

WESTCASTLE (PRIVATE) LIMITED
versus
NEWLANDS RESIDENTS ASSOCIATION
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 29 July 2022 & 7 November 2023

Opposed Application – Leave to file an additional Affidavit

Mr *L Uriri*, for the applicant
Mr *TL Mapuranga*, for the 1st respondent
Mr *M Matanhire*, for the 2nd respondent

MUSITHU J:

This is an application for leave to produce an additional affidavit in terms of r 58(12) of the High Court Rules, 2021. The parties are embroiled in some dispute in a matter that is already pending before this court under HC 1968/21 (the main application). The first respondent is the applicant in that matter, while the second respondent is the first respondent. The applicant herein is the second respondent. In the main application, the first respondent seeks a *mandamus* to compel the second respondent herein to ensure that the applicant complies with its development permit. It also wants the second respondent to direct that the applicant bricks up the third storey of its cluster homes on the development which is the subject of the said permit.

The Factual Background and the Applicant’s Case

The first respondent’s claim in the main application is based on its understanding of the terms of a permit granted to the applicant by the second respondent herein. The permit was issued in respect of the applicant’s developments on stand subdivision “B” of Lot 45 Highlands Estate (the property), being permit number SC/CR/53/16. The permit was issued based on the then existing local plan for the area in question. The applicant contends that the local planning authority

has absolute discretion in certain matters pertaining to development permits, and may allow certain variations from the terms of the permit within certain parameters. One important consideration in the exercise of such discretion is the governing local plan.

It is the first respondent's contention in the main application that the development permit issued to the applicant herein did not allow for the nature of developments made by the applicant on its property. The applicant denies violating any of the requirements of the permit in the manner alleged by the first respondent.

The applicant became aware of the Enterprise Corridor Local Development Plan No. 60 (hereinafter referred to as Plan No. 60), which was approved by the second respondent herein on 19 November 2021. That date is significant as it is the date on which the last of the approving authorities approved the plan. The applicant claims that this local plan supersedes the earlier plan founding the development permit. The new plan therefore effectively removed the cause of the first respondent's complaint in the main application. The applicant also became aware of the report leading to a resolution approving the then proposed new local plan. That resolution is dated 13 July 2020. There is also the Plan No. 60 report of study and written statement produced by the second respondent. According to the applicant, that document records the current uses which informed the development permit.

The applicant avers that the development permit must now be purposively interpreted on the basis of the new Plan No. 60. Any exercise of discretion must also be informed by the new plan. At the time it filed its opposing affidavit in the main application, the applicant claims that it was unaware of the new plan. The applicant further claims that the second respondent, as the author of Plan No. 60, never made reference to that plan. It was obviously aware of its existence.

The applicant contends that the interests of justice demanded that the said documents be placed before the court as they were crucial to the determination of the substantive issues between the parties. This resonated with the principle of a fair hearing which demands that a party be given an opportunity to present its case fully. The documents sought to be produced were public documents that were at the centre of litigation in the main application. No prejudice would be occasioned to the other parties by the production of the documents, which the court could take judicial notice of anyway.

The applicant averred that if the relief sought were to be granted, the respondents should be afforded an opportunity to respond to the additional affidavit.

First Respondent's Case

Two preliminary points were taken at the outset. The first one was that the applicant had not paid the first respondent's costs of suit arising from the ill-fated first application for leave to adduce an additional affidavit. The application which had been filed under HC 1968/21 was withdrawn. Taxation had since been set down for 6 May 2022, and until the costs had been paid, the application was premature.

The second point was that the applicant was required to file the present application by 31 January 2022 in terms of an order granted by CHILIMBE J on 27 January 2022. The withdrawn application was filed and served on 1 February 2022, a day out of time. The applicant had not sought condonation for the late filing of the application, which was filed out of time in breach of a court order. The new application was being filed some 61 days out of time. The applicant was conveniently trying to avoid seeking condonation for its original breach by filing this new application. The applicant could not right a wrong by simply filing a new application. The court order would lose its significance. The original defect had to be cured first. The application was not properly before the court.

Concerning the merits, it was averred that the applicant had no legal basis to speak on behalf of the second respondent. The first respondent did not believe in the authenticity of the plans that the applicant sought to introduce. It dismissed them as contrived as between the applicant and the second respondent in a bid to avoid judgment being made against them.

The first respondent denied that the Plan No. 60 legitimised the applicant's unlawful development. The applicant had not explained how the plans that came into effect some years after the developments made them lawful. The applicant constructed cluster houses at number 12 Walmer Drive Highlands, Harare that are three storeys in height. The height of the cluster houses infringed upon the privacy of the surrounding residents. The second respondent could not exercise discretion in such a manner that allowed a party to violate the law. Public bodies were expected to follow the law. It was further averred that an illegality could not be ratified by a public body some four years after the development in the form of Plan No. 60. It was interesting to note that the

second respondent had not even alluded to that plan in its response to the main application in HC 1968/21.

The first respondent further averred that the applicant's reaction to Plan No.60 all but confirmed that at the time the applicant developed the cluster houses in issue in 2018, it did not have the approval from the second respondent. It also misled the court in its opposing affidavit in HC 1968/21. The first respondent further averred that even if the second respondent allegedly approved Plan No. 60, it did not invite the affected residents to register their objections to the development. The second respondent was obliged to invite these objections as the changes to the development directly affected the constitutional rights of the people in the neighbourhood. Further, the second respondent ought to have given notice by way of advertisements in the gazette of its intention to change development plans. Due process was not followed, and the applicant could not rely on an illegality.

The first respondent also contended that the position taken by the second respondent could not help the applicant's cause. In the withdrawn application the second respondent opposed and sought to consent to the relief sought at the same time. Such an approach was incompetent at law. A respondent could only oppose an application. It could not do anything else. The affidavit that it allegedly filed in opposition in the main application ought to have been struck off the record.

The second respondent had not said anything in connection with the present application. The documents that the applicant sought to rely on were therefore a complete hearsay. The second respondent did not even know about them. The second respondent could have produced the said documents as the author, in its opposition to the main application. The applicant could not make submissions on behalf of the second respondent in support of those plans. It is the second respondent that had to explain why it did not produce the plans that were in its possession at the time of filing its opposition in the main application. This application had therefore been brought by the wrong party.

Courts allowed the filing of additional affidavits only in very exceptional circumstances. In doing so, the court exercised discretion. This was not one such case for the exercise of discretion in favour of the admission of a further affidavit. This was because the evidence sought to be introduced was created years after the fact in issue. It could not assist an applicant who remained

in breach of the law. The court was urged to dismiss the application with costs on the punitive scale.

The Applicant's Reply

The applicant dismissed the first respondent's points in *limine* as cosmetic and specious. They were not dispositive of the matter as they did not go to the root of the matter. As regards the preliminary point on the non-payment of costs, the applicant averred that this objection was taken in bad faith. It said so on two bases. At the time the point in *limine* was taken, the first respondent's costs were yet to be taxed. The application for taxation was pending for hearing before a taxing officer on 6 May 2022. This was the day on which the applicant paid for those costs. The applicant contends that it could not have paid costs that were untaxed. Attached to the answering affidavit is a CABS RTGS transfer slip confirming payment of a sum of \$1, 328,413.15 into a Standard Chartered Account held by Matizanadzo and Warhurst. The transaction occurred on 6 May 2022.

Concerning the second preliminary point, the applicant denied that its application was filed in breach of a court order. It submitted that the court order granted by CHILIMBE J was concerned with the first application that the applicant withdrew. It is the filing of that application that required condonation. The present application was fresh, and it required no condonation. It bore no relationship with the order granted by the court.

The applicant further averred that even assuming this was not the case, the reason for the delay had been explained. The failure to file the application on the date ordered by the court was a result of counsel's heavy workload which required him to appear at the Supreme Court. Delays in complying with court rules on the basis of counsel's workload was condonable. The withdrawn application was only filed a day out of time. The delay from the date of the order to the present application was sixty-one days. Condonation would only be refused if the extent of delay was long and inordinate. According to the applicant, the application was filed after sixty-one days because all along it believed that the withdrawn application was in order. It was only after it briefed counsel following objections made concerning the form of the application that a decision was taken to withdraw the application and file a fresh one. For the sixty-one days that lapsed, the explanation for the delay was that the application was pending before the court, as the applicant could not have similar applications pending at the same time.

As regards the merits, the applicant maintained its position as set out in the founding affidavit. I further denied that the plans sought to be introduced were not authentic. At any rate, no reason had been given to suggest that the plans were not authentic. The applicant's plans had always been approved by the second respondent. The construction of the houses was inspected and approved at every stage of the process by officials of the second respondent. There was nothing unlawful in constructing houses following laid down procedures and processes by the second respondent. In any event, it was denied that the houses were three storey structures. What the first respondent called a third storey was actually an attic.

Submissions

The second respondent did not oppose the application. At the hearing of the matter, Mr *Matanhire* appearing for the second respondent advised that he was only in attendance to note the proceedings. Mr *Mapuranga* for the first respondent abandoned the first preliminary point concerned with the non-payment of wasted costs arising from the withdrawn application. I proceed to deal with the second preliminary point.

Whether the application is properly before the court

Mr *Mapuranga* submitted that even though the rules of court did not prescribe timelines within which applications of this nature should be filed, parties were not always free to do as they wished. The main matter was postponed by CHILIMBE J after the applicant asked for more time to file an application to adduce a further affidavit. The main application was postponed on condition that the application for leave to file an additional affidavit was to be made on or before 31 January 2022. That directive was not followed as the first application was filed a day out of time. The applicant could not condone itself. It had to go back to court to seek condonation. There was no such application for condonation before the court. The applicant was taking the court's directive for granted.

Mr *Uriri* submitted that the bar related to by the first respondent did not affect the present application. The order granted by CHILIMBE J only affected the withdrawn application that the applicant had earlier filed. The effect of that order lapsed the moment the application that was supposed to be filed pursuant to that order was filed. Counsel further submitted that when the parties agreed on the timelines before CHILIMBE J, the first respondent had proposed that its

opposing affidavit would also deal with the additional affidavit that was sought to be placed before the court. The intention of the parties was that the main application and the interlocutory application be heard on the same day. If the interlocutory application succeeded, then the matter would proceed on the basis that there was an additional affidavit. If it failed to succeed, then the matter would proceed on the basis that there was no additional affidavit.

According to counsel, the directions given by CHILIMBE J were in the context of a consolidated hearing. That arrangement fell off the rails when the first respondent's then counsel withdrew from the matter. Thereafter the first respondent changed course and insisted that the application for leave was a separate application.

While it was admitted that the application that the first application was filed out of time, the reason for the delay had been the heavy workload on the part of the applicant's counsel. The courts have always held that delays caused by counsel's heavy workload is condonable. Counsel further submitted that the objection taken by the first respondent did not satisfy the threshold of why preliminary objections should be taken. A preliminary objection could only be taken if it went to the root of a matter and effectively disposed of the matter.

Analysis

Two critical issues arise from the submissions made by counsel on the preliminary point. The first is whether the bar related to by the first respondent as arising from the non-compliance with the order by CHILIMBE J affected both the withdrawn application and the present application. If the court determines that the order by CHILIMBE J also affected the present application, then the follow up issue is whether this court can condone the applicant's non-compliance with that order.

It is not in dispute that on 27 January 2022, CHILIMBE J granted an order by consent which directed the applicant to file the application for leave to produce an additional affidavit by 31 January 2022. For completeness sake, I reproduce hereunder, the contents of the order granted by the learned judge on 27 January 2022:

- “1. Matter postponed to 23/2/22.
2. 2nd respondent to file application for leave to file additional affidavits in terms of the rules, by 31/1/22.
3. 1st respondent and applicant to file any opposition by 4/2/22.

4. 2nd respondent to file answer plus heads by 11/2/22.
5. Applicant and 1st respondent to file heads by 18/2/22.”

It is also not in dispute that the said application which has since been withdrawn was filed and served on 1 February 2022. The applicant does not dispute that the first application was filed out of time. Its argument is that the terms of the above order were only concerned with that withdrawn application. The said order did not have a bearing on the present application. I find the applicant’s argument unconvincing. The Honourable CHILIMBE J postponed the matter before him to allow the applicant to file the application for leave by a specific date. The matter was postponed with that singular purpose in mind. The fact that the first application was then withdrawn and a new one filed does not change the purpose of the order by CHILIMBE J. The main application was put on hold in order to facilitate the filing and determination of the application for leave to file an additional affidavit.

The new application is no different from the withdrawn application. It cannot be considered a standalone application. It cannot be read to be independent of the order by CHILIMBE J. Without the order by CHILIMBE J, that second application has no leg to stand on. It is bereft of a legal foundation. For as long as it pertained to proceedings that were pending before CHILIMBE J then it cannot be considered a stand-alone application. The main application remains in abeyance because of the said order. If the applicant’s logic is followed, it follows that there is no reason why the main application should remain in limbo. If it is unaffected by the order by CHILIMBE J, then there is no reason why the main application should not just be set down and argued, since there will be nothing staying its hearing. The parties would have to appear again before CHILIMBE J to have the hearing of the main application suspended whilst this application is being determined. Surely that could not have been the intention of the court when it granted the said order.

The court therefore determines that the present application is also affected by the order of this court per CHILIMBE J. This application could not have been filed timeously if the applicant concedes that the withdrawn application was filed out of time. The applicant ought to have applied for condonation for the late filing of the present application in as much as it ought to have applied for condonation for the late filing of the withdrawn application.

Should this court condone the non-compliance with the Order by CHILIMBE J?

As already stated, the second leg of the preliminary point that warrants determination is whether this court, having found that the present application is equally out of time, should condone the non-compliance with the order by CHILIMBE J. The applicant's attitude in this regard is summed up in paragraph 14 of its heads of argument where it states:

“It is submitted that should the court find that the applicant ought to have condonation, the above submissions apply.”

The submissions that were said to be applicable to an application for condonation were made in the context of the withdrawn application. They are captured in para 13 of the applicant's heads of argument as follows:

“Granted the application that the order related to was filed a day out of time. The reason was explained as being that counsel was overwhelmed with work. The court has always held that delay caused as a result counsel's heavy workload which would have precluded him to comply with the courts' directives is condonable-S v Mutasa 1988 (2) ZLR 4 (SC).”

It is clear from the foregoing that in urging the court to condone non-compliance with the order by CHILIMBE J, the applicant was preoccupied with the withdrawn application. It is the one that was filed a day out of time. The present application was only filed on 26 April 2022, more than two months after the withdrawn application was filed. An attempt was also made to explain the delay and its extent in the applicant's answering affidavit. In its heads of argument, the first respondent argued that the present application was a nullity. Condonation of the late filing of the application in breach of a court order could not be sought after it had been filed. The applicant ought to have sought condonation at the time of bringing the application. I agree with the first respondent's argument.

Condonation ought to have been sought simultaneously with the filing of the present application. The two applications could have been heard at the same time. Did the applicant seek condonation for the late filing of the present application? I have already noted that the applicant appeared pre-occupied with the withdrawn application as the one that was filed one day out of time. At the commencement of the oral submissions, the applicant's counsel did not rise to seek condonation for the late filing of the present application. He persisted with the argument that the present application was unrelated to the order by CHILIMBE J. There is therefore nothing to condone

in the absence of an application seeking condonation. It is the making of the application for condonation that triggers the court's discretion to extend the time within which the application for leave to file an additional affidavit must be filed.¹

It is for the foregoing reasons that the court finds merit in the applicant's preliminary objection. This application is not properly before the court as it was filed in violation of the order by CHILIMBE J.

Costs

In its notice of opposition and submissions, the first respondent urged the court to dismiss the application with an order of costs on the punitive scale in the event of making a finding in its favour on the preliminaries. In the exercise of my discretion, I do not consider the applicant's case to be so frivolous as to warrant an adverse order of costs on the punitive scale

DISPOSITION

Accordingly, **IT IS ORDERED AS FOLLOWS:**

1. The application is hereby struck off the roll.
2. The applicant shall bear the first respondent's costs of suit.

Machinga Mutandwa, applicant's legal practitioners
Matizanadzo & Warhurst, first respondent's legal practitioners
Mbidzo, Muchadehama & Makoni, second respondent's legal practitioners

¹ See *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S)