

RIVER VALLEY PROPERTIES (PVT) LTD

Versus

**MINISTER OF LOCAL GOVERNMENT AND PUBLIC
WORKS**

And

**PRINCIPAL DIRECTOR OF PHYSICAL PLANNING &
DEVELOPMENT IN THE MINISTRY OF LOCAL
GOVERNMENT AND PUBLIC WORKS**

And

**PROVINCIAL PLANNING OFFICER OF PHYSICAL
PLANNING & DEVELOPMENT IN THE MINISTRY OF LOCAL
GOVERNMENT AND PUBLIC WORKS
BULAWAYO PROVINCE**

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 16 March 2023 & 23 March 2023

Unopposed court application

L. Uriri, for the applicant

DUBE-BANDA J

[1] This application was placed before me on the unopposed motion roll. It is an application for a *mandamus*. The applicant seeks an order couched in the following terms:

- i. The application is allowed.
- ii. The 1st and 2nd respondents are hereby compelled within 21 days of service of this order;
 - a. To issue a notice of extension to 6 months, being the period within which the survey diagrams for surveyed stands of the Remainder of Lot 27A Lower Rangemore situated in the District of Bulawayo shall be lodged with the Surveyor-General.
 - b. To notify the Surveyor-General of the extension period within which the survey diagrams for surveyed stands shall be lodged by the applicant.

- iii. In the event that the 1st and 2nd respondents failing to take any of these steps as may be necessary in terms of paragraph (*sic*) 2a and 2b, the Sheriff of Zimbabwe or his lawful deputy be and hereby authorized to take such steps on behalf of the 1st and 2nd respondents as fully and effectually as if the respondents had undertaken such steps.
- iv. For the avoidance of doubt, in the event that the 1st and 2nd respondents failing to take any of these steps as may be necessary in terms paragraph 2a & 2b and the Sheriff of Zimbabwe taking reasonable steps to act on their behalf, the Surveyor General shall accept the lodging of survey diagrams for surveyed stands of the Remainder of Lot 27A Lower Rangemore situated in the District of Bulawayo within 6 months of notification by the Sheriff of Zimbabwe.

[2] Answering to the queries I raised, Mr *Uriri* Counsel for the applicant made the following submissions: that this is an application for a *mandamus* to compel the first and second respondents to issue an extension period within which the survey diagrams for the surveyed stands shall be submitted to the Surveyor General in terms of s 40 (5) (a) (ii) as read with section 40 (7) of the Regional, Town and Country Planning Act [Chapter 29:12]. It was argued that this can be used to require an administrative authority to perform a statutory duty imposed upon it that it is wrongly refusing to perform, or to require the authority to correct the effects of its unlawful administrative action.

[3] Counsel submitted that the question to be asked is whether there is a statutory obligation that the first and second respondents have to comply with and they have failed or refused to comply. If they have failed or refused to comply the court may order that they comply with such statutory obligations. Further Counsel argued that if the respondents had a lawful reason to decline to issue a notice of extension as sought by the applicant they would have filed a notice of opposition and said the basis of their position.

[4] The uncontested facts are that the process of submitting the survey records was stalled by the court dispute pertaining to the transfer between the first respondent, Minister of Lands, Agriculture, Fisheries, Water and Rural Resettlement on one hand and the applicant on the other hand. The parties were waiting for the outcome of the court case in order to proceed with the outstanding processes with regards to the development. Subsequent to the applicant acquiring its title deed it approached the second respondent who issues and approves layout

plans and subdivision permits on State land for the extension of the period within which the survey records should be lodged with the Surveyor General. The applicant was instructed to write a letter to the third respondent. The applicant through its legal practitioners wrote a letter to the second respondent highlighting in detail the background to the matter, pointing out that the reason the survey records were not lodged within the time line stipulated on the permit. In the letter the applicant proposed an amendment on the permit, *inter alia* to allow that the “approval date should allow 6 months to lodge surveys since Survey Field work has been completed.” Representations were also made at the second respondent’s office and the applicant says, “It was clear that our endeavors were fruitless.”

[5] Counsel submitted further that there has been a failure to decide which failure amounts to a refusal to make a decision. Counsel argued that in the case of a *mandamus* the court may compel the administrative authority to make a decision, or the court if satisfied with the material that was before the authority and is satisfied that the refusal to decide is unreasonable, make the decision itself. Counsel argued that this is a case where this court may make the decision itself and that a case has been made for the relief sought in this application.

[6] What is clear from the papers is that the administrative authorities have not decided whether to authorize an extension or not. Counsel submitted that there has been a failure to make a decision which failure amounts to a refusal to make a decision. I agree. The failure to take a decision includes a refusal to take a decision. See: *Vulindlela Furniture Manufacturers (Pty) Ltd v MEC, Department of Education and Culture, Eastern Cape* 1998 (4) SA 908 (Tk); *Noupoort Christian Care Centre v Minister of National Department of Social Development* 2005 (10) BCLR 1034 (T). There is a duty on the administrative authorities to take a decision and they have refused to do so. What exercised my mind is whether this court may compel first and second respondents to issue a notice of extension to six months being the period within which the survey diagrams for surveyed stands shall be lodged with the Surveyor-General, and to notify the Surveyor-General of the extension period within which the survey diagrams for surveyed stands shall be lodged by the applicant.

[7] In terms of s 40 (5) (a) (ii) as read with section 40 (7) of the Regional, Town and Country Planning Act [Chapter 29:12] it is the administrative authorities that grant a permit and authorizes an extension of the period within which the survey records shall be submitted to the Surveyor-General. I agree that the administrative authority may be compelled *via a mandamus*

to decide, i.e., to comply with their statutory obligations. A *mandamus* forces an administrative body to perform a statutory duty, and because discretionary powers are at issue, the court will usually order the administrative authority to exercise its discretion rather than to exercise it in a particular way, for example, to consider an application rather than to grant it. See: *Chotahbai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13.

[8] It is not for this court, in the first instance to compel the administrative authorities to issue a notice of extension of the period within which the survey diagrams for surveyed stands shall be lodged with the Surveyor-General. The decision in the first instance whether to issue a notice of extension lies with the administrative authorities. This is the legitimate province of administrative authorities, and this court should not usurp the functions of such administrative agencies. This court must refrain from intruding unnecessarily into the realm of administrative agencies. This is judicial deference. See: *Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs* 2004 4 SA 490 (CC). This court may not compel the administrative authorities to issue an extension, but can compel them to decide whether to issue it or not. A court moving on its lane may only compel the administrative authorities to make a decision whether to grant an extension or not, and not how to decide.

[9] Counsel further relied in terms of the order granted by this court sitting in Harare under HC 1072/22 @ paragraph 2.5, for the point that a case has been made for the relief sought by the applicant. The court ordered as follows that:

The second respondent (first respondent herein) would take all such steps as are prescribed by law, practice and custom to hand over to the applicant to allow for the passage of title to the beneficiaries of the housing, such steps to include the condonation, ratification and regularisation of any conduct that may not have accorded with the prescribed formalities and practices in accordance with the provisions of the law allowing for ratification, condonation and regularisation.

I do not agree. I do not understand this to mean that this court can then compel the administrative authorities to issue an extension of the period within which the survey diagrams for surveyed stands shall be lodged with the Surveyor-General. The question of whether an extension is merited, must in the first instance be decided by the administrative authorities.

[10] I agree with Mr *Uriri* that there is indeed a statutory obligation on the administrative agencies to decide whether to authorize an extension or not. This court can compel the administrative authorities to make such a decision. But the applicant is not seeking an order to

compel the administrative agencies to take a decision, but is seeking to compel the authorities to decide in a particular way, i.e., to compel them to issue a notice of extension. With this I disagree. In general this court has no such powers, in fact it will be making unlawful forays into the terrain of administrative agencies.

[11] Counsel submitted that this matter is unopposed and the only version before court is that of the applicant. And that all issues that are not denied are taken as if they have been admitted. I agree. However, the fact that the matter is unopposed is one of the factors that a court considers, but standing alone is not dispositive of the matter. On the applicant's version the order that is sought is not merited. And a court cannot grant an incompetent order merely because the application is unopposed. The order sought is incompetent.

[11] It is for the above reasons that the order sought cannot be granted in the form in which it is couched.

In the result, it is ordered that as follows:

This application be and is hereby struck off the roll with no order as to costs.

Nyamundanda & Mutimudye Attorneys, applicant's legal practitioners