REPORTABLE Z.L.R. (48)

Judgment No S.C. 79\2001
Civil Appeal No 318\2000

THE CITY OF MUTARE v THE WILDLIFE SOCIETY OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
McNALLY JA, SANDURA JA & MALABA JA
HARARE SEPTEMBER 11 & OCTOBER 4, 2001

T. Biti, for the appellant

J. Wood, for the respondent

McNALLY JA: This is a town planning appeal from the Administrative Court. The City of Mutare (the City) is dissatisfied with a decision by the court allowing the respondent (the Society) to construct dormitories in the Cecil Kop Nature Reserve. The Society has cross-appealed on three aspects of the judgment, as follows:

1. Against the reasoning of the court in coming to a decision in its favour;
2. Against a restriction imposed by the court, limiting the use of the dormitories to persons visiting the Nature Reserve for educational purposes;

3. Against the failure of the court to award it its costs, save for certain wasted costs.

The Society negotiated a lease with the City on 23 June 1993. The area leased is a large (approximately 1180 hectares) area known as the Cecil Kop Nature Reserve. The period of the lease is 99 years from 1 January 1992. The purpose of the lease is set out in Clause 2 c, in which the Society covenants:-

> "to use the land as a wildlife sanctuary to which the public may have access and to maintain and preserve the land in a suitable condition therefor, to provide game-viewing facilities and generally to use the land for the consideration of flora and fauna."

The rent was fixed at a nominal $20 per annum and the full amount was paid in advance. The land, which is largely mountainous in character, is in the North-East corner of the municipal area. Its eastern boundary is the Mozambique border, its western boundary is the Christmas Pass Road. Suburbs lie to the south, and the municipal boundary is to the north.

The Society conceived the idea of constructing three blocks of rooms to accommodate groups of school children, with their teachers, who might wish to make educational visits to the Nature Reserve. The intention was to provide accommodation, of a fairly spartan nature, for about 75 persons at any one time. There would be no dining facilities, but only outdoor cooking facilities and an ablution block. The funding was to come from a friendly Embassy. In order to make the project self-sustaining they proposed to offer accommodation to tourists or back-packers when there were no bookings for school children.

When the Society was ready to start, its representative, Mr Hitschmann, went to the City Council and spoke to the relevant official. He was advised that he could go ahead on the basis of a temporary building permit if he was prepared to take the risk that the Council might refuse the permit and order him to demolish the structures. Otherwise he would have to wait for formal approval. The committee of the Society decided to go ahead, not expecting that there would be any problems. But there were. The City declined, in April 1999, to approve the proposal. It issued an enforcement order to discontinue the construction, and, on 4 May 1999, a prohibition order.

The Society then appealed to the Administrative Court. That court decided in its favour (save for a limitation as to occupancy referred to below). But the court's reasoning has been criticised by both parties in this appeal, and it is necessary to examine that reasoning closely.

The court first came to the conclusion that the Master Plan for the City of Mutare, approved by the appropriate Minister (see General Notice 260 of 1993 in the Gazette of 7 May 1993) prohibited development in the Cecil Kop Nature Reserve. "Development" is defined in s 22 of the Regional Town and Country Planning Act, Chapter 29:12 (the Act) in such a way as to include any building operations. Therefore any building is prohibited.

Then, however, the court went on to consider whether the situation was any different by reason of the provisions of s 22(1)(b)(i) of the Act.

The section provides as follows:-

> "Any reference in this Part to development, in relation to any land or building, means any of the following –
>
> (a) …
>
> (b) the altering of the character of the use of any land or building, other than –
>
> (i) where the existing use and the proposed use both fall within the same prescribed group of land or building uses;"

The court then went on to decide that:

1. the proposed dormitories would not alter the character of the use of Cecil Kop Nature Reserve, and
2. the existing use as a Nature Reserve and the proposed use for the construction of dormitories to accommodate students on educational visits both fall within the same prescribed group of land or building uses.

However, if the proposed dormitories were to be used for tourists or back-packers not on educational visits to the Nature Reserve there would be both an alteration of the character of the use and a use falling outside the prescribed group of land or building uses. Accordingly the court prohibited the use of the dormitories for persons other than students and accompanying teachers on educational visits.

In short the court concluded that the building of the dormitories for the purpose indicated was not development and therefore was not prohibited.

Mr *Biti*, for the City, contended that once there was a finding that the Master Plan prohibited "development", that was the end of the matter. What the Act said was irrelevant because it was the Master Plan that governed the situation - see Part IV of the Act.

Mrs *Wood*, for the Society, was inclined to agree that what the Act said was irrelevant, but she argued that the court had been wrong to conclude that the Master Plan prohibited "development" in the sense used in the Act. It prohibited commercial, industrial or residential development, but not development consistent with, and ancillary or incidental to, the prescribed use of the area as a Nature Park.

Section 61 of the Act provides that, notwithstanding the provisions of section 19 of the Administrative Court Act, Chapter 7:01, an appeal to the Supreme Court in a matter arising from a decision under the Act shall be only on a matter of law. (There are certain other grounds but they are not relevant here). I am satisfied that the issue before us is an issue of law as to the interpretation of the Master Plan, and is thus appealable.

I have no quarrel with the proposition that if there is an absolute prohibition in a Master Plan or in an approved town planning scheme, that prohibition cannot be overridden either by the local authority or on appeal by the court. That has been established as the law at least since *Vainona Estates Ltd and Others v Anderson*

and Anderson 1960 R & N 382 at 388 D-E. It was re-stated in *Holden v City of Harare* 1989 (3) ZLR 134.

I do, however, quarrel with the proposition that there is, in the Master Plan, an absolute prohibition of any kind of building or construction in the Cecil Kop Nature Reserve. I agree with Mrs *Wood's* contention that what is clearly intended is a prohibition on commercial, industrial or residential development.

I appreciate that there are clear words in the Master Plan indicating opposition to development in areas such as the Cecil Kop Nature Reserve. Among them are the following:-

1. At page 15 "Objectives – a, Ensure that land considered unsuitable for development is restricted against development."
2. At page 29. "Proposals – d, Cecil Kop Cross Kopje, Murahwa Hill and Thompson Vlei Nature Reserve should be preserved and new nature reserves developed on land south of Fern Hill.."
3. At page 30. "Land and Environment. Proposals - (f) Zone the areas along the Dangamvura Hills, Cecil Kop and all river valleys as land protected against development (LI)."

These words however, are entirely consistent with the interpretation that the development disapproved of is commercial, industrial or residential development out of keeping with the character of a Nature Reserve. Indeed there could never have been an intention absolutely to prohibit all development. As long

as human beings are allowed into the area - and town planning is for the benefit of human beings - there must at least be footpaths, railings in dangerous places, toilets, accommodation for game rangers and other staff, storerooms, entrance gates etc. Most of those things are there already. So much for an absolute prohibition.

Almost every national park one can think of in Zimbabwe has accommodation for visitors staying overnight. Harare's McIlwaine National Park has a facility for educational camps.

I conclude, therefore, that the Master Plan does not absolutely prohibit building and construction in the Cecil Kop Nature Reserve. It may be permitted to the extent that it is ancillary or incidental to the main purpose of preserving the area as a nature reserve. I am satisfied that the proposed dormitories may be said to fall into that category.

Mr *Biti's* second contention was this. If he is unsuccessful in defending the court's finding that the Master Plan absolutely prohibits development, then the building of these dormitories is development. It is not excluded from being defined as development by the provisions of section 22(1)(b)(i) of the Act.

I think this argument must be right. And indeed there is a fundamental illogicality in the reasoning of the court. It begins by finding that the building of the dormitories is not development by reason of the provisions of section 22(1)(b)(i) of the Act. It then goes on to say that it is development, but not prohibited development, and orders the City to grant a development permit.

The real meaning of section 22(1)(b)(i) of the Act is to be found by separating the concepts of "land" on the one hand, and "building" on the other. Thus it is not "development" when one changes the use of land, so long as the new use and the old use both fall within the same prescribed group of land uses. Nor is it "development" when one changes the use of a building in the same circumstances. Compare *Leadership Education & Advancement Foundation v C T Municipality* 1994 (1) SA 825 (C) at 834C *et seq*.

But to construct a building on land cannot be described simply as a use of the land. It is more than that. It is construction. It is development. It is not covered by the sub-section.

Mr *Biti's* next submission was that the court was not empowered simply to reverse the City's decision. In terms of section 26 it was necessary for the matter to be referred back to the City for proper consideration of the application for a building permit, and for public notice to be given in terms of section 26(3), to allow for objections.

Mrs *Wood's* counter to this was that public notice is necessary only where certain circumstances exist. The City did not find that those circumstances existed. It did not require public notice to be given. Therefore the court was entitled to substitute its own decision. In any event the court did recognise the role of the City by requiring the Society to have its building plans approved by the City.

Section 26(3) sets out the circumstances in which the local planning authority (the City) must require public notice to be given. Those circumstances are –

1. Where the application, in terms of the Master Plan or local plan or an approved scheme requires special consideration of the circumstances, or special consent;
2. Where the application relates to development which does not conform to the development existing or normally permitted in the area;
3. Where the application relates to development which could, in the opinion of the local planning authority, have an adverse effect or important impact on the locality or the area generally;
4. Where the application relates to development which conflicts with any condition which is registered against the title deed of the property concerned and confers a right which may be enforced by the owner of another property.

I deal with the relevance of these four considerations as follows:

1. There is no suggestion that the Master Plan, or any local plan or approved scheme requires special consideration or special consent.
2. If the order of the Administrative Court had allowed use of the accommodation by tourists or back-packers I think that might well have been categorised as a non-conforming development. However, the use which was allowed can fairly be described as a conforming use.

3. Similarly, had the nature reserve been allowed to compete with local hotels and hostels in providing accommodation for tourists and back-packers there might have been an argument for public notice to allow objectors to express their views. But in view of the limitation imposed this problem does not arise.

4. This does not arise.

I conclude therefore, that Mrs *Wood's* argument has force, and that the court was entitled to make the order that it did.

In the circumstances the appeal must be dismissed with costs.

I turn then to consider the cross-appeal.

The first ground of the cross-appeal was an attack on the reasoning of the court. We have made it clear in *Chidyausiku v Nyakabambo* 1987 (2) ZLR 119 at 124 C-F that an appeal must be lodged against an order, and may not be lodged merely against the reasons for that order. I find nothing in *Hingeston v Lightfoot* S-97-2000, to contradict this. In any event of course the point raised has succeeded. It was not necessary to make it a ground of cross-appeal.

The second ground of cross-appeal was that the court should not have restricted the use of the dormitories to persons visiting the Nature Reserve for educational purposes. Assuming this to be an appeal on a point of law I find it to be a bad point.

To use the dormitories to accommodate back-packers passing through Mutare would, in my view, offend against the restriction in the Master Plan. Such persons would not be using the dormitories as part of their visit to the Nature Reserve, but simply as accommodation. It would be a residential use.

As to the award of costs by the court *a quo*, such awards are covered by the provisions of section 60 of the Act, which, rather curiously, overrides section 11 of the Administrative Court Act, Chapter 7:01. The relevant proviso to the section states:-

> "no order as to costs shall be made against any person unless the Administrative Court considers that that person has behaved unreasonably."

The court ordered the City to pay the wasted costs of one day, which was wasted because a city employee who was to give evidence failed to appeal. The Society considered that having won the case it should have been awarded its costs in full.

I do not think, in the light of the proviso quoted, that that argument can be sustained. There are allegations that the City was *mala fide* in its opposition to the application, but they were no more than allegations. Nor was it argued that the word "person" in the proviso should be interpreted to mean "person other than a planning authority."

In this Court, however, the City's appeal has failed, and that failure should carry costs. The Society's cross-appeal has also failed, but overall the main success has gone to the Society. A special order as to costs will be appropriate.

Accordingly the order of the Court is as follows:

1. The appeal is dismissed.
2. The cross-appeal is dismissed.
3. The appellant is to pay 80% of the respondent's (cross-appellant's) costs of appeal.

SANDURA JA: I agree

MALABA JA: I agree

Bere Brothers, appellant's legal practitioners

Henning Lock Donagher & Winter, respondent's legal practitioners