**REPORTABLE (1)**

**CITY OF HARARE**
**v**
**(1) WONDER MUNZARA (2) DELUXE MASHAVA (3) THERESA KASHAVA (4) ROSELINE MUSARINGO**

**SUPREME COURT OF ZIMBABWE**
**BHUNU JA, MATHONSI JA & CHITAKUNYE JA**
**HARARE: 8 NOVEMBER 2022**

*A. Moyo*, for the appellant

*F. Nyamayaro* with Ms *M. Tlou*, for the respondents

**MATHONSI JA:** On 26 May 2022, after hearing arguments in an application brought by the four respondents against the appellant, the High Court ("the court *a quo*") delivered an *ex tempore* judgement, to wit:

> "1. The respondent is hereby ordered to advise the applicants in writing the actual intrinsic values in respect of Stands Nos.1051, 1045, 1044 and 1052 Mount Pleasant Township Harare within 7 days of this order.
>
> 2. Should the respondent not comply with this order within the period aforementioned, the provisional intrinsic values already paid by the applicants shall be deemed to be the full and final payments in respect of the intrinsic values for the stands.
>
> 3. The respondents to pay costs of this application at the rate of attorney and client scale (sic)."

The full reasons for that judgment were provided on 22 August 2022 at the specific request of the appellant. This is an appeal against that whole judgment of the court *a quo*. After hearing submissions on appeal on 8 November 2022 we issued the following order:

"It is ordered as follows:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

   'The application is dismissed with costs.'
3. The reasons for judgment shall follow in due course."

What follows are those reasons for the judgment.

**THE FACTS**

The appellant is a municipal authority established in terms of the Urban Councils Act [*Chapter 29:15*] and is charged with the responsibility of running the affairs of the City of Harare. What has brought the parties on a collision course are allocation letters ostensibly penned on behalf of the appellant by its officials and directed to the four respondents. The circumstances are as follows.

On 13 November 2019, Engineer H. A. Chisango, then the Town Clerk of the appellant, wrote a letter to the first respondent in which he offered to the latter stand number 1051 Mount Pleasant Township Harare on certain terms and conditions. A similar letter was written to the second respondent by the same official on the same date. It was followed up by another letter dated 11 December 2019, this time written by A. Nhekairo, then the Director of Housing and Community Services. Nhekairo demanded that the second respondent should pay "a provisional deposit for intrinsic land price" of ZWL$$50 000.00 to the appellant.

Much later, on 26 June 2020, Nhekairo again wrote a letter to the third respondent in which he offered to the third respondent stand 1044 Mount Pleasant Township, Harare. The same official again wrote a letter dated 19 May 2020 to the fourth respondent in

which stand 1052 Mount Pleasant Township, Harare was offered to her on terms similar to those set out in earlier letters to the other respondents.

All four respondents fulfilled the conditions set out in their allocation letters. The first respondent paid an administration fee of ZWL$1 500.00 and a provisional intrinsic land value charge of ZWL$50 000.00. The second respondent also paid the same amounts. The third respondent, in fulfilment of conditions laid out in her letter of allocation, paid an administration fee of ZWL$4 000.00 and a provisional deposit for the intrinsic land value of ZWL$150 000.00. The fourth respondent also paid the same amounts paid by the third respondent.

In terms of the allocation letters given to the respondents, the appellant should then have valued the stands and thereafter notified the respondents of the actual intrinsic values for them to pay such values to the appellant. That did not happen. As such the respondents could not commence development of the stands. The respondents were agitated and approached the court *a quo* for redress.

**PROCEEDINGS BEFORE THE COURT *A QUO***

In a joint effort, the four respondents filed a court application seeking an order compelling the appellant to make available to them the actual intrinsic values of the stands allocated to them. In the event of failure, they craved an order deeming the provisional intrinsic values they had already paid, as the full and final payments of the said intrinsic values. All of that was sought on the pain of costs on the adverse scale of legal practitioner and client.

The basis of the claim was that the respondents had fulfilled the terms and conditions fixed in the allocation letters. As such, the appellant was obliged to perform its part of the bargain in order to move the matter forward and enable the respondents to develop their stands. The application was opposed by the appellant.

The appellant raised the preliminary point that the relief sought was incompetent in that it sought to invite the court *a quo* to usurp the powers of an administrative body by fixing the intrinsic values of the stands. The appellant advanced the argument that the process of evaluating the stands was the domain of the appellant in terms of the Urban Councils Act [*Chapter 29:05*] and was not the province of the court.

Apart from that, the appellant contended that the stands mentioned by the respondents were either non-existent or had already been designated as church land and allocated to other parties. According to the appellant, stand 210 Mount Pleasant, on which the land claimed by the respondents is located is held by the appellant by Deed of Transfer Number 438/58. The land is a designated public open space set aside for passive recreation purposes in terms of the Operative City of Harare Arundel Local Development Plan.

The appellant explained that in 1997 the City Planner proposed a subdivision of stand 210 under application M/8/97 and Plan No. TP2F1996 was drawn from which, in 2017, two church stands were created in compliance with statutory requirements. In due course the two stands, being stands 1043 and 1044, having been created with Ministerial approval as required by law, were allocated to two church organisations. They could not be allocated to any of the respondents.

According to the appellant, the rest of stand 210 remains open land designated as such and set aside for passive recreation purposes. No attempt has been made to apply for change of its use to residential stands. Unfortunately this is where the respondents claim the other two stands are located. No due process was followed to create the stands, and for that reason, so the appellant contended, any creation of stands 1051 and 1052 would be fraudulent and unlawful. For that reason, a Notice of Demolition was served on one of the respondents who was carrying out illegal construction on one stand.

The court *a quo* found the point *in limine* taken by the appellant to be "misplaced" because all that the respondents urged of it was the remedy of specific performance which remedy was within its jurisdiction. It found that the respondents, having complied with all the requirements set by the appellant and having expressed their desire to pay the intrinsic values of the stands, were entitled to the relief that they sought.

The court *a quo* rejected the appellant's defence that due process had not been followed and that two of the stands did not exist. In doing so, the court *a quo* took the view that the appellant was "approbating and reprobating" as the evidence suggested that at some stage the appellant accepted that the stands existed. Regrettably the court *a quo* did not shed any light as to why it awarded costs against the appellant on the punitive scale.

**PROCEEDINGS BEFORE THIS COURT**

The appellant was aggrieved by that turn of events. It noted an appeal to this Court on the following grounds:

"1. The court *a quo* erred in law in granting the order in circumstances where granting the same would sanitize an unlawful transaction which is in direct contravention

of s 49 (3) of the Regional Town (and Country) Planning Act [*Chapter 29:12*] and s 152 of the Urban Councils Act Councils Act [*Chapter 29:15*].

2. The court *a quo* grossly misdirected itself on the facts which amounted to an error in law, in making an irrational finding that stands 1051 and 1052 Mount Pleasant were in existence without any evidence of their existence in the extant lay out plan.
3. The court *a quo* grossly misdirected itself on the facts, which amounted to an error in law, in failing to appreciate that the transaction in respect of the stands was void *ab initio* as failure to comply with the lawful due process to create the said stands renders the transaction and the very existence of the stands, null and void.
4. The court *a quo* grossly misdirected itself on the facts which amounted to an error in law, when it made an irrational finding that by virtue of its conduct through its officers, the appellant was bound by the agreement it entered into with the respondents, whereas there was no valid and or lawful agreement between the parties."

There may be four grounds of appeal but they all dovetail into one crisp issue for determination in this appeal. It is whether or not the agreements entered into between the parties were lawful and enforceable at law.

The gist of Mr *Moyo's* submissions on behalf of the appellant is that the agreements were unlawful in two respects. Firstly, they contravened s 49(2) and (3) of the Regional Town and Country Planning Act [*Chapter 29:12*] which regulates the change of use of any land reserved for a particular purpose. The land in question was reserved for purposes

other than residential in the master plan. Residential stands could not be created by anyone without following the procedure laid out in the law.

The procedure for creation of residential stands not having been complied with, the parties could not enter into any lawful and/or enforceable agreement for the allocation or disposal of the stands in questions.

Secondly, Mr *Moyo* submitted that the provisions of s 152 (2) of the Urban Councils Act [*Chapter 29:15*], prescribing the procedure to be followed by a municipal authority intending to sell any land owned by it, was not complied with when the officials of the appellant purported to allocate the stands to the respondents. Accordingly, so it was argued, whatever the parties did was an exercise in futility. It did not give rise to any lawful agreements as could be enforced by a court of law.

Mr *Moyo* rounded off by submitting that only stands 1043 and 1044 were procedurally created out of the composite stand 210 Mount Pleasant Township, Harare. The approval of the Minister of Local Government to do so was produced as evidence and it indeed shows that the Minister approved change of use of the land to church use. In that regard, the court's attention was drawn to minutes of the appellant's council meeting which adopted recommendations made on 29 March 2018 by the Finance and Development Committee to allocate church stands 1043 and 1044 Mount Pleasant Township to the Reformed Church in Zimbabwe and the Great Light Heaven Ministries respectively.

Finally, it was argued on behalf of the appellant that no further stands were lawfully created out of stand 210 Mount Pleasant Township after the two church stands. Thus,

there could not be a lawful agreement for the disposal of the so-called stands 1051 and 1052 which did not exist.

*Per contra*, Mr *Nyamayaro* for the respondents initially took the stand point that all the issues raised in the appellant's four grounds of appeal were being raised for the first time on appeal. In his view the court *a quo* did not relate to them and as such it was inappropriate for this Court, as an appellate court, to relate to those issues.

Following exchanges with the court, it became apparent to Mr *Nyamayaro* that, not only did the four grounds of appeal raise points of law dispositive of the matter, those issues were squarely placed before the court *a quo*. In fact the issue of illegality was discussed throughout the appellant's opposing affidavit. For instance, at para 2.2 the deponent averred:

> "2.2 With that being mentioned, the respondent's City Planning Division has no knowledge of the stands which were purportedly created in favour of the applicants. <u>There is no evidence to show that due process was followed in the creation of the stands</u>." (The underlining is for emphasis)

The deponent of the opposing affidavit continued with that line of argument at para 3.1, which reads:

> "3.1 City of Harare did not allocate the said stands to the applicants, because such stands would not have been created without the due process set out above. This points to the fact that the transactions were fraudulent and the respondents cannot be held liable for such fraudulent acts. As has been highlighted above, the two stands which were created are church stands hence they cannot be converted to residential stands when the approval plan is to the effect that they are church stands."

Having come unstuck on that score, Mr *Nyamayaro* took another dimension. He submitted that all the stands claimed by the respondents exist because at the time of allocation the respondents visited the site. They were shown the pegs and individual diagrams

for each stand. According to Mr *Nyamayaro*, the fact that accounts were created in which the respondents deposited money means that the stands not only existed but were also properly allocated.

In the end, again following exchanges with the court, Mr *Nyamayaro* conceded that the onus to prove the existence of valid agreements was on the respondents. He also conceded that no evidence was placed before the court *a quo* to prove compliance with the procedure for alienation of municipal land.

**THE LAW**

It was common cause that Stand 210 Mount Pleasant Township, Harare on which the land forming the basis of the dispute between the parties, is undeveloped open space. There was also convergence between the parties that the open space was reserved for recreation purposes and that certain processes have to be undertaken before alienation of the land could be done. One has to examine the law governing that process.

In terms of s 49 (2) and (3) of the Regional Town and Country Planning Act [*Chapter 29:12*]:

> "(2) An authority which has acquired land in terms of this Act or under the repealed Act may, with the consent of the Minister, dispose of the land to such person in such manner and subject to such conditions as may appear to it to be expedient for the purpose of ensuring –
>
> (a) the best use of the land concerned or of any other land or any buildings or works existing or to be erected on the land; or
>
> (b) the erection on the land concerned of such buildings or works as appear to it to be needed;
> for the proper use of the land for the purposes for which it was acquired.
>
> (3) Notwithstanding an operative master plan or local plan or an approved scheme or the terms of any permit or any approval issued in terms of Part III, IV or V of the repealed

Act, the Minister may authorise the use of any reserved land for a purpose other than that for which it was so reserved;

> Provided that the Minister shall not authorise any use in terms of this subsection until-
> (a) he has served notice thereof on the local planning authority, the owner of the land concerned and every owner of property adjacent to the reserved land and afforded them an opportunity of lodging objections or representation."

Where land belonging to a municipal authority is reserved for a specific purpose in the Master Plan, the procedure for changing that use is as set out above.

While the local authority may change the use for which its land is acquired or reserved, it requires the approval of the Minister of Local Government. Where it is the Minister who intends to change the use, the Minister is required to act in accordance with ss (3) of s 49. The procedure set out in the section is a pre-requisite for any change of use of land.

The provisions of s 49 (2) and (3) were considered in the case of *Delta Corporation & Ors v Harare City Council & Ors* 2002 (2) ZLR 182 (H)at 192D-G, 193A where the court remarked:

> "The legislation governing the matter is the Regional, Town and Country Planning Act [*Chapter 29:12*] which makes provision, among other things, for land which is to be vested in the municipality. The municipality that has acquired land shall use it for the purpose for which it was acquired or for use which is permissible in terms of the operative master plan or local plans. A municipality that has acquired land may, in terms of s 49(2), with the consent of the Minister, dispose of land to anyone in such manner and subject to such conditions as may appear to it to be expedient for the purpose of ensuring the best use of the land concerned or the erection on the land concerned of such buildings as appear to be needed for the proper use of the land for the purposes for which it was acquired. Section 49 (3) provides that, notwithstanding an operative master plan or local plan, the Minister may authorise the use of any reserved land for a purpose other than that for which it was so reserved. But the Minister may not authorise any use until he has served notice on every owner adjacent to the reserved land and afforded them an opportunity of lodging objections and representations.

--- But the Minister may not give such consent until he has given public notice inviting objections and representations and has given the municipality concerned an opportunity to respond to the objections and representations."

In addition to the above legislative provisions, s 152 (2) of the Urban Councils Act [*Chapter 29:15*] applies to the sale or alienation of municipal land. It provides:

"(2) Before selling, exchanging, leasing, donating or otherwise disposing of or permitting the use of any land owned by it the council shall, by notice published in two issues of a newspaper and posted at the office of the council, give notice-

(a) of its intention to do so, describing the land concerned and stating the object, terms and conditions of the proposed sale, exchange, lease, donation, disposition or grant of permission of use; and
(b) that a copy of the proposal is open for inspection during office hours at the office of the council for a period of twenty-one days from the date of the last publication of the notice in a newspaper; and
(c) that any person who objects to the proposal may lodge his objection with the town clerk within the period of twenty-one days referred to in paragraph (b)." (The underlining is for emphasis)

There is therefore an elaborate process that has to be undertaken by a municipal authority before it may lawfully dispose of its land. It is a process provided for by statute.

**EXAMINATION**

The appellant is an administrative authority reposed with the responsibility to manage public property including land. When doing so it is regulated by statute and cannot act like a private individual. The respondents laid claim to four stands belonging to the public body allocated to them by office bearers in the appellant's employ.

The irrefutable evidence placed before the court *a quo* was that the open space which is stand 210 Mount Pleasant was partially subdivided to create only two recognisable stands namely, stands 1043 and 1044 specifically for church use. It was certainly not for

residential purposes as claimed by the respondents. More importantly, those two stands were already allocated to two church organisations prior to their purported allocation to the respondents.

The evidence before the court *a quo*, which it completely over looked was that the remainder of stand 210 Mount Pleasant remained an open space for recreational as opposed to residential purposes. The processes preceding change of use set out in s 49 of the Regional Town and Country Planning Act [*Chapter 29:12*] for such change of use were never set in motion.

Stands 1051 and 1052 claimed by the respondents could not have been lawfully created out of the remainder of stand 210 Mount Pleasant Township, Harare. It follows that the alleged agreements sought to be relied upon by the respondents were *ultra vires* the provisions of s 49 (2) and (3) of the Act as such stands could not have been created outside the remit of the law.

To the extent that the said agreements did not satisfy the requirements of s 49 (2) and (3), which are mandatory, they were invalid and unenforceable at law. In respect of the said stands 1051 and 1052, were they to be lawfully created, it was mandatory that the approval of the Minister be sought and obtained prior to any change of use of the open space reserved for recreational purposes to residential stands. I mention, for completeness, that proper subdivisions and subdivision permits would have been procured in the process.

It is also important to mention that land belonging to the appellant could not have been lawfully sold without compliance with s 152 (2) of the Urban Councils Act

[*Chapter 29:15*]. Its provisions are also peremptory and they proscribe the selling of municipal land without first giving notice and inviting objections following the step by step method set out therein.

To the knowledge of the court *a quo*, the parties herein did not even begin to comply with s 152 (2). Given that no such notices were published as required by law before the conclusion of the agreements, there was therefore a direct violation of the peremptory provisions of s 152 (2). It follows that the agreements were a nullity. The court *a quo* misdirected itself in a big way by seeking to enforce a nullity.

I state, again for completeness, that there was a signal failure to comply with s 39 of the Regional Town and Country Planning Act. The section is peremptory and proscribes the subdivision of any property or the conclusion of any agreement for *inter alia*, change of ownership of any portion of a property without a subdivision permit. Clearly therefore, the agreements purportedly entered into by the parties breached s 39 to the extent that they involved the sale of non-existent subdivided portions of a stand.

It is trite that illegal agreements are void *ab initio*. As they are invalid, they do not create obligations. See van Der Merwe, Van Huyssteen, Reinecke & Lubbe, *Contract, General Principles*, 4th ed at p 173. It follows that the respondents have no recognisable right to claim against the appellant.

**DISPOSITION**

The question whether or not the appellant's Town Clerk and Director of Housing and Community Services had authority to allocate the stands to the respondents pales

to insignificance regard being had to the non-compliance with both s 49 (2) and (3) and s 39 of the Regional Town and Country Planning Act and s 152 (2) of the Urban Councils Act [*Chapter 29:15*]. Whatever it is that those officials agreed with the respondents was of no legal consequence. It is a nullity and does not bind anyone. The appeal has merit and ought to succeed.

Regarding the question of costs, it is the practice of the courts in this jurisdiction that the costs follow the result. The appellant has been successful and as such, there is no reason why its costs should not be borne by the respondents.

It is for the foregoing reasons that this Court issued the order quoted earlier in this judgment.

**BHUNU JA** : I agree

**CHITAKUNYE JA** : I agree

*Gambe Law Group*, appellant's legal practitioners

*Farai Nyamayaro Law Chambers,* respondents' legal practitioners