TINIEL ALBERT MAFIRAKUREVA TAPFUMA
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 4 September 2018 & 23 January 2019

Opposed Application

T.R Tsivama, for the applicant
Miss P Kaseke, for the respondent

MUREMBA J: The applicant was issued with a permit by the respondent on 6 February 2014 to operate a hotel on lot 103 of Greendale (103 Cecil Road/Valley Road, Greendale) in terms of s 26 (3) of the Regional, Town and Country Planning Act [*Chapter 29:12*], but the respondent later cancelled the permit on 6 December 2017 on the basis that the applicant had violated the conditions of the permit. The applicant approached this court seeking a review of the respondent's decision to cancel the permit on the grounds that the respondent has no power at law to revoke a permit it would have issued. The applicant further averred that before the decision to cancel was made he was not given an opportunity to be heard which is a violation of the principles of natural justice. The applicant averred that the respondent thus exhibited bias against him. I heard this matter on 4 September 2018 and granted the application. I have been asked for the written reasons thereof and these are they.

In opposing the application the respondent raised a point *in limine* to the effect that in terms of s 38 of the Regional, Town and Country Planning Act [*Chapter* 29:12] the applicant ought to have appealed to the Administrative Court instead of approaching this court with an application for review. In the answering affidavit in response to the point *in limine* the applicant averred that he is entitled to apply for review in terms of s 26 and 27 of the High Court Act [*Chapter 7:06*]. Looking at these provisions of the High Court Act, I dismissed the point in *limine*. They read:

26 Power to review proceedings and decisions
Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe.
27 Grounds for review
(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
(*a*) absence of jurisdiction on the part of the court, tribunal or authority concerned;
(*b*) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
(*c*) gross irregularity in the proceedings or the decision.

Clearly, the applicant was entitled to apply for review as long as he raised appropriate grounds for review as provided for in s 27 of the High Court Act. In any case s 38 (1) (a) of the Regional, Town and Country Planning Act which the respondent sought to rely on does not provide for an appeal against cancellation of a permit. It provides for appeals in respect of applications for a permit, permissions and extensions of time. It reads:

"38 (1) Any person—
(*a*) who is aggrieved by any decision made or deemed to have been made by a local planning authority in connection with an application for—
(i) a permit or preliminary planning permission; or
(ii) any permission required in terms of a development order, building preservation order or tree preservation order; or
(iii) an extension of time as contemplated in paragraph (*d*) of subsection (1) of section *twenty-two* or subparagraph (ii) of paragraph (*a*) of subsection (2) of section *twenty-four*;
may, within one month from the notification of such decision;…. or such longer period as the President of the Administrative Court may in writing authorize, appeal to the Administrative Court in such manner as may be prescribed in rules and the Administrative Court may make such order as it deems fit.

It was only in the heads of argument that it was stated that the respondent relied on s 38 (1) (b) (iv) in cancelling the permit, but even then that provision is also not relevant because it does not deal with cancellation of permits. It reads:

"(1) Any person—
(b) upon whom—
(i) a building preservation order; or
(ii) a tree preservation order; or
(iii) an enforcement order; or
(iv) a notice in terms of section *thirty-five*;
has been served or who is otherwise aggrieved by such order or notice, may, within one month from the serving of the order or notice; or…. or such longer period as the President of the Administrative Court may in writing authorize, appeal to the Administrative Court in such manner as may be prescribed in rules and the Administrative Court may make such order as it deems fit.

The provision deals with appeals to do with notices given in terms of s 35 and these notices pertain to the local planning authority's powers to remove, demolish or alter existing buildings or discontinue or modify uses or operations upon payment of compensation. Before taking any such action the local planning authority is required to serve a notice upon the owner of the land concerned and upon any other person who, in the opinion of that authority, will be affected thereby, specifying the nature of, and the grounds upon which it proposes to take that action and the period within which an appeal may be lodged in terms of section thirty-eight. It reads:

"35 Powers to remove, demolish or alter existing buildings or discontinue or modify uses or operations or require abatement of injury

(1) Subject to this section, a local planning authority may—

(*a*) upon compensation being paid in terms of section *fifty* except as otherwise provided in subsection (4) of section *fifty-two*—

(i) remove, demolish or alter any building which constitutes existing development;

(ii) by order, require the discontinuance of any use or operations;

(iii) by order, impose any conditions subject to which any use or operations shall continue, in which case such order shall, upon it becoming operative, be deemed, for the purposes of this Part, to be a permit issued subject to the conditions so imposed;

(*b*) without payment of compensation, by order, require any owner of land at his own expense to take such action as may be specified in the order to abate any injury caused to the amenities of any other land by—

(i) the ruinous or neglected condition of any building or fence; or

(ii) the objectionable or neglected condition of the land.

(2**) Before taking any action in terms of subsection (1), the local planning authority shall serve notice upon**

the owner of the land concerned and upon any other person who, in the opinion of that authority, will be affected thereby, specifying—

(*a*) the nature of, and the grounds upon which it proposes to take, that action; and

(*b*) the period within which an appeal may be lodged in terms of section *thirty-eight*.

Clearly s 35 has nothing to do with cancellation of permits. The notice that it talks about in subsection 2 has nothing to do with intended cancellation of permits but intended removal, demolition or alteration of existing buildings or discontinuation or modification of uses or operations. In *casu* the applicant was served with a notice of cancellation of permit, a notice which is totally unrelated to the notice referred to in s 35. The applicant could not therefore use s 38 (1) (b) (iv) in appealing to the Administrative Court.

In response to the merits the respondent averred that the applicant violated clauses 5 and 6 of the permit which prohibited degeneration of the hotel into a nuisance in the form of noise and the use of public speakers, microphones, radios, disco equipment and other musical instruments which interfere with the peace and tranquillity of the neighbourhood as manifested by repeated

public complaints to it. The respondent averred that in cancelling the permit it followed all processes provided by law and that its Environmental Management Committee resolved to revoke the permit. It further averred that the Regional, Town and Country Planning Act [*Chapter* 29:12] allows it to cancel a permit especially where provision for cancellation is provided for in the permit as reflected in clause 6 of the permit which was issued to the applicant. The respondent averred that complaints by residents were the basis for revoking the permit. The use of speakers was prohibited in the permit and the applicant did not comply with the respondent's warning letter of 24 March 2017. The permit was for the use of a hotel which the applicant failed to build within the time frame specified in the permit thereby failing to fulfil the requirements of the permit. He had up to 1 March 2016 to build the hotel but he did not. He did not approach the respondent to extend the time frame as set out in clause 12 of the permit. The applicant was concentrating on the ancillary activities instead of the principal activities set out in the permit which was not the intended use of the land.

In the answering affidavit the applicant maintained that he was not given an opportunity to be heard before the drastic action to cancel the permit was taken. He contended that the respondent was not entitled to act as it did. He disputed the authenticity of the letters of complaint the respondent adduced saying that there is no entity called Greendale Wetland residents. Furthermore, he stated that even if the respondent had received complaints, it should not have accepted the complaints as genuine without hearing his side of the story. He stated that the respondent did not even explain the process it followed in cancelling the permit. He averred that in September 2017 the respondent's personnel recommended construction of a sound proof structure at the premises which was done to the satisfaction of the respondent. He admitted to having failed to complete the hotel within the time frame given in the permit but averred that that was not the reason why the respondent cancelled the permit. He contended that the use of speakers is not completely ruled out in the permit. It is only prohibited when it causes too much noise affecting the peace and tranquillity of the neighbourhood.

In upholding the application I considered that the respondent did not show how in terms of s 38 (1) (b) (iv) of the Regional, Town and Country Planning Act which I have already discussed above it has powers to revoke the permit. No procedure for cancellation of the permit is even

outlined in that section. The closest the respondent can get in interfering with a permit is amending it as provided for in s 26 (12) of the said Act. The provision reads:

"26 (12) A local planning authority may amend a permit granted in terms of this section or any conditions thereof
if—
(*a*) the holder of the permit agrees to such amendment; and
(*b*) in the opinion of the local planning authority the amendment is of a minor nature and does not materially alter the effect of the permit originally granted."

In this regard, the respondent revoked the permit when it has no jurisdiction to do so under s 38 (1) (b) (iv) of the Regional, Town and Country Planning Act.

Even if it is correct that the respondent has powers to revoke the permit, it is mandated to comply with the provisions of s 3 of the Administrative Justice Act [*Chapter* 10:28] which provides that a person who is going to be affected by an administrative action to be taken should be given notice of the intended action and an opportunity to make representations before such action is taken. It reads:

"**Duty of administrative authority**
3(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—

(*a*) act lawfully, reasonably and in a fair manner; and
(*b*) ……
(*c*……..
(2) In order for an administrative action to be taken in a fair manner as required by paragraph (*a*) of subsection (1), an administrative authority shall give a person referred to in subsection (1)—
(*a*) adequate notice of the nature and purpose of the proposed action; and
(*b*) a reasonable opportunity to make adequate representations; and
(*c*) adequate notice of any right of review or appeal where applicable. (My underlining for emphasis)

The requirements in s 3 (1) and (2) can only be departed from in exceptional circumstances as provided for in s 3 (3) which reads:

"3(3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if—
(*a*) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or
(*b*) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including ·
(i) the objects of the applicable enactment or rule of common law;
(ii) the likely effect of its action;
(iii) the urgency of the matter or the urgency of acting thereon;

(iv) the need to promote efficient administration and good governance;
(v) the need to promote the public interest.

In *casu* the letter which was written to the applicant by the respondent which is dated 24 March 2017 which the respondent said it relied on in cancelling the permit pertained to two issues. The first issue was about the unauthorised use of 8 freight containers which had been found on the premises of the applicant as permanent storage rooms. The applicant was warned to cease the illegal activity by 24 April 2017 failure upon which the respondent was going to issue an enforcement order, prohibition order and demolition order. The applicant was instructed in that letter to make representations on the cessation of the illegal activity. The second issue was a noise complaint coming from the neighbours. The applicant was only advised to refer to his permit on this issue. He was not invited to make any representations on this issue. What is pertinent is that in that letter there was neither an indication whatsoever that his permit was going to be cancelled nor an invitation to the applicant to make representations or to show cause why his permit should not be cancelled. The permit was only cancelled on 6 December 2017, 8 months later without the respondent having written any other communication to the applicant. When the cancellation was made, the applicant was never told that he had not complied with the warning he was given in the letter of 24 March 2017. All he received was a letter dated 21 March 2018 notifying him that his permit was cancelled on 6 December 2017 due to the following reasons:

> "(a) The venue has degenerated into a public nuisance in the form of noise as manifested by repeated public complaints to the Zimbabwe Republic Police and to the Local Planning Authority.
>
> (b) The use of loud speakers, microphones, radios/ disco equipment, amplifiers and musical instruments and similar devices is interfering with the rest, peace and tranquillity of the neighbourhood and
> (c) The property is being used for functions venue as opposed to the hotel use provided by the permit."

By merely writing the letter of 24 March 2017 in which it warned the applicant about the noise, it cannot be said that the respondent followed due process before cancelling the permit. There is no way that letter can be taken as a notice to the applicant of the intended cancellation of the

permit. In any case, the letter did not even deal with the two other reasons which respondent gave as its reasons for cancelling the permit i.e. the use of devices interfering with the rest, peace and tranquillity of the neighbourhood and the property being used for functions as opposed to hotel use. The applicant was neither warned nor invited to make representations on these two other issues before his permit was cancelled. I also realised that the respondent in its opposing affidavit sought to give different reasons for cancelling the permit from the reasons it gave in the letter of cancellation it wrote to the applicant. In the letter it never said that it had cancelled the permit because the applicant had failed to build the hotel to completion as stipulated in the permit, a reason it sought to use in the present application. If this had been one of the reasons for cancelling the permit, it should also have been stated as one of the reasons why the permit was cancelled in the letter of 21 March 2018 which was written to the applicant notifying him of the cancellation of the permit. Again, the applicant ought to have been given notice about it and invited to make representations or show cause why his permit should not be cancelled on this basis.

By failing to give notice of the intended cancellation of the permit to the applicant and an opportunity for him to make representations on why his permit should not be cancelled, the respondent clearly violated the *audi alteram partem* principle which is a rule of natural justice. It proffered no justification for such violation. This was a gross procedural irregularity. The purported cancellation of the permit was thus a nullity.

In the result, I granted the application to set aside the purported cancellation of the applicant's permit as was prayed for by the applicant.

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