondent interdicted from interfering with the stands already allocated to them on Valley Lane Plan TPX 1290. They also want the respondent ordered to take steps to ensure relocation of beacons in respect of stands allocated to them upon payment of any prescribed fees to enable them to take occupation of the residential stands.

It is the applicants' argument that they have a clear right to the stands allocated to them in terms of the Council resolution. They aver that that right demands that for as long as the Council resolution has not been revoked they should not be stripped of the allocations made in their favour. They argue that since they have already been allocated stands at Valley Lane Plan TPX 1290 the 59 Valley Lane beneficiaries should be allocated stands elsewhere. They argue that if respondent proceeds with the allocation of the stands to the 59 Valley Lane beneficiaries they (applicants) will suffer irreparable harm as those stands allocated to them were their only hope of obtaining accommodation of their own. They said that they have no other remedy available to them. They argue that if the respondent was still committed to fulfilling the resolution to allocate stands to them it would not have ordered that they be refunded the money they paid for beacon relocation.

In opposing the application the respondent's Town Clerk, Dr Tendeyi Mahachi, deposed to the opposing affidavit. He did not dispute that there is a Council resolution to allocate 120 stands to its employees. He also confirmed that 87 of the employees have already been allocated stands. He said that the only reason why 33 employees who include the applicants have not been allocated stands is that they refused to make contributions towards the servicing of the land yet those that were allocated made those contributions. He said that the resolution to allocate stands to Council employees was the initiative of the respondent as it had the desire to assist its employees with accommodation at a subsidised cost. He said that the payment of contributions was very critical to occupation since the stands could not be occupied before servicing was done. He said that without servicing there would be no occupation. He said that Council is still committed to its resolution, but it is incumbent upon the applicants to fulfil their obligation to contribute before they can occupy the stands. He said that each employee should pay $3 200-00 towards the servicing of the stands. He said that the applicants are the authors of their own demise because of their conduct of refusing to make payment for the servicing of the stands. He said that the issue of payment towards servicing by beneficiaries was an essential condition of the agreement between Council and the employees. He said that over and above the payment of beacon

relocation fees, the applicants were supposed to pay the servicing fees. He said that without the payment of $3 200-00, which is the servicing fee, the applicants are not entitled to allocation and occupation of the stands. He said that no beneficiary is supposed to occupy any stand before a certificate of compliance is issued in terms of Council by-laws. He further said that a certificate of compliance is only issued when servicing has been done. He said the scheme is called an Employee Housing Pay Scheme meaning that the employees have to pay towards their full enjoyment of use and occupation.

The Town Clerk said that the memorandum of 17 January 2013 which was written by the Acting Director of Housing and Community Services to the Director of Planning Services asking him to do beacon relocation for the remainder of allotees was written on the erroneous assumption that the applicants had fully paid their contributions. He said that when the error was realised, the Director of Housing on 23 June 2013, wrote to the Director of Urban Planning Services reversing the earlier instruction to do beacon relocation in favour of the applicants and directing that the applicants be refunded the money they paid as beacon relocation fees. He said that several meetings were held between the beneficiaries (Council employees) and top officials in the department of housing and in those meetings the issue of contributing towards servicing stood out. He attached some of the minutes. In one meeting which was held on 28 February 2013 in the Housing Manager's office between Valley Lane aggrieved allottees and Harare Municipal Workers Union managing the Valley Lane Housing project and the Residence Association of Valley Lane Housing project, the second, fifth, seventh and twelfth applicants were in attendance. These are Mazani, C. Hodera, E. Mudukuti and S. Nyambi. The meeting was chaired by Mrs Mandizha and the agenda of the meeting was to deal with the dispute which was between the three parties.

It is stated in the minutes that the Harare Municipal Workers Union Committee (HMWU Committee) was managing the housing project and servicing the stands while the Residence Association Committee was responsible for making sure that all its members were settled on their allocated stands. It is stated that when the HMWU Committee took over the servicing of the stands it suggested that each member (allottee) should pay a certain amount of contribution. It is said that the contributions that had been made by some of the allottees had led to the project achieving about 70% development. It is also stated that the aggrieved allottees had stopped making contributions to the housing pay scheme because they felt that development was not going on well. HMWU Committee indicated that the other employees had paid $3 500-00 each, but the aggrieved allottees complained that the figure was

exaggerated and that they were not going to pay the money easily given their salaries. A consensus was finally reached that all those allottees who had not been making contributions should make payment of their arrears by 31 March 2013 so that they would catch up with the others who had started contributing since the beginning of the servicing. It was agreed that they should each pay an amount of $3 200-00 for them to be taken aboard. The aggrieved allottees were actually being referred to as former allottees in the minutes.

Another meeting was held on 28 March 2013 at 9:15 in respect of City of Harare Employee Housing Scheme (Valley Lane). It was chaired by the Director of Housing, Mr Chivavaya, and was attended by some of the applicants including H. Mazani, the second applicant who was taking down the minutes. Members of the scheme were urged to continue paying for the development of the scheme whilst an independent auditor would be dealing with the books of accounts and the development fee payable by each member was being calculated.

Another meeting was held on 28 March 2013 at 9.30 am. The agenda was to deal with the complaint the aggrieved allottees had about the meeting that was held on 28 February 2013 in Mrs Mandizha's office. The aggrieved allottees were in disagreement with the recommendations of the previous meeting that they make contributions for development. The Director of Housing, Mr Chivavaya who was chairing the meeting told the parties not to interfere with contributions to avoid the delay of developmental progress. The chairman urged the aggrieved allotees to make contributions for them to be taken aboard. He asked them to pay whatever little they had for the good of the developments on site so that when the audit was done they would only pay the balance owing to the Housing Pay Scheme after which there would be direction on how to screen the 120 members.

The Town Clerk averred that the stands which were allocated to the 59 Valley Lane employees are totally different from the stands earmarked to benefit Council employees. He said that these are separate pieces of land. He said that it is not the giving of the land to the 59 Valley Lane employees which is stopping the allocation and handover of stands to the applicants, but their refusal to pay their own contributions towards servicing.

The applicants filed answering affidavits to the effect that the servicing of the stands was only supposed to commence after the allocation of stands on paper and beacon relocation on the ground by the department of Urban Planning Services. They said that a beneficiary cannot be expected to service a stand that has not been allocated and pegged for him. They said beneficiaries under Hopley and Crowborough which were allocated under the same

Council resolution had their beacons relocated without them having paid the servicing fee. The applicants attached a document titled "Harare City Council – procedure (Allocation of un-serviced stands to beneficiaries)". It outlines the procedure as follows:

1. Town Planning (Dept of Urban Planning Services) Lay-out plan preparation and approval.
2. Survey Section (Dept of Urban Planning Services) Drilling of beacon pegs on the ground.
3. Full council approves the TPX 1 plan no. and recommends the Dept of Housing to allocate the stands.
4. Allocation of stands to beneficiaries by Dept of Housing and Community Services.
    - Interview applicants on the Housing waiting list
    - Short list successful beneficiaries
    - Allocate stands on paper to successful beneficiaries.
    - Forward a memo to Dept of Urban Planning Services (Survey Section) attached with list of beneficiaries.
5. Indication of Beacon pegs
    - Department of Urban Planning (Survey section) receives memo with attached list from housing.
    - Survey section charge beacon peg fees to individual beneficiaries
    - Thereafter surveyors indicate beacon pegs on the ground to beneficiaries.
6. Beneficiaries are expected to come up with an agreed Constitution and Bank account. Thereafter development of un-serviced stands commence i.e (water and sewer reticulation system, roads etc).
7. After developments Council inspects the work and issues certificate of compliance.
8. Agreement of sale between City of Harare and each beneficiary takes centre stage. (Land value).
9. Approved plans are issued to beneficiaries to construct houses.
10. Title deeds."

They said that the outlined procedure shows that servicing of the stands could only commence after beacon relocation. They further argued that even if it was taken for a moment that the servicing fee was already due (which is denied) such fee would have nothing

to do with the respondent and would not be payable to the respondent, but to a pay scheme administered by the members. They said that it would have been up to the members in terms of their Constitution to expel any person who failed to make contributions. They said that it is the employees who conduct the servicing not the respondent. They said that the respondent does not even have an account where contributions are paid into. They argued that the respondent did not attach any correspondence pointing to a possibility that there was even a demand for servicing fees from the applicants. They also argued that in the correspondence between their legal practitioners and the respondent, the respondent never raised the issue of the servicing fee.

The applicants argued that while the issue of contributions for the servicing of the stands is critical, there is a stage at which such fees become payable. They stated that at the time the respondent rescinded their allocations, beacon relocation was supposed to be done. After beacon relocation the beneficiaries were then supposed to commence payment of servicing fees. They said that even then the servicing fees would not be paid to the respondent but to the scheme established by the beneficiaries through their Constitution. They said that the scheme would then pay the contractors and developers. They argued that the respondent's duty is to inspect and approve the servicing in order to pave way for the construction of houses.

The applicants stated that the other 87 employees who were allocated stands did not pay any servicing fees, but beacon relocation fees which the applicants also paid. The applicants stated that the 59 Valley Lane beneficiaries who were allocated the stands which were once allocated to them took up all the remaining stands such that there is no longer any available piece of land on Plan TPX 1290. They said that the respondent was misleading the court into believing that there is land left on Plan TPX 1290.

The applicants submitted that the US$3 200-00 that the respondent was seeking to rely on was not agreed upon. They said that the minutes of the meetings that respondent sought to rely on were not confirmed because of variations pertaining to what was agreed upon in the meetings. They argued that even if the money for servicing was due, it had nothing to do with the respondent because the money was supposed to be paid to the Scheme. The applicants argued that the respondent provided un-serviced land and it was not its responsibility to service the land.

The applicants attached the list of the 59 Valley Lane beneficiaries which replaced them. It shows that some of the stand numbers which were allocated to the 59 Valley Lane

beneficiaries were once allocated to the applicants. The applicants also attached an investigation report which was compiled by the Audit Manager of the respondent on 25 October 2012. The investigation report was in respect of Crowborough North Housing Project (Valley Lane Plan TPX 1290). It states that both the 120 Council Employees and 59 Valley Lane beneficiaries were supposed to be allocated stands on Plan TPX 1290. The report also states that the total number of beneficiaries exceeded the number of stands available by 6.

In the heads of argument Mr *Kwaramba* for the respondent argued that the answering affidavits of the respondents should be disregarded as they raised 3 new issues which were not raised in the founding affidavits. He argued that these 3 new allegations constitute new matters. He argued that a litigant's case stands or falls on the founding papers. He said that no case can be made in the answering papers. He relied on the case of *Mangwiza* v *Ziumbe NO and Anor* 2000 (2) 489 (SC) at 492 wherein SANDURA JA said:

> "The third point is that in her answering affidavit Perpetua averred that Godfrey had ceded to her a half-share in the property in terms of Annexure C. That averment was not made in her founding affidavit. In my view, that was improper.
> It is well established that in application proceedings the cause of action should be fully set out in the founding affidavit, and that new matters should not be raised in an answering affidavit. That principle was laid down many years ago in cases such as Coffee, Tea and Chocolate Co Ltd v Cape Trading Company 1930 CPD 81. At p 82, Gardiner JP said:
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> > 'A very bad practice and one by no means uncommon is that of keeping evidence on affidavit until the replying stage, instead of putting it in support of the affidavit filed upon the notice of motion. The result of this practice is either that a fourth set of affidavits has to be allowed or that the respondent has not an opportunity of replying. Now these affidavits of Barnes, Turnbull, Lee, Gardner and Lang should in my opinion properly have been put in in support of the notice of motion. They are not a reply to what has been said by the respondent, and I am not prepared to allow them to be put in at this stage.'
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> In the present case, the issue of cession was not raised by Perpetua in her founding affidavit and could not, therefore, be raised in the answering affidavit. No good reason was given by her for her failure to include in her founding affidavit the true basis of her claim against Ziumbe."

In the present case Mr *Kwaramba* submitted that the issue of the procedure to be followed in the allocation of stands was a new matter. He said that the document outlining the procedure should have been attached to the founding affidavit.

He said that the second issue was the annexure which was attached in support of the allegation that the stands allocated to the 59 Valley Lane beneficiaries are the same as those allocated to the applicants.

He said that the third issue was the allegation which was made that an investigation was carried out by the respondent's audit manager on 25 October 2012 whereby it was discovered that there were more beneficiaries on plan TPX 1290 than the available stands.

I do not agree with Mr *Kwaramba* that these 3 issues are new allegations constituting new matters altogether. Instead they are a reply to what the respondent's deponent said in his opposing affidavit. The *Mangwiza* v *Ziumbe* case that Mr *Kwaramba* referred to makes it clear that new matters should not be raised in the answering affidavit, but a reply to what has been said by the respondent in his opposing affidavit is permissible. That is the whole purpose of rule 234 of the rules of this court which says,

> "…. Where the respondent has filed a notice of opposition and an opposing affidavit, the applicant may file an answering affidavit with the registrar, which may be accompanied by supporting affidavits".

The issue of the procedure that is followed in the allocation of stands is an issue that the respondent raised in the opposing affidavit. It was using that as its defence for not allocating the applicants stands. It said that they had not paid the servicing fees as is the procedure. It was therefore necessary for the applicants to respond showing that it is not the procedure to pay the servicing fees first before beacon relocation. In their founding affidavits the applicants had said that they had paid the beacon relocation fees and after that they were supposed to be shown their stands.

The applicants attached annexure L2 to their answering affidavits supporting the averment that the 59 Valley Lane beneficiaries were allocated the same stands that were allocated to them. This was not a new averment. It is an averment that the applicants made in their founding affidavits. In fact it forms the backbone of their case. It is on the basis that their stand allocations were withdrawn in favour of the 59 Valley Lane beneficiaries. In response to this averment, the respondent's deponent stated that the land that was allocated to the 59 Valley Lane beneficiaries was different from the land that was reserved for the applicants. In the answering affidavits it was therefore necessary for the applicants to show that the respondent was not being truthful. The production of the investigation report by the respondents' audit manager also buttresses the applicant's argument that both council employees and 59 Valley Lane beneficiaries were being allocated stands on the same piece of land, Plan TPX 1290. It further shows that with the allocation of stands to the 59 Valley Lane beneficiaries there are no longer enough stands on Plan TPX 1290. They want to strengthen the point they made in the founding affidavit that if they lose on these stands there

is nothing else for them and that this is their last hope of accommodation. This is not a new averment. It is clear to me that the applicants did not attach the annexures they attached to the answering affidavits to their founding affidavits because they did not realise that the respondent would raise the defence it raised in its opposing affidavit. In view of the foregoing I will accept the answering affidavits and their annexures. If the respondent felt that it needed to respond to the answering affidavits it should have made an application to file a further affidavit in terms of r 235 of the rules of this court.

Mr *Kwaramba* for the respondent made another submission to the effect that there are material disputes of facts which cannot be resolved on the papers in this matter. He argued that while there was a Council resolution to allocate stands to Council employees, terms and conditions pertaining to the allocation were decided after the resolution. He argued that as it is the parties are not agreed as to whether or not the servicing fee was payable before beacon relocation. He said that this is an issue which cannot be ascertained on the papers, but at trial.

He said that on one hand the respondent is saying $3 200-00 which is the servicing fee was payable before beacon relocation was done. On the other hand the applicants are saying that the servicing fee should have been paid after beacon relocation. Mr *Kwaramba* further argued that the respondent disputes that the 59 Valley Lane beneficiaries have been allocated the same pieces of land as the applicants. He said, again, this is not an issue that can be resolved on the papers. Mr *Kwaramba* made reliance on Herbstein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa,* 3rd at p 62 where it is stated that:

> "it is clearly undesirable in cases where the facts relied upon are disputed to endeavour to settle the dispute of fact upon affidavit, for the ascertainment of the true facts is effected by the trial judge on consideration not only of probabilities, which ought not arise in motion proceedings, but also of credibility of witnesses giving evidence *viva voce*, and in such event it is more satisfactory that evidence should be led and that the court should have the opportunity of seeing and hearing the witnesses before coming to a conclusion."

Mr *Kwaramba* also made reference to the case of *Jirira* v *Zimcor Trustees Ltd and Anor* 2010 (1) ZLR 375 (H) at 378 where Makarau JP (as she then was) said:

> "There is no proven way of ranking affidavits in terms of veracity. One simply cannot find one affidavit more credible than the other."

Mr *Kwaramba* argued that the nature of the relief being sought by the applicants is such that there will be need for a full inquiry, where there is an interrogation of how the allocations were to be handled.

Mr *Chivizhe* for the applicants argued that there are no material disputes of facts which cannot be resolved on the papers. He said that the respondent was manufacturing

disputes that are not there in a bid to cover up for its unlawful acts of rescinding allocations of stands which had been made in favour of the applicants.

I do not agree with Mr *Chivizhe* that the dispute concerning the servicing fee is capable of being resolved on the papers. Looking at the affidavits of both parties I find it difficult even to employ a robust approach and making a determination on the papers. Both parties seem to have strong and arguable points in their favour which makes it difficult for me to rank the affidavits. I have no way of making a finding that one affidavit is more credible than the other.

Mr *Chivizhe* made the following arguments. He argued that in the correspondence which happened between the applicants' legal practitioners and the respondent's representatives before litigation commenced the respondent's representatives never mentioned that the allocation of the stands was not made to the applicants because they had not paid the servicing fees. He said that the issue of the servicing fees only came up after the applicants had filed the present application. Mr *Chivizhe* argued that this was an after-thought by the respondent. He said that from the respondent's opposing affidavit it is clear that according to it the issue of the non-payment of the servicing fees goes to the root of the allocation of the stands to the applicants. He said that it being an important issue the question is why did the Chamber Secretary in his letter dated 17 July 2013 to the applicants' legal practitioners not indicate that the applicants had not been allocated stands because they had not paid the servicing fees? Mr *Chivizhe* argued that instead in that letter the Chamber Secretary said that the Director of Housing was going to allocate stands to the remaining 33 Council employees after dealing with Valley Lane beneficiaries.

Mr *Chivizhe* further argued that in any case the respondent did not furnish anything to prove its averment that the 87 Council employees who were allocated the stands paid the servicing fees. He said that with the applicants making an averment that the payment of the servicing fee was not a pre-requisite for them to be allocated stands, the respondent should have furnished evidence to show that the other 87 employees paid it.

Mr *Chivizhe* also relied on the document which the applicants attached to their answering affidavits which document outlines the procedure in the allocation of un-serviced stands. According to that document payment of servicing fees is only done after beacon relocation has been done. The beneficiaries would have been shown their stands on the ground.

On the other hand Mr *Kwaramba* argued that the meeting minutes that the respondent relies on show that the applicants were supposed to pay money for the servicing or developments of the stands. The minutes show that there were disputes over the amounts payable with the aggrieved employees who are the applicants complaining that the amount of US$3500 was exaggerated. It is even said that some members were refusing to pay. It is important to note that although the respondent was not a party to these disputes, the meetings were being chaired by the Director of Housing. The Director of Housing was chairing in a bid to resolve the disputes affecting the involved parties. What is sticking out in those minutes is that the aggrieved allottees were refusing to pay the servicing fee. They were even given a dead line by which they should have paid their arrears which was 31 March 2013. It was also emphasised that they should pay their contributions in order to be taken aboard. In one of the minutes they were referred to as 'aggrieved former allottees' giving the impression that they had been removed from the list of allottees for non-payment of the contributions for development or servicing. While it is clear that the contributions were not being paid to the respondent, but to the HMWU Committee, it is however, a fact that the respondent's department of Housing was chairing the meetings which were being held in order to resolve these meetings. It is also a fact that it is the Director of Housing who was administering this housing project.

The respondent's deponent said that the memorandum which was written by the Acting Director of Housing on 17 January 2013 to the Director of Urban Planning Services asking him to do beacon relocation in favour of the applicants was written in error as he had not realised that the applicants had not paid the servicing fees. He said that on 25 June 2013, the Director of Housing sought to rectify that error by writing to the Director of Urban Planning Services replacing the list of beneficiaries which included the applicants with the new list involving the 59 Valley Lane beneficiaries.

Looking at Mr *Kwaramba*'s argument it makes sense the same way Mr *Chivizhe*'s argument makes sense. This shows that there is need for *viva voce* evidence to clearly explain the terms and conditions which surrounded the implementation of the Council resolution to allocate stands to its employees. There is need for an explanation of the US$ 3 200 that the applicants were being urged to pay during the meetings. The significance of that money needs to be clearly ventilated in a trial as it forms the cornerstone of the dispute between the parties. If the trial court makes a finding that the applicants were supposed to pay this money before beacon relocation, clearly they have no case against the respondent since

they did not pay this money. On the other hand if the trial court finds that they were only supposed to pay the servicing fees after beacon relocation then they have a case against the respondent.

The second dispute pertains to the issue of the 59 Valley Lane beneficiaries having been allocated the same stands that were allocated to the applicants on paper. The respondent's deponent averred in the opposing affidavit that separate land was allocated to the 59 Valley Lane beneficiaries, a fact that applicants strongly dispute. I do not feel inclined to decide this issue since I have already made a decision that this matter should be referred to trial. The trial court will deal with both issues. Let me not pre-empt the decision of the trial court.

In the result, it is ordered that:

1. The matter be and is hereby referred to trial.
2. The application will stand as the summons. The notice of opposition will stand as the appearance to defend. The applicants should file their declaration within 10 days of this order. Thereafter the matter should proceed in terms of the rules of this court.

Wintertons, applicants' legal practitioners
Mbidzo, Muchadehama & Makoni, respondent's legal practitioners