

DISTRIBUTABLE (10)

ANTHONY MAKINTOSH
v
(1) THE CHAIRMAN, ENVIRONMENTAL MANAGEMENT COMMITTEE OF CITY OF HARARE (2) CITY OF HARARE

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & GOWORA JA
HARARE, SEPTEMBER 19, 2013**

L Uriri, for the appellant

C Kwaramba, for the respondents

ZIYAMBI JA: This is an appeal against a judgment of the Administrative Court. The appellant, an accountant by profession, carries on business as C & J Accounting and Secretarial Services (Pvt) Limited. On 20 December 2010, the appellant applied to the respondents for a permit in terms of s 26 of the Regional Town and Country Planning Act [*Cap 29:12*] (“the Act”) to alter the character of the use of Stand 76 Groombridge Township 2 of Lot 39A Mount Pleasant otherwise known as 162 The Chase, Mt Pleasant, Harare from residential to business premises, namely, a motor cycle showroom and offices. It is common cause that the appellant was, at the time of the application, already operating a motor cycle showroom as well as accounting offices from the said premises.

On 1 June 2012, the City of Harare wrote to the appellant refusing the application for a permit on four grounds. The letter reads as follows:

“Dear Sir,

APPLICATION IN TERMS OF SECTION 26(3) OF THE REGIONAL TOWN AND COUNTRY PLANNING ACT, REVISED EDITION (1996), CHAPTER 29:12 PROPOSED CHANGE OF USE FROM RESIDENTIAL TO OFFICES AND MOTOR CYCLE SHOWROOM ON STAND 76 GROOMBRIDGE TOWNSHIP 2 OF LOT 39A MT PLEASANT (162 THE CHASE) HARARE.

You are hereby notified that in terms of Section 26(3) of the Regional Town and Country Planning Act Chapter 29:12 Revised Edition (1996), the City Council of Harare's Environmental Management Committee, as a Local Planning Authority, on Monday, 30 April 2012 (Minute Item 15) refused to grant a permit for the use of Stand 76 Groombridge Township 2 Of Lot 39A Mt Pleasant (162 The Chase), For Offices And Motor Cycle Showroom purposes, because of the following reasons:-

- a) There was no proven local area NEED for the proposed offices as they are of no benefit to the community. The motorcycle showroom is prohibited in terms of the operative local plan.
- b) Mt Pleasant is losing its residential character due to illegal commercialization of the properties. This application is one such illegal use. If all these changes are permitted, it will soon cease to be a low density residential area but a commercial one. The application is therefore not supported.
- c) Already we have the Mt Pleasant Business Park to cater for office needs in the area and retain the residential aspect in the remainder of the neighbourhood.
- d) The city of Harare faces an acute shortage of housing. Any one of the existing housing units should as a result only be converted to any other use where it is absolutely necessary.

Notice of Appeal

- (i) Attention is drawn to the provisions of section 38 of the Regional Town and Country Planning Act, Chapter 29:12 Revised Edition (1996) under which any person aggrieved by this decision may appeal to the Administrative Court within one month of this permit or such longer period as the President of the Administrative Court may, in writing, authorize, the relevant procedure is set out in the Rules of the Administrative Court.

Yours faithfully

DIRECTOR OF URBAN PLANNING SERVICES".

Aggrieved by the decision, the appellant appealed to the Administrative Court in terms of s 38 of the Act. The appeal was unsuccessful. The court upheld the decision of the respondents on all grounds.

Two grounds of appeal were advanced in the appeal before this Court. They are:

- “1. The court *a quo* erred in law –
 - (a) in finding that there is no local area need for offices for accounting and secretarial services yet Respondents granted permits for commercial offices of related businesses in the same neighbourhood;
 - (b) in failing to separate the permit application for accounting and secretarial offices from the motorcycle showroom thereby refusing to grant the permit subject to the conditions imposed in respect of offices; and
2. In any event, the court *a quo* misdirected itself –
 - (a) in failing to take cognizance of the fact that Respondents have already granted permits with commercial rights to other businesses in the same neighbourhood thereby discriminating against the Appellant;
 - (b) in finding that an acute shortage of residential accommodation or property in Harare is a basis upon which a permit should be refused.
 - (c) in failing to differentiate Appellant’s private residential property from the public duty to provide residential accommodation which the Respondents have in providing residential accommodation to Harare residents”.

It was contended on behalf of the respondents that a decision by the Administrative Court in terms of s 38 of the Act involves the exercise of a discretion and that this Court as an appeal court, could only interfere with the exercise of a discretion by a lower court in limited circumstances none of which were present in this case.

Section 38 of the Act provides, in part, as follows:

“38 Appeals

(1) Any person—

(a) who is aggrieved by any decision made or deemed to have been made by a local planning authority in connection with an application for-

- (i) a permit or preliminary planning permission; or
- (ii) ...
- (iii) ...;

may, within one month from the notification of such decision; or

(b) ...

(c) ...

or such longer period as the President of the Administrative Court may in writing authorize, appeal to the Administrative Court in such manner as may be prescribed in rules and the Administrative Court **may** make such order **as it deems fit**".

(My emphasis)

A wide discretion is conferred on the Administrative Court by this provision.

DISCRETION

An appeal court will only interfere with a decision which involves the exercise of discretion by a lower court in very limited circumstances. These were set out by this Court in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at p 62-63, where the Court said:

“The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first – one which clearly involved the exercise of a judicial discretion – may only be interfered with on limited grounds. See *Farmers’ Co-operative Society (Reg.) v Berry* 1912 AD 343 at 350. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account relevant some consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always has the materials for so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court”.

Contrary to the appellant's allegation that the learned President misdirected himself, it would appear to me that the court *a quo* was alive to the principles to be applied in a matter such as this and went on to apply those principles. For example, it was guided by the judgment in *Doves Morgan (Pvt) Ltd v The City of Salisbury* 1973 (1) RLR 50 which set out the applicable principles to be the following:

“... the special consent procedure is inserted in town planning schemes to allow an obtrusive activity to be carried on in an area if the applicant can establish that there is a need for the use in that area, in the sense that the members of the public who are in that area would suffer serious disadvantage if such activity is not allowed to be carried out in that area”.

The learned President took into account that Stand 76 is located in an area set aside primarily for residential houses; that Motor cycle showrooms are prohibited in that area; and that use of buildings in that area for other purposes may be permitted with the special consent of the local planning authority, the respondents. He found that “conversion of the appellant's residential property into a motor cycle showroom and offices would constitute disharmonious development in the area”. Such a development, the President found, would have disrupted the harmonious and co-ordinated development of properties in that area as there would be more noise and motor cycle traffic than would be the case in a quiet residential area. He took into account that the respondents have an obligation in terms of the Act to formulate policies for the co-ordinated and harmonious development of the use of land in its area of jurisdiction and therefore concern themselves with the interests of the members of the public in the area as opposed to individual interests.

In its submissions, the appellant stated that no less than seven stands along The Chase in Mount Pleasant have been converted from residential stands to commercial uses. The response by the respondents was that most of these businesses were operating

illegally and that proceedings for redressing that situation were in progress. As observed by the learned President, the fact that other residents had illegally changed the use of their residences to commercial use was not a factor which the appellant could rely on in advancing the justice of his case. The court found that not only had no need been proved but that there was adequate office space provided at Mount Pleasant and Arundel business parks which were designed for that very purpose.

In the final analysis, this Court is unable to interfere with the judgment of the learned President unless there has been a misdirection as set out above in *Barros v Chimpondah* (supra). I find no such misdirection in the judgment of the learned President. He took into account all the relevant factors and was alive to the law applicable in such cases.

It was for the above reasons that, after hearing submissions from Counsel, we dismissed the appeal with costs and indicated that reasons for our decision would follow.

GWAUNZA JA: I agree

GOWORA JA: I agree

Muhonde Attorneys, appellant's legal practitioners

Messrs Mbidzo Muchadehama & Makoni, respondents' legal practitioners