MARGOLIS TRADING (PVT) LTD
versus
HARARE MUNICIPALITY

HARARE HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 10 November 2016 and 23 August 2017

Opposed Matter

Ms N. G Maphosa, for the applicant
D Kanokanga, for the respondent

MAKONI J: The applicant approached the court seeking an order in the following terms:

It is ordered that

1. Pending the outcome of the dispute between the parties concerning proper and lawful chargeable rates over Stand 571 Derbyshire Township Harare.
    a) The respondent shall issue out Rates Clearance Certificates over the individual subdivided stands as and when they are sold to purchasers to allow the transfers of ownership to take place.
    b) The respondent shall charge rates for the purposes of the certificates in terms of rates chargeable on the stand 571 Derbyshire Township Harare as at 1 October 2010.
2. The respondent shall pay the costs of suit

The background to the matter, put in simple terms, is that the applicant is the owner of stand no. 571 Derbyshire Township Harare (the property). It is an industrial stand. The applicant obtained a subdivision permit and proceeded to subdivide the property. The general plan was approved by the Survey General on 29 October 2010. On 16 April, 2012 the Registrar of Deeds registered the Consolidated Deed of transfer under deed of Transfer Number 1707/12. Prior to

August 2013, the respondent was levying rates over the entire property of approximately US$400.00.

In July 2013, the respondent issued the applicant with a Rates Clearance Certificate (RCC) showing that no rates were due. In August 2013, the respondent sent a bill to the applicant in the sum of $302 866.17 stating that the amount was the total of rates due on the individual stands which were subdivided from stand 571 Derbyshire. The bill was backdated to October 2010 when the General Plan was approved.

The applicant raised a query regarding the bill and it was reduced to $114 590.72. The respondent removed charges levied for water and refuse. The levies in respect of land remained.

There is a dispute between the parties regarding the rates payable by the applicant. The respondent has instituted action claims against the applicant in respect of rates it say are owed by the applicant. The applicant has instituted the present proceedings to obtain relief pending the determination of the dispute between the parties.

Ms Maphosa contends that the rates being charged by respondent are not yet due. In terms of s 276 of the Urban Council Act [Chapter 25:15] (The Act), and in respect of non-residential stands, rates will become due and payable on individual stands, where the improvements are completed, or when erection of building has been completed and that the buildings are occupied. She further contended that the applicant was never consulted as to the calculations of the rates, on its developed land and was never given the opportunity to object to the billing as provided for by the law. Furthermore, levying rates from the date of the approval of the plan by the Surveyor General and before the properties are sold or occupied or built would be reprogressive as it effectively punishes a developer with higher rates, for developing and subdividing a piece of land. This would not be justifiable in a democratic society.

The application is opposed and Mr Kanokanga contends that the application is fatal as the applicant has no legal right to act on behalf of the "purchasers of the subdivided stands, belonging to the applicant." Further the respondent is entitled in terms of the law to levy rates fixed by it to land owners. The subdivisions became liable for rates when the certificate for consolidated title was issued on 16 April 2012.

The issue for determination is whether this court can compel the respondent to issue a RCC pending the determination of the dispute between the parties as to whether rates fixed and levied are due and payable to the respondent.

It is not in dispute that the respondent in terms of s 269 of the Act, is entitled to levy rates in respect of all property within its jurisdiction and that the applicant's property falls under its jurisdiction. It is also not in dispute that the applicant, in terms of s 279 of the Act is primarily liable to pay rates, fixed and levied by the respondent. The point of departure comes with s 282 (2) (a) which provides

> "No transfer of land shall be registered in, and no certificate of consolidated or registered title to any land shall be issued by, a Deeds Registry if the land concerned is in a council area or in a local government area administered and controlled by a council or local board, unless there is produced to a Registrar of Deeds a valid certificate issued in terms of this section by the appropriate issuing authority stating that all rates and charges made and levied in respect of the land during the period of five years immediately preceding the date on which the certificate, in terms of subsection (3), ceases to be valid have been paid."

The applicant contends that there is a dispute regarding rates fixed and levied by the respondent wherein the respondent is charging rates on individual industrial stands where there is no development contrary to the Act.

The respondent is arguing that the sub divided property was brought on board, for purposes of levying rates, through a Supplementary Valuation Roll. The respondent further contends that the applicant has not indicated to the court in terms of which law it can compel the respondent to issue RCC before the payment of rates. To do that would amount to going against the provisions of the Act.

The respondent took issue with the fact that the applicant is seeking an order on behalf of various purchasers. Whilst l agree with Mr Kanokanga that it would be incompetent for the court to make an order in favour of the various purchasers who are not even cited, my view is that it would not be fatal to the applicant's case. In terms of s 279 of the Act, the applicant is liable to pay the rates on the property in issue as he is the owner of the property. The draft order could have been amended to reflect the correct position. The confusion came about as a result of what Ms Maphosa termed a conveyancing practice whereby the purchaser is made to pay the rates and then be reimbursed later by the seller.

I would want to agree with the submissions, made by Mr Kanokanga. What the applicant is asking of the court is to suspend the provisions of a statute pending the determination of the dispute between the parties. Section 282 (2) (a) is couched in peremptory terms. It stipulates that certain formalities must be complied with before a RCC can be issued. Can a court suspend the provisions of a statute? The answer is found in *Registrar General* v *Combined Harare Residents Association & anor* 2002 (1) ZLR 83 (s) at 105 G - 106D where the following was stated:

> "With respect, this is where the learned trial judge fell into error. The court cannot suspend the provisions of the Act for whatever purpose and no matter how desirable and plausible that might be. It is the legislature itself, and possibly an authority properly delegated, that can amend an Act of Parliament. A court cannot amend an Act of Parliament. This is trite, P S Atiah in his work, *Law and Modern Society* at p 131 had this to say:
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> > :It is of course quite clear that law-making by the courts is a different sort of process from law-making by Act of Parliament. Apart from the totally different procedures involved, and the different characteristics of the persons who make the law in the two processes, even the most fervent admirer of judicial law-making will admit that it differs from parliamentary legislation in important respects. First, it is subordinate law-making. Parliament can override judicial decisions, while the judges cannot override what parliament does. A court can declare a SI void on the ground that it was not within the authority delegated by Parliament but (subject to the doubts discussed above concerning Scotland and the EEC) no court can declare an Act of Parliament void."
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> Zimbabwe has a written Constitution. The courts can declare an Act of Parliament unconstitutional by virtue of the provisions of s3 of the Constitution of Zimbabwe, which provides that the Constitution shall be the supreme law of Zimbabwe and if any other law is inconsistent with the Constitution that other law shall, to the extent of the inconsistency, be void. A court can strike down an Act of Parliament for being ultra vires but cannot amend it simply because necessity so demands. Thus, the learned judge clearly misdirected himself in concluding that it was incumbent upon him to modify the provisions of the Act."

I also agree with Mr Kanokanga that the bulk of the submissions made by Ms Maphosa, in addressing prospects of success in the main matter, should be reserved for the court dealing with the dispute between the parties.

It appears from the authorities quoted by the applicant in its Heads of Argument such as *N& B Ventures P/L* v *Minister of Home Affairs and Anor* 2005 (1) ZLR 27, that the applicant is aggrieved by the decision of an administrative authority, the respondent. There are procedures available to a party aggrieved by the decision of an administrative authority. The applicant should have considered following those procedures, rather than ask the court to do that which it is prohibited to do by law.

In view of the above, the applicant has not made out a case for the relief that it seeks. In the result, I will make the following order;

1. The application is dismissed with costs.

Sawyer and Mkushi, applicant's legal practitioners
Kanokanga and Partners, respondent's legal practitioners