

ZVIMBA RURAL DISTRICT COUNCIL
versus
THE REGISTRAR OF DEEDS
and
RYDALE RIDGE PARK (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHATUKUTA J
Harare, 10 & 30 August 2017

Urgent Application

P Mangwana, for the applicant
Gama, for the respondent

CHATUKUTA J: This application was brought to me on an urgent basis. The applicant seeks the following relief:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That all title deeds processed by 1st respondent through the invalid certificate of compliance be declared invalid.
2. That the 2nd respondent be and are (sic) hereby directed to cancel all title deeds processed in terms of the invalid certificate of compliance.
3. 1st and 2nd respondent shall pay costs of suit on legal practitioner clients scale.

TERMS OF THE INTERIM RELIEF GRANTED

Pending the determination of this matter, the applicants are granted the following relief:

1. That 1st respondent be and is hereby interdicted from processing transfers of properties created by 2nd respondent in an area known as Rydale Ridge Park

being developed by 2nd respondent without a valid certificate of compliance issued in terms of condition 10 of the subdivision permit.”

The salient facts of this matter are as follows: The applicant is the local planning authority for Zvimba Rural District. The second respondent is a land developer. It developed a suburb called Rydale Ridge Park falling under the jurisdiction of the applicant. It has been selling stands in the suburb to various individuals. It is common cause that from 2007, the applicant has been issuing rates clearance certificates required for the transfer of the stands to the purchasers upon application by the second respondent. The applicant issued such certificates as recent as May of this year. Numerous stands have been transferred to some of the purchasers in terms of the Deeds Registries Act [*Chapter 20:05*].

Sometime in April 2017, the second respondent applied for rates clearance certificates for some of its clients. The applicant, through the Chief Executive Officer, declined to issue some of the rates clearance certificates and instead requested in a letter dated 5 May 2017 that the second respondent produce a parallel development permit, subdivision permit and proof of payment for endowment fees. This prompted the second respondent to file an urgent chamber application on 8 May 2017 under case number HC 4049/17 seeking an order that the applicant (being the second respondent in that matter) issue it with the certificates. On 2 August the following order was granted in favour of the second respondent:

- “(a) 2nd respondent be and is hereby ordered to forthwith sign and issue Rates Clearance Certificates in respect of Stands 6, 301 and 2939 Rydale Ridge Park in favour of the applicant;
- (b) Pending the determination of Applicant’s Application for Review respondent shall not withhold rates clearance certificates from the applicant except if applicant fails to pay rates fixed by 1st respondent.
- (c) The respondents, jointly and severally the one paying the to be absolved, shall pay the costs of suit on a legal practitioners and client scale.”

On 4 August 2017, the applicant filed the present application contending that the second respondent has been using a fraudulent certificate of compliance to secure rates clearance certificates. It was contended that all the previous transfers of property, having been based on the fraudulent certificate of compliance were a nullity and any impending transfers would also be a nullity hence the interdict sought.

The second respondent opposed the application and raised three preliminary issues. The first issue was that the application was not urgent. The second issue was that the applicant does not have the *locus standi* to institute the present proceedings as it is not a planning authority as envisaged under the Regional Town Planning Act [*Chapter 29:12*]. Lastly it was submitted that the relief sought was not competent as it would affect rights of persons who were not joined to the application.

Regarding the first issue, the requirements for urgency are trite. A matter is urgent if at the time the need to act arises the matter cannot wait and the applicant takes immediate corrective legal action. Urgency which stems from a deliberate or careless abstention from action is not the type of urgency contemplated by the rules (See *Kuvarega v Registrar-General & Another* 1998 (1) ZLR 188 (HC), *General Transport & Engineering P/L & Ors v Zimbank Corporation P/L* 1998 (2) ZLR 301 (H) at 302, *Triple C Pigs & Anor v Commissioner-General*, 2007 (1) ZLR 27 & *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) 240 (H)). The question for determination in this matter is when did the need to act arise.

Mr *Gama* submitted that the need to act arose in 2007 when the second respondent first applied for rates clearance certificates. It is at that stage the applicant ought to have filed this application. The applicant has been issuing rates clearance certificates for the past ten years and the second respondent has been transferring stands to its purchasers for the same period. Further the, applicant did not state, either in the certificate of urgency or the founding affidavit, the irreparable harm that it would suffer if the matter was not heard on an urgent basis.

Mr *Mangwana* submitted that upon taking office, the new chief executive officer (who is the deponent to the founding affidavit) in a bid ensure that there was due diligence in all development projects under the applicant, realised that relevant documents required for the issuance of rates clearance certificates in favour of the second

respondent were not on record. He requested the same from the second respondent by letter dated 5 May 2017. The second respondent was not forthcoming prompting him to undertake his own inquiries which resulted in the discovery on 2 August 2017 that the second respondent did not have a valid certificate of compliance. The certificate of compliance was in fact a forged one. The need to act therefore arose on 2 August 2017 and the applicant promptly acted by filing the present application on 4 August 2017. It was submitted that previous chief executive officers were not as diligent as the present one hence the inaction by the applicant over the past ten years.

The applicant cannot, by any stretch of imagination successfully contend that the application is urgent when it has been issuing rates clearance certificates to the second respondent for the past ten years. The parties were in agreement that a rates clearance certificate is a prerequisite for the transfer of property from a seller to a purchaser. In issuing the certificate, a local authority will in essence be authorising transfer of the property. For ten years the applicant has been authorising transfers to numerous purchasers of stands in the Rydale Ridge Park suburb. Any diligent local authority ought to have inquired as far back as in 2007 whether or not the second respondent had a valid certificate of compliance. The lack of diligence of previous chief executive officers cannot not be a basis for suggesting that the need to act only arose when the current chief executive officer took office. An application, as alluded to above, is urgent if at the time the cause of action arises the determination of the matter cannot wait. When the need to act arose in 2007, the applicant did not act with diligence and vigilance.

This court found in *Gwarada v Johnson Others* 2009 (2) ZLR 159 that a lapse of one year after the need to act arose to be an inordinate delay to seek an interdict. The delay to act and the reason for failure to act in the present application are indeed novel. Ten years is an inordinate delay in taking remedial action. Further, the inefficiency of applicant's previous employees cannot be an acceptable excuse for inaction.

Even if I were to be generous with the applicant and accept that it only engaged a diligent chief executive officer this year, the new chief executive officer did not, in my view, act diligently either. He realised as early as April 2017 that there appeared to be anomalies in the manner in which the second respondent's project was being run. According to paragraph 14 of the founding affidavit, he alleges that he only approached

the first respondent on 1 August 2017 inquiring after the compliance certificate. For almost three months after realising the anomalies, he did not take any legal action. He ought to have undertaken the requisite inquiries with the 1st respondent in May 2017 when the second respondent did not respond to his letter of 5 May 2017 and take the appropriate legal action then. In fact, he ought to have exhibited diligence when the applicant was served with the application under case number HC 4049/2017 on 9 May 2017. Further, apart from the chief executive officer's mere say so, the applicant did not place any proof before me of the chief executive's endeavours to obtain the relevant documents from the first respondent. What is more confounding is the fact that even after discovering the anomalies, the applicant has been issuing the second respondent with rates clearance certificates as evidenced by the certificates annexed by the second respondent to its opposing papers. In fact one of the rates clearance certificates was issued on 23 My 2017 after the applicant had been served with the application under case number HC 4049/17.

As rightly submitted by Mr *Gama*, the applicant has not satisfied the other requirement that it will suffer irreparable harm if the application is not heard urgently. Urgency as envisaged by the rules is the type of urgency whose postponement will result in irreparable harm to the applicant in the absence of immediate relief from this court. The mere fact that the applicant did not see any cause to bring this application in the past ten years is an indication that it has not felt any harm at all. It is therefore difficult to fathom the irreparable harm that the applicant will now suffer following the realisation that the second respondent is in possession of an alleged fraudulent certificate of compliance.

I find that the matter is not urgent and consider it not necessary to determine the other points raised *in limine*. However, it is necessary to observe that it is apparent that the relief sought by the applicant both in the interim and in the finale has far reaching consequences as it affects rights of persons not before the court. Such persons may include innocent third, if not fourth parties who may have purchased the stands from the second respondent's purchasers. A determination of this application in the absence of those persons would be clearly contrary to rules of natural justice.

It would be remiss of me not to comment on the apparent non-disclosure by the applicant that the second respondent obtained an order under case number HC 4049/17 two days before the filing of this application. Paragraph 2 of the order is pertinent. It orders the applicant to continue to issue to the second respondent rates clearance certificates pending the determination of an application for review of the applicant's decision to refuse to issue the second respondent with rates clearance certificates and as long as the second respondent pays the rates fixed by the applicant. The order is extant. In essence, the applicant is therefore seeking in this application to circumvent that order without this court determining the second respondent's application for review. It was imperative that it should have disclosed the existence of the order as the granting of the relief sought in this matter would have resulted in two conflicting decisions of this court. Of greater concern is the fact that the applicant was represented in that matter by its present legal practitioners. The applicant's conduct borders on deceit. The applicant's conduct coupled with the inconvenience occasioned by consideration of a purported urgent chamber application filed after such an inordinate delay is a clear abuse of court process warranting the court's show of its strong displeasure with an award of costs on a higher scale as requested by the second respondent.

It is accordingly ordered that:

1. The application is not urgent.
2. The application be and is hereby struck from the roll.
3. The applicant be and is hereby ordered to pay the second respondent costs on attorney and client scale.

Mangwana & Partners, applicant's legal practitioners
Gama & Partners, respondent's legal practitioners