

REPORTABLE (54)

DEVELOPMENT STUDIO AFRICA PRIVATE LIMITED
v
**(1) PAZA BUSTER COMMODITY BROKERS (2) THE CITY OF
HARARE ENVIRONMENTAL MANAGEMENT COMMITTEE (3)
ACTING DIRECTOR OF WORKS CITY OF HARARE (4)
CITY OF HARARE**

**SUPREME COURT OF ZIMBABWE
BHUNU JA, KUDYA JA & MWAYERA JA
HARARE: 4 NOVEMBER 2023 & 31 MAY 2024**

T. Zhuwarara, for the appellant

T. Mpofo, with *Makamure*, for the first respondent

N. Nyathi, for the second, third, and fourth respondent

MWAYERA JA:

INTRODUCTION

1. This is an appeal against the whole judgment of the High Court (“court *a quo*”) wherein it granted an application for review of the second respondent’s decision authorizing the permit for the construction of a funeral parlor by the appellant.

PARTIES

2. The appellant is a company duly registered in terms of the laws of Zimbabwe and the owner of two adjoining stands namely stand number 961 and stand number 962 Pomona Township.
3. The first respondent registered is a company duly registered in terms of the laws of Zimbabwe and the owner of stands number 955, 956, 957, 958, and 959 Pomona Township.

The second respondent is a standing committee of the City of Harare appointed in terms of s 96 of the Urban Councils Act [*Chapter 29:15*] (“the Act”).

4. The third respondent is an official employed in the capacity of Acting Director of Works of the fourth respondent, which respondent is a City Council and body corporate established in terms of the Act.

FACTUAL BACKGROUND

5. The appellant applied to the fourth respondent for a special consent permit for change of use of land to establish a funeral parlor on its stands. The third respondent acknowledged receipt of the application and stated that owners of the stands in the area being stands 960, 963, 965, 964, 996 and 967 of Pomona Township should be notified of the application.
6. On 14 July 2024, the third respondent issued a notice of the appellant’s application for a permit in the Herald’s Finance and Business Newspaper, in terms of s 26 (3) of the Regional Town and Country Planning Act [*Chapter 29:13*] (“the planning Act”). In a letter dated 11 August 2021, the third respondent acknowledged that it had complied with s 26 (3) of the Planning Act by notifying the public through an advertisement. In addition, the third respondent served three property owners of stands 961, 962 and 875 with the permit application.
7. The first respondent upon getting information about the appellant’s intention to open a funeral parlor on its stands lodged a complaint or objection with the third respondent. Despite the lodgment of the objection on the basis that the change of use of land from industrial use to a funeral parlor would have detrimental effect to the neighboring properties, there was no response from the third respondent.

8. Other property owners also lodged objection with the third respondent. On 6 August 2021, Valley Seeds (Pvt) Ltd of stands numbers 968, 969 and FPG Capital (Pvt) Ltd of stand 960 Pomona Township and Luscious Foods of stands 963 also wrote to the third respondent objecting to the establishment of the funeral parlor. The basis of the objections was that a funeral parlor being a high traffic business, would negatively affect their business and their clients. On 5 November 2021, the third respondent listed objections that it had received in respect of the proposed funeral parlor and beseeched the appellant to respond to them. The appellant responded arguing that, the second respondent had authority to grant the permit since the fourth respondent had delegated powers to it.
9. On 8 March 2022, the second respondent granted the permit in favor of the appellant. Disgruntled by the decision of the third respondent, the first respondent applied for review to the court *a quo*.

PROCEEDINGS A QUO

10. The first respondent impugned the decision in terms of which the permit was granted to the appellant on three grounds. These are that:
- (i) The second respondent, a committee of the fourth respondent, which granted the permit to the appellant did not have the jurisdiction to permit the latter to establish a funeral parlor on the stands.
 - (ii) The second respondent violated the *audi alteram partem* rule when it granted the permit to the first respondent without hearing it.
 - (iii) The first respondent did not make a reasonable and impartial decision which was substantively and procedurally fair and it, in the process violated s 3 (1) and (2) of the

Administrative Justice Act as read with s 68 (1) of the Constitution of Zimbabwe (No. 20) of 2013.

11. The first respondent argued that the second respondent is not a Local Planning authority as contemplated by s 26 (3) as read with s 10 of the Planning Act. It further submitted that the second respondent is not synonymous to the fourth respondent's full Council which is the only legal persona empowered in terms of the Planning Act to grant permits. The first respondent further submitted that the second respondent had no legal basis to usurp the powers which were a preserve of the fourth respondent only.
12. It was against this background that the first respondent submitted that in the absence of the proper delegation of power to the second respondent by the fourth respondent, the second respondent could not purport to grant the permit in terms of s 26 (3) of the Planning Act. The respondent further submitted that even if the fourth respondent had attempted to delegate power, such delegation would have been invalid at law since the fourth respondent could not competently delegate power granted to it by statute.
13. The appellant, second, third and fourth respondents opposed the application. The second and third respondent spoke with one voice that the fourth respondent and not the second respondent, granted the permit for change of use of land to the appellant.
14. The appellant's narrative on the issue was that the second respondent granted it the permit to establish a funeral parlor on its stands in terms of s 26 (3) of the Planning Act, acting in its capacity as a local planning authority.

FINDINGS OF THE COURT A QUO

15. The court *a quo* held that the second respondent, as a committee of the fourth respondent issued the permit for change of use of land. It held that since the second respondent did not make reference to the law permitting it to grant the permit in question, it had no authority to grant the permit. The court *a quo* further held that the fourth respondent did not produce any evidence in the form of a resolution of board members granting the permit to the appellant. It further held, that the permit was improperly granted as the first respondent was not heard, thereby violating the *audi alteram partem* rule.

16. It thus held that the decision of the second respondent in the circumstances was unreasonable, biased and procedurally unfair considering that it ignored the objections raised in relation to the establishment of a funeral parlor. Further, there were no reasons furnished for the grant of permit. Consequently, the court *a quo* granted the review application in favor of the first respondent.

17. The appellant, aggrieved by the decision of the court *a quo* lodged an appeal with this Court on the following grounds of appeal.

GROUND OF APPEAL

1. The court *a quo* erred in determining that the fourth respondent's Environmental Management Committee had no jurisdiction to cause the issuance of a permit to the appellant. Such holding was anomalous in that the said Committee was empowered to issue such permit by operation of s 96 (1) of the Urban Councils Act [*Chapter 29:15*] as read with s 12 (1) of the Regional Town and country planning Act [*Chapter 29:12*].

2. Furthermore, the court *a quo* erred in setting aside the appellant's permit at the behest of the first respondent when such court had determined that the appellant's operations did not have the remotest chance of adversely affecting the operations of the said respondent.
3. Concomitantly, the court *a quo* erred in holding that in granting the appellant the permit, the fourth respondent had violated the first respondent's right to be heard, to the contrary such respondent had managed to register its objection which objection was nugatory in the circumstances.
4. The court *a quo* also misdirected itself in failing to turn its mind to the conditions endorsed in the appellant's permit which conditions evidenced the fact that the fourth respondent had applied its mind to the objections and had indeed an impugnable decision (sic).

SUBMISSIONS BEFORE THIS COURT

18. Mr *Zhuwarara*, counsel for the appellant submitted that the court *a quo* erred in finding that the second respondent lacked the requisite jurisdiction to authorize the permit to establish a funeral parlor on the appellant's property. He further submitted that there was no violation of the principles of the *audi alteram partem* rule since the first respondent was granted the right to be heard considering that it had the opportunity to submit written objections to the application for a permit if it so wished. He further averred that in terms of the Planning Act and the Urban Councils Act [*Chapter 29:15*] there is no requirement for oral submissions to be made in objections. Counsel further argued that the stands in question were not adjacent to the first respondent's stands. He thus urged the court to uphold the appeal and set aside the judgment of the court *a quo*.

19. *Per contra*, Mr Mpofu, counsel for the first respondent submitted that the stands belonging to the first respondent are adjacent to those of the appellant. He referred the court to the definition of adjacent as outlined in *Chidyausiku v Nyakabambo* 1987 (2) ZLR 119 (S).

He further submitted that the first respondent's right to be heard was violated given that there was no evidence to illustrate that the objections raised were considered. No reasons were furnished for grant of the permit. He contended that the local planning authority is the one authorized to issue permits by special consent. In this case he argued that no such consent existed such that the second respondent lacked jurisdiction to grant the permit.

20. Mr Nyathi, counsel for the second, third and fourth respondents submitted that he would abide by the court's decision.

21. Having considered the record of proceedings, written and oral submissions the following issues fall for determination.

ISSUES FOR DETERMINATION

1. Whether or not the second respondent had jurisdiction to grant the permit.
2. Whether or not the first respondent had the *locus standi in judicio in judicio* to institute proceedings.
3. Whether or not the *audi alteram partem* principle was violated.

APPLICATION OF THE LAW TO THE FACTS AND ANALYSIS

Whether or not the first respondent had *locus standi injudicio* to institute proceedings.

22. The doctrine of *locus standi* is fairly settled and has been traversed in a number of cases in this jurisdiction. It connotes that in order for a person to bring a matter before a court they must have a direct and substantial interest in the matter. The case of *Museredza & Ors v Minister of Agriculture, Lands, Water and Rural Settlement & Ors* CCZ 01/22 is instructive. The court stated that:

“It is settled that the principle of *locus standi* is concerned with relationship between the cause of action and the relief sought. Thus, a party needs direct, personal and substantial interest in the matter in contention. In *Zimbabwe Stock Exchange v Zimbabwe Revenue Authority* SC 56/07 MALABA JA (as he then was) said:

“The common law position on *locus standi in judicio* of party instituting proceedings in a court of law is that to justify participation in the action, the party must show that he or she has a direct and substantial interest in the right which is the subject matter of the proceedings.”

In *Museredza* case *supra*, the Constitutional Court also had occasion to relate to *Sibanda & Ors v The Apostolic Faith Mission of Portland Oregon (South African Headquarters)* SC 49/18 wherein HLATSHWAYO JA (as he then was) considered the principle of *locus standi* and stated the following:

“It is trite that *locus standi* is the capacity of a party to bring a matter before a court of law. The law is clear on the point that to establish *locus standi*, a party must show a direct and substantial interest in the matter. See *United Watch & Diamond Company (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C) at 415A – C and *Matambanadzo v Goven* SC 23/04.”

23. In the present case, the first respondent who is the owner of stands 955, 956, 957, 958 and 959, upon hearing about the intended change of use of stand to establish a funeral parlor by the appellant, lodged an objection. The court *a quo* held that the first respondent had the *locus standi* as the owner of adjacent stands.

24. Upon considering the evidence on record and submissions, made before us it is apparent that the first respondent has the requisite *locus standi*. The first respondent, as an owner of tenements adjacent to the appellant`s, has rights to raise objections on establishment of a funeral parlor which is new use of adjacent land by the appellant, this being against the operative plan of the area. The diagram on p 29 gives clear picture of stands in issue. The appellant`s stands 961 and 962 are adjacent to the first respondent`s stands 955, 966, 967 and 968 (which are situated near the appellant`s stands). Stand 959 is one stand away from the respondent`s stand 961, while the other stands for the first respondent are directly across the road which separates them from the appellant`s. In fact, the stands use entrances are on the same road.

25. The word adjacent in Garren`s Blackslaw Dictionary, 8th ed, means “lying near or close but not necessarily touching.” In this case, the properties although not touching are adjacent because of their nearness to each other. One is bound to immediate injury by having wrongful use put to the neighboring property. It is on this basis that the first respondent objected to the change of use of industrial use to funeral parlor as this would affect its business. To this end therefore, the first respondent clearly had a direct and substantial interest hence the application for review of the grant of permit. It is on this back drop that this Court finds that the first respondent had the *locus standi* to institute proceedings in the court *a quo*.

26. Having found that the first respondent had *locus standi* we now turn to the second issue that falls for determination.

Whether or not the second respondent had the requisite jurisdiction to grant the permit.

27. The issue for permit for change of use is regulated by statute and s 26 of the Planning Act is instructive. It provides as follows:

“26 Application for permit or preliminary planning permission

(1) An application for a permit or preliminary planning permission 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 consent in writing of:

- (a) the owner of the land; and
- (b) where the application relates to developments which involves an alteration;
 - (i) In the character of the use of any land or building or
 - (ii) In the conditions of title to the property;
 - (iii) the holder of any real right registered over the property concerned:

Provided that the local planning authority may dispense with any consent required in terms of this subsection if it is satisfied that:

- (a) the applicant has made all reasonable attempts to ascertain the address of the person whose consent is required and has been unable to do so; or
- (b) the person whose consent is required has unreasonably failed or refused to give consent and that the permit, if granted, would not prejudice the rights of such person.

2.

3. Where an application in terms of subs (1),

- (a) may in terms of an operative master plan or local plan or approved scheme, only be granted by the local planning authority-
 - (i) after special consideration of circumstances of the particular case,
or
 - (ii) in the case of such scheme, by special consent of the Local Planning Authority or;
- (b) relates to development which does not conform to the development of existing or normally permitted in the area, or
- (c) relates to development which could in the opinion of the Local Planning Authority 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 which the application relates and such other owners as the planning authority may direct and to submit proof that such notice has been given.”

28. The law provides that the 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.

29. Section 2 of the Planning Act defines a Local Authority as:

“subject to the limitation specified in s 10 means an authority which is a local planning authority in terms of that section”

Section 10 (1)(a) of the Planning Act further defines a local planning authority as follows

“10 Local planning authorities

(1) Subject to this section, the following shall be the Local Planning Authorities.

(a) every municipal council of town council for the area under its jurisdiction.

(b) every rural district council or local board for the area under its jurisdiction.”

The second respondent, an environmental management committee does not fall within this definition.

30. The appellant's further argument was that the second respondent had authority to grant the permit in terms of s 96 of the Act as read with s 12 (1) of the Planning Act. It is worth while to pay attention to the provisions s 96 which provides:-

“96 standing committees of council

- (1) Subject to this section and s 97 for the better exercise of its functions, a council may appoint one or more standing committees and vest in the committees such of its functions as it thinks fit.”
- (2) ...
- (3) ...
- (4) Every council shall appoint an environmental management committee which shall be responsible for environmental matters relating to the council.”

Section 12 of the Planning Act reads as follows:

“12 delegation of functions by Local Planning authority

- (1) A local authority may establish a committee, consisting of such number of members being not less than three as that authority may determine, and may delegate to the committee any powers duties or responsibilities conferred or imposed on a Local Planning authorities by this Act or by any operative master plan or an approved scheme.”

31. From the above cited provisions, one can deduce that the local planning authorities have power to delegate their functions to the committees .However, the question which lingers for determining is whether the second respondent when it granted the permit to the appellant it acted as a Local Planning Authority; or it acted within the power delegated to it by the forth respondent. It is evident from the record that no such delegation of power occurred. Further it appears on record that by letter dated 3 March 2023, the second respondent granted the permit for changed of use of land to the appellant. The letter is reproduced for emphasis. It reads as follows:

“You are hereby notified that in terms of s 26 (3) of the regional town and country Planning Act [*Chapter 29:12*] of 1996, that the City Council of Harare's Environmental Managerial Committee, as a Local Planning Authority, on Monday 30 April 2012

(minute them so) GRANTED a permit for use of stands 961 and 962 Pomona township for Funeral Parlor purpose only, subject to the following conditions.” (Underlining my emphasis)

32. It is not in dispute that the second respondent is a standing committee of the fourth respondent.

It however, granted the permit as a Local Planning Authority, which it is not. The law permits the Local Planning Authority to delegate its power and functions which did not ensure in the present case. There is no evidence of such delegation of powers. To further compound the second respondent's assumption of the role of the Local Planning Authority is the fact that the fourth respondent, that is, the City of Harare, did not delegate power to grant the special consent permit to the second respondent. The letter is clear that the second respondent was not acting for and on behalf of the Local Planning Authority. Further considering that Council had reserved to itself the right to make decisions on matter considered by Committees, the permit issued otherwise would be flawed and irregular.

33. The second respondent not being a Local Planning Authority and not being empowered by any law, had no jurisdiction to issue out a permit in the circumstances. Having stated that the second respondent lacked the requisite jurisdiction to grant the permit for change of use of land it will not be necessary to relate to the third issue of whether or not the *audi alteram partem* rule was violated in the process of granting the permit.

34. The courts are ordinarily loath to interfere with decisions of the Administrative Authority unless the decision is unlawful, grossly unreasonable or procedurally irregular and unfair. The court *a quo* correctly detected the patently unlawful process conducted by the Administrative Authority and granted the review application for due process to be followed.

DISPOSITION

35. This Court agrees with the court *a quo* in so far as it is clear that the Administrative Authority's decision cannot be saved. The appeal lacks merit.

36. Regarding costs, they follow the result. We find no reason to depart from that standard.

Accordingly, it is ordered that:

“The appeal be and is hereby dismissed with costs”

BHUNU JA : I agree

KUDYA JA : I agree

Gwaunza & Mapota Legal Practitioners, appellant's legal practitioner

Rubaya & Chatambudza Legal Practitioners, 1st respondent's legal practitioners

Gambe Law Group Legal Practitioners, 2nd, 3rd and 4th respondents' legal practitioner