LUKE DANZVARA
and
FARAI MUCHENA
and
PERCY TAKAVASHA
and
STELLAH MUSHIRI
and
NYARADO MGODI
and
PATIENCE MANENE
and
GETRUDE DAKA
and
WALTER MUDZINGWA
and
ANDREW DAKA
and
SARUDZAI DANZVARA
versus
CITY OF HARARE
and
ZIMBABWE ASSEMBLIES OF GOD AFRICA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 13 & 28 June 2023

Opposed Matter

Mr N Tonhodza & Giya, for the applicants
Mr R Zinhema, for the respondents
Mrs T. Muchini, for the second respondent

MANGOTA J: Bannockburn, Mount Pleasant Heights, is a residential area ("the area"). It is in Mount Pleasant, Harare. The area, according to papers filed of record, has no public functionaries like shops, supermarkets, sales outlets, vendors, bars, clubs, churches, sports grounds or schools. It is allegedly specifically designed for those Zimbabweans who move from high density suburbs in search of peace and a quiet environment which is far away from public life.

It is in the area that the second respondent, an universitas, purchased Stand 946 ("the stand") from a seller and applied to the first respondent, a local planning authority, for a permit for change of use of land. It filed its application in terms of s 26 of the Regional, Town and Country Planning Act. It advertised its intention to establish a church on the stand by placing an advertisement in *The Herald* newspaper and also by purportedly serving notices of the same on owners of properties which are adjacent to the stand.

The first respondent granted the permit to the second respondent on 11 December, 2011 as a result of which the latter commenced to construct a church structure on the stand. The granting of the permit to the second, by the first, respondent constitutes the applicants' cause of action. All ten of them are residents of the area. They are reviewing the decision of the first respondent on the grounds that:

(i) they were not served with the second respondent's application for change of use of the land and were therefore

(ii) not given the opportunity to exercise their right to object to the granting of the permit to the second respondent.

They move me to set aside the decision of the first respondent and to interdict the second respondent from:

a) constructing the church on the stand; and

b) conducting church services on the same.

They move me to declare the constructed portion of the church an illegal structure.

Both respondents oppose the application. They insist that the decision which the first respondent made was not only lawful but was also above board. They claim that the applicants were notified of the second respondent's application for change of use of land by the advertisement which the latter inserted in *The Herald* and, in respect of owners of properties which are adjacent to the stand, by registered post. They aver that, serving of the notice notwithstanding, the applicants did not object to the granting of the permit to the second respondent. The first respondent states that the applicants cannot seek the remedy of an interdict and a declaratur in an application for review. Both of them move me to dismiss the application with costs.

The application cannot succeed.

Section 26 of the High Court Act confers power or authority upon me to review all proceedings and decisions of inferior courts, tribunals and administrative authorities within Zimbabwe. It is, accordingly, within the letter and spirit of the section that the decision of the first respondent, which is an administrative authority, remains reviewable by me. In reviewing the same, however, the law does not allow me to take over its functions: *Affretair (Pvt) Ltd* v *M.K. Airlines (Pvt) Ltd*, 1996 (2) ZLR 15 at pp 21-22. All l am required to do, in such circumstances, is to satisfy myself that the procedure which the first respondent adopted leading on to the decision which the applicants are impugning was or is above board. I should, in other words, be satisfied, on a reading of the papers which are placed before me, that in deciding as it did, the administrative authority did not cut corners but that it followed the law to the letter and spirit, as it should. I must remain convinced that it did not show any interest in the cause and/ or that it was not motivated by malice, bias or corruption. The papers which are placed before me should show that it acted honestly, fairly and without any fear or favour. Without any fear or favour because it is the hallmark of any judicial or quasi-judicial work to be performed in an honest, fair and frank manner which takes on board all those whose interests will be adversely affected by the decision which is so made.

The application which the applicants placed before me largely turns on the interpretation which must be placed on s 26(1) as read with subs (3) of the Regional, Town and Planning Act [*Chapter 29:12*] ("the Act"). The section reads, in the relevant parts, as follows:

> "(1) An application for a permit….shall be made to the local planning authority in such manner and shall contain such information as may be prescribed and shall be accompanied by the consent in writing of-
> (a) The owner of the land; and
> (b) Where the application relates to development which involves an alteration-
> (i) In the character of any use of any land or building; or
> (ii) In the conditions of title to the property;
> the holder of any real right registered over the property concerned.
> (2) ……..
> (3) Where an application in terms of subsection (1)-
> (a) ..…….or
> (b) relates to development which does not conform to the development existing or normally permitted in the area; or
> (c) relates to development which could…..have an adverse effect or important impact on the locality or the area generally; or
> (d) relates to development which conflicts with any condition which is registered against the title deed of the property concerned and confers a right which may be enforced by the owner of another property;

> The local planning authority shall require the applicant, at his own expense, to give public notice of the application and to serve notice of the application on every owner of property adjacent to the land to which the application relates and such other owners as the local planning authority may direct and to submit proof that such notice has been given."

The above-cited section contains three very important matters which remain pertinent to an application for change of use of land. The matters are that the applicant for change of use of land must:

i) serve notice of his application on owners of properties which are adjacent to the land to which his application relates;
ii) give public notice of the application; and
iii) submit proof to the local planning authority, *in casu*, the first respondent, that such notice has been given.

In the instant case, the second respondent should have made personal service of the application or served the same by registered post on owners of Stands 947, 948, 949 and 950. The stands are adjacent to the stand. It should also have notified the remaining applicants as well as the general public of its application by giving public notice of its application.

The record shows that owners of Stands 947, 948 and 949 were not at their respective stands at the time that the second respondent applied for change of use of land and a permit was granted to it by the first respondent. The concession which the applicants made in respect of the stated matter serves as confirmation of the observed set of circumstances. Applicants for the mentioned three stands were therefore being economic with the truth when they stated, as they did, that they were not served with the second respondent's application. They knew that they had not taken occupation of their stands when the permit was granted to the second, by the first, respondent. They, for reasons known to themselves, teamed up with the first applicant who is the deponent to the applicants' founding affidavit to portray a picture which was non-existent. They all told a blue lie on this aspect of the case. They did so in the hope that I would believe their assertions which they all knew were false. They, in short, sought to mislead me into buying their statement which they knew was not true.

The law, it goes without emphasis, takes a very serious view of litigants who make up their minds, and agree between themselves, to tell lies as the applicants did. It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as

if he had not given evidence at all: *Leather Trade Zimbabwe (Pvt) Ltd* v *Smith*, HH 131/ 03. People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court: *Deputy Sheriff, Harare* v *Mahleza & Anor*, 1997(2) ZLR 425. It is fundamental to court procedure in this country and in all civilized countries that standards of faithfulness and honesty be observed by parties who seek relief. If this court were not to enforce that standard, it would be washing its hands of its responsibility: *Underbay* v *Underbay*, 1997 (4) 23 (W) at 24 E-F.

The above-quoted excerpts show the disdain to which the court is prepared to go the moment it discovers that a litigant has decided to lie to it on a matter which is pertinent to the decision which it shall make for, or against, him. The hallmark of justice delivery encourages those who place their cases before the court to always hone up and disclose all matters which are relevant to their case including those which are not favourable to them. The stated fact constitutes the spirit of good pleading. What the applicants did is bad pleading which leaves the court guessing as to what exactly they meant to convey to it other than for them to mislead it and obtain a decision which is favourable to them.

Only the first and tenth applicants who own Stand 950 remain in the equation as owners of adjacent property to the stand. They took ownership of Stand 950 in 2003. They claim, as owners of Stands 947, 948 and 949 do, that they were not served with the second respondent's application for change of use of land.

In the spirit of the above-analyzed set of matters, one remains uncertain if they indeed were not served with the application of the second respondent. The record, Annexure C p 33, shows that the second respondent sent the notice to the owner of the stand by registered post in September 2011. The owner to whom the notice was sent is one I.C Plews and not the first and tenth applicants. That the notice was sent to a person who did, or does, not own Stand 950 is not the fault of the second respondent. It is that of the first respondent from whom it got the name of the owner of Stand 950. The first respondent regrets the mishap. It, however, emphasizes that the notification was sent to the right address and that the owner of the property should have made representations if it had any notwithstanding the wrong name ascribed to the owner of the property.

Whilst the first respondent cannot explain why the name I.C Plews appears against Stand 950 it being a fact that the first and tenth applicants did not acquire title in the property from

I.C Plews but from Assetfin (Pvt) Ltd, the second respondent's service of the notice at the correct address does, in my view, constitute substantial compliance with the law which the respondents are arguing in the present case.

Substantial compliance was aptly discussed in *Chivore* v *Mudavanhu*, EP 76/08 wherein the court remarked that:

> "Where substantial compliance is being argued, the petitioner must show that which he did in an effort to comply with the statute exactly. He must have done all that he is required to do to comply with the law within the stipulated time serve for minor defects that would not invalidate the notice".

The second respondent accepts that the owner of Stand 950 is adjacent to the stand. It also accepts that the owner(s) of Stand 950 cannot be served by any other way except being served with the application by either personal delivery of the notice to them or by registered post. It posted the notice to the correct address. It did not know the owner of Stand 950. It, accordingly, adopted the method which the law stipulated for it and proceeded to serve on the owner of Stand 950. Whilst the mishap remains regretted, the second respondent cannot be penalized for following the dictates of the law in the manner that it did.

In the event that I am wrong in my analysis of this aspect of the case, I remain satisfied that the advertisement which the second respondent placed in *The Herald* sufficed to alert the first and tenth applicants as well as all other applicants who are cited in this case of its application for change of use of land. The applicants' statement which is to the effect that there is no Herald newspaper which circulates in the area cannot be true. They lied in one instance. Nothing prevents them from lying again. In any event, the applicants bear the *onus* to prove, on a balance of probabilities that *The Herald* newspaper does not circulate in the area. The cardinal rule on *onus* is that a person who claims something from another in a court of law has to satisfy the court that he is entitled to it: *Zupco Limited* v *Parhorse Services*, SC 13/17. The rule is, in short, stated in the words '*he who alleges must prove*'. As was succinctly stated in *Nyahondo* v *Hokonya & Ors*, 1997 (2) ZLR 457 (S) at 459 the general principle is that he who makes an affirmative assertion, whether plaintiff or respondent, bears the *onus* of proving the facts so asserted. It follows, from the observed case authorities, that the applicants who state that *The Herald* newspaper does not circulate in the area should prove the veracity of their assertion. The *onus* remains with them. It does not lie on the respondents.

It is in line with subs (3) of s 26 of the Act that the second respondent placed a public notice in *The Herald* on 25 March, 2011. The notice advised all the applicants of its application for change of use of land in respect of the stand. That the applicants did not see the newspaper is of no moment. It is probably another lie which they chose to tell with a view to defeating the clear and very good intention of the second respondent. They cannot have me believe that they leave in isolation from the rest of the world which is around them. They state, in para 28 of their founding affidavit that they drive out of the area to go and shop groceries, attend church services or take their children to, and from, school. One may add that they go to work every five days in a week or visit their loved ones who do not stay in the area. They cannot argue, as they are doing, that they did not see the advertisement which the second respondent placed in *The Herald*. What clearly comes out of their assertion is that they made up their minds to come and lie in court on the issue which relates to their sight of the advertisement. Their insistence on the notice being given in the *gazette* is also of no moment. They peddled it as a way of trying to convince me that they did not see the insert which the second respondent placed in the newspaper. They do not tell the manner in which they would have accessed the *gazette* in which they insist that the notice should have been inserted. Nor are they asserting that the *gazette* circulates in the area where they reside.

The law which relates to giving of public notice in matters of the present nature is clear and straightforward. A public notice, according to the Act, means a notice which is given in the *Gazette* and additionally, or alternatively, in a newspaper which circulates in the area of the local planning authority….It is evident, from a reading of the definition that the notice may be published in the *Gazette* and the newspaper which circulates in the area or only in the newspaper which circulates in the area of the local planning authority.

The second respondent's insert of the notice in the newspaper suffices. It served the purpose for which it was intended. The notice complied with the law to the letter and spirit of the same. It cannot therefore be impugned.

The applicants state, in para(s) 23 and 24 of their founding affidavit, that they applied for review on 10 April 2021 and under HC 1540/21. They assert that the court struck off the application on the basis that they filed a hybrid application for review, a declaratur and a constitutional relief in terms of s 85 of the Constitution. The court, according to them, held that

the approach which they took was irregular making the application so filed fatally defective for want of form.

Their past unpalatable experience notwithstanding, the applicants yet again filed another application for review, an interdict and a declaratur. When challenged on this issue which is as clear as night follows day, they insist that the application which they filed in the instant case is unblemished. One remains lost for words. One fails to understand why the applicants cannot learn from their previous conduct which cost them a whole case.

An interdict and a declaratur are totally different from a review. The law and the rules of procedure are very clear on the difference between, or amongst, the three set of remedies. The applicants who are ably legally represented should not find any difficulty to see the difference. The applicants themselves, as lay persons who are not schooled in the law and its procedure, would have taken a leaf from what happened to the application which they filed under HC 1540/21. They should have been wiser in this application than they did in HC 1540/21. Their failure to appreciate the pitfalls which they placed in the way of their application is not only unfortunate but is also incomprehensible.

The applicants failed to prove their case on a balance of probabilities. The application is, in the result, dismissed with costs.

Ndlovu & Pratt Law Chambers, applicants' legal practitioners
Gambe Law Chambers, first respondents' legal practitioners
Matsikidze Attorneys, second respondents' legal practitioners