

MARLBOROUGH ENVIRONMENTAL ACTION GROUP
versus
THE HARARE CITY COUNCIL
and
THE ENVIRONMENTAL MANAGEMENT AGENCY
and
THE HON. MINISTER OF LOCAL GOVERNMENT
PUBLIC WORKS AND NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 20 September, 2017 and 29 November, 2017

Opposed Application

D Matawu, for the applicant
B Furidzo, for the 1st respondent
No appearance for the 2nd and 3rd respondents

MANGOTA J: Cities, towns and such town - like settlements are established in terms of, and owe their existence to, legislation. Legislation which gives birth to them is, by and large, supported by other legislation. The supporting legislation enables them to operate as well as discharge their functions efficiently and effectively.

Persons who man such mentioned bodies are always enjoined to operate within the confines of the enabling legislation. Where the conduct of these offends such legislation and a person or a group of persons call(s) them to order and exhort(s) them to work within, and not outside, the law by filing applications such as the present one, the court will, more often than not, decide in favour of the applicant(s). They will do so because it is the duty of the courts to ensure that people live within, and not outside, the law.

The applicant is an association of owners and occupiers of homes which are in the suburb of Marlborough. The suburb falls under the City of Harare.

The applicant called the respondents to order. It moved the court to compel them to live within, and not outside, the law. Its application which it filed under HC 11073/14 is relevant.

The applicant filed three applications with the court. The first one, HC 11073/14, seeks an order which declares as null and void the first respondent's process which relates to the preparation and approval of Amendment Number 1 to the Marlborough Development Plan No. 45 ["the plan"]. The second application, HC 3121/16, is interlocutory in nature. The applicant, through it, seeks leave to produce new evidence in HC 11073/14 in its answering affidavit. The third application, HC 11667/16, is the present wherein the applicant is moving the court to exercise its discretion in terms of rule 4 C as read with order 23, rule 155, of the High Court Rules, 1971. It, in effect, is an application for directions.

The first respondent opposed all the three applications. The other respondents did not oppose the current application. My assumption is that they made up their minds to abide by the decision of the court.

The applicant conceded that it failed to adhere to the rules of court when it filed its first application. It said it did not set out all its evidence in the founding affidavit to the application. It gave as a reason for not having included the evidence it moves the court to allow it to introduce in the answering affidavit that the evidence in question was not in its possession when the affidavit was prepared and filed. It submitted that the first respondent withheld the evidence from it. It said it filed the application in a hurried manner as it had to beat the statutorily laid down deadline. It said it was only after it had filed the affidavit that it became apparent to it that vital evidence which should have been made part of the founding affidavit was omitted from the same. It averred that HC 11073/14 and HC 3121/16 should be properly ventilated together and not as separate applications. Its view, is said, was to protect the important elements of the natural environment of Marlborough suburb and to prevent new residents from occupying houses which will be subjected to periodic flooding. It insisted that such occupation of houses would be detrimental to the houses and convenience of the new residents. It, therefore, applied to introduce new evidence as well as for condonation of its failure to comply with the rules of court.

The first respondent's opposition to the application appeared to stand on nothing. It admitted that the application under HC 11073/14 was filed in a hurry. Its assertion which was to the effect that the amendment of the plan was done after it had consulted the second respondent cannot hold. It was not for it to consult the second respondent. The law enjoined it

to have invited the second respondent to investigate the circumstances of what it intended to do.

The second respondent should have investigated the issue which related to the amendment of the plan and prepared an environment impact assessment report upon which the first respondent should have acted. The first respondent was clearly out of line when it acted on the advice of the second respondent, if any ever came its way.

It is not certain if the first respondent received any advice from the second respondent. The probabilities are that it did not. The fact that it refrained from attaching the advice which it said it received from the second respondent to its opposing papers tends to confirm the view that no advice ever came its way from the second respondent. Its unsubstantiated claim on that aspect of the case cannot hold.

The first respondent made two admissions. These were that:

- (i) its change in land use zoning for the land which stretches towards Gwebi River from *open space* to high density housing scheme was never properly advertised as is required by s 18 of the Regional Town and Country Planning Act [*Chapter 29:12*] [“the Act”].
- (ii) the change was undertaken without any prior notification to the third respondent.

The contents of s 18 of the Act are mandatory. They admit of no discretion on the part of the first respondent. The first respondent, no doubt, acted outside the law when it failed to comply with the mentioned section. It is, therefore, approaching the court with dirty hands. It, in effect, is saying *here I am. I broke the law, but all the same hear me out and give judgment in my favour*. The court will not condone let alone accept such wanton disregard of the law.

The applicant states, correctly so, that the first respondent’s conduct offended s 17 (5) of the Act. The section requires any town planning exercise to satisfy two requirements. These are that there should be:

- (i) a written statement or description of the features of any new plan- and
- (ii) a map or plan which illustrates the changes which will be made.

It is observed that the first respondent did not meet the above mentioned requirements. The approval it made to the plan was effected by its environmental management committee and itself. It did not exhibit the plan to the councillors who approved the same.

The first respondent's assertion which was to the effect that all procedural requirements were complied with was devoid of merit. The assertion remains open to criticism. The criticism could easily have been avoided if the first respondent had attached to its papers a written statement or a description of the features of the new plan and the map or plan which shows the changes it intended to make. It was, therefore, not sufficient for it to alleged, as it did, that all procedural requirements were complied with without showing what it did as evidence of the alleged compliance.

The fact that the second respondent whom the first respondent allegedly consulted did not take an active role on a matter of such a serious magnitude as related to the plan leads to the inescapable conclusion that the first respondent acted on its own on the same. It., in my view, did not consult the second respondent at all when it moved to introduce the plan into the area.

Housing developments, it is needless to mention, fall under projects which require environmental impact assessment reports. Reference is made in this regard to clause 5 of the 1st schedule of the Environmental Management Act [*Chapter 20:27*].

The matter which falls under HC 11073/14 is one for a very big housing development project. The first respondent did not advance any reason which showed why it did not have the requisite report. What it managed to show, however, was that it was prepared to work outside the law for reasons known to itself. Its conduct remains without excuse.

The importance of the applications cannot be underestimated. Their aim and object are to deal decisively with a future threat which remains potentially injurious to the plan's intended beneficiaries. The immediate and future welfare of the beneficiaries remains more important than the decision which the first respondent reached without following the law.

The applicant stated, and the court agrees, that the aim of the application is, to deal with serious irregularities which the first respondent fell into as it approved the plan. The conduct of the first respondent, I am satisfied, offended s 62 of the Constitution of Zimbabwe. It constituted a serious breach of the concept of public accountability.

The case of the applicant is unassailable. It substantiated its averments in a clear and cogent manner. I am satisfied, from its submissions, that it made a convincing case which calls for a departure from the rules of court as is provided for under r 4C of the High Court Rules, 1971. The departure is necessary in the interest of attaining real and substantial justice.

The applicant proved its case on balance of probabilities. The application is, in the premise, granted as prayed.

Coghlan, Welsh & Guest, applicant's legal practitioners
Kanokanga & Partners, 1st respondent's legal practitioners