MAKONI RURAL DISTRICT COUNCIL
versus
DIAGONAL INVESTMENTS (PRIVATE)LIMITED
and
RUSAPE TOWN COUNCIL

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 5 March 2015 and 11 March 2015

Opposed Application

C Warara, for the applicant
T Tandi, for the 1st respondent
2nd respondent in default

MATHONSI J: In this application, the applicant, which is a local authority constituted in terms of the Rural District Councils Act [*Chapter 29:13*] seeks an order against the first respondent, a duly incorporated company which owns a piece of land known as Zimati Kop held by Deed of Transfer No. 3547/2010 in the following:

> "IT IS ORDERED THAT:
>
> That the respondent be and is hereby ordered to set aside endowment in favour of the applicant within five (5) days of this order as follows:-
>
> (a) 10% for residential stands excluding the value of improvements.
> (b) 7% for all institutional stands excluding the value of improvements.
> (c) 13% for all commercial stands excluding the value of improvements
> (d) 7% for all residential agricultural stands excluding the value of improvements; and
> (e) 13% for all industrial stands excluding the value of improvements
>
> 2. The respondent bear costs of this application on legal practitioner client scale."

The first respondent applied to the Minister of Local Government for a permit to subdivide the piece of land in terms of s 39 and s 40 of the Regional, Town and Country Planning Act [*Chapter 29:12*] (the Act) which application was successful. The Minister

issued subdivision permit number MAN 04/2010 with certain conditions including condition 7 which reads:

> "The applicant in terms of section 41 (1) (b) (ii) of the Act shall set aside endowment as follows:
>
> (a) 10% for all residential stands excluding the value of improvements,
> (b) 7% for all institutional stands excluding the value of improvements,
> (c) 13% for all commercial stands excluding the value of improvements and
> (d) 13% for all industrial stands excluding the value of improvements.
>
> The money shall be deposited in the development account of Makoni Rural District Council at the time of disposal and proof of such deposit being availed to the said local authority."

Condition 5 stipulates that no development shall commence on stands 4441 to 7348 Rusape Township of Zimati Kop without prior approval of building plans by the applicant while condition 6 requires approval of buildings and the issuance of a certificate of completion by the applicant. Condition 8 provides that the Registrar of Deeds shall not register transfer of property until condition 3(a) and (b) (provision of water reticulation and the opening up of roads) and condition 7 have been complied with while condition 9 provides for a development permit to be issued by the applicant.

From the conditions set out in the subdivision permit given to the first respondent, it would appear that the management and supervision of the project is entrusted entirely in the hands of the applicant and there is no mention whatsoever of the second respondent in the scheme of things.

In this application the applicant protests that the first respondent has not set aside any endowment in violation of condition 7 of the permit despite demand being made. It would therefore like to enforce that condition of the permit.

The application is opposed by both respondents. I must mention that the original application did not cite the second respondent and the papers placed before me do not show how and when the second respondent became a party to the proceedings. From submissions made by counsel it is common cause that at some point an application was made by someone for the joinder of the second respondent which application was granted. The second respondent filed opposition as well laying a claim to any endowment due on the basis that the land in question falls under its own jurisdictional boundaries following the gazetting of Proclamation 5 of 2013 (S.I 149/13). The endowment is therefore not due to the applicant.

In its opposing affidavit sworn to by Norman Elias Sachikonye its director, the first respondent stated that the conditions of the permit issued by the Minister should fall within the parameters set out in s 41 of the Act requiring that the endowment due to the appropriate local authority should be a percentage of the value of each subdivision at the date of disposal. As the Minister chose the mode of endowment to be money, the permit excludes payment of endowment in the form of land being claimed by the applicant.

According to the first respondent the conditions necessary to trigger the obligation to pay money to the applicant have not arisen because it has not disposed of the subdivisions. The value of any subdivision for purposes of fixing the endowment must be determined in accordance with s 41(5) of the Act at the time of transfer of the subdivision. If the value of the land has been assessed by the Registrar of Deeds for payment of duty that value should be used to determine the endowment. If the Registrar of Deeds has not assessed the value and there is a purchase price in money for the land, that purchase price shall be deemed to be the value. Where there is no purchase price for the subdivision, its value should be agreed between the parties. If the local authority is not satisfied with the assessed value of the Registrar or the purchase price of the subdivision and there is no agreement on the value, it is obliged to obtain a valuation of the land from the Chief Valuation Officer of the Government.

As none of the foregoing has occurred, even as the first respondent has sold 60 stands out of 2 100, payment of endowment is not due yet. This is because the stands that the first respondent sold are not yet due for transfer and no assessment of duty has been done because all of them were sold but the purchase price has to be paid in instalments over a period of time. In short the application has been made pre-maturely.

Mr *Warara* for the applicant submitted that to the extent that the first respondent admits that s 41 of the Act and condition 7 of the permit apply, it cannot refuse to set aside the endowment because the disposal of the subdivision triggers payment of the endowment. As such as each subdivision is disposed of, payment of the endowment is triggered. Therefore the first respondent should pay endowment for the stands it has sold. The use of the word "disposal" in both the section and condition 7 does not equate to transfer especially as condition 8 stipulates that proof of payment of the endowment must be availed to the Registrar of Deeds before transfer. Condition 8 reads:

> "The Registrar of Deeds shall not register transfer of property until such term of condition 3 (a) and (b) and 7 have been adhered to."

On the applicant's claim to land, Mr *Warara* submitted that it is imperative that certain land be given to the applicant as endowment as such land can simply not belong to a private entity and its value cannot possibly be ascertained for purposes of paying endowment in monetary terms. He insisted that according to the Land Use Budget attached to the permit land is set aside for schools, community hall and a police post which cannot be owned by a private entity but should be surrendered to the local authority. That in my view is a very sound argument indeed. The question however is: To which local authority should that land vest? Is it the applicant or the second respondent in light of SI 149/13 annexing the land in question to Rusape Town?

Giving the land to the applicant would mean that one local authority would own and manage land firmly located within the jurisdiction of another local authority. Anarchy would prevail if that were to be allowed. It was never the intention of the legislature to allow such an eventuality. In any event, subs (8) of s 41 states that such land vests in the President for onward transmission to the local authority to have jurisdiction over the land.

Mr *Tandi* for the first respondent submitted that the conditions of the permit fall within the provisions of the Act and cannot be read in isolation. I agree. This is particularly so as the Minister was himself alive to that reality when granting the permit prefixing condition 7 with the words:

> "The applicant in terms of section 4 (1) (b) (ii) of the Act shall set aside endowment as follows ……."

Section 41 (1) of the Act provides:

> "(1) A permit authorising the subdivision of any property may, subject to this section, include conditions requiring the owner of the property –
>
> (a) to set aside land for road purposes; and
> (b) to do any one of the following –
>
> (i) to set aside for public purposes the prescribed percentage of the land covered by subdivisions; or
> (ii) to pay to the appropriate authority the prescribed percentage of the value of each subdivision, excluding the value of any improvements on the subdivision, at the date of its disposal; or
> (iii) to set aside for public purposes a percentage of the land covered by the subdivisions which is less than the prescribed percentage and to pay to the appropriate authority a percentage of the value of each subdivision, excluding

the value of any improvements on the subdivision, at the date of its disposal, the last mentioned percentage being equal to the difference between the percentage of the land so set aside and the prescribed percentage."

(2) ……
(3) ……
(4) ……
(5) Subject to subsection (6), the value of any subdivision for the purposes of paragraph (b) of subsection (1) shall be determined in relation to the land concerned, without any improvement, in accordance with the following provisions –

(a) subject to paragraph (c) if the value of the land has been assessed by the Registrar of Deeds for the purposes of the payment of duty in terms of Chapter II of the Finance Act [Chapter 23:04], the value as so assessed shall be deemed to be the value of such subdivision;

(b) subject to paragraph (c) if the value of the land has not been as referred to in paragraph (a) -

(i) where there is a purchase price in money for such land, such purchase price shall be deemed to be the value of such subdivision;
(ii) where there is no purchase price in money for such land, the value of such subdivision shall be that agreed with the appropriate authority.

(c) If -

(i) the appropriate authority is of the opinion that the value in terms of paragraph (c) or subparagraph (i) of paragraph (b) does not reflect the fair and just value of the subdivision; or
(ii) there is no agreement as provided for in subparagraph (ii) of paragraph (b); the appropriate authority shall obtain from the Chief Valuation Officer of the Government a valuation of the land concerned at the date of disposal which shall be deemed to be the value of such subdivision."

The question which arises in respect of the 60 stands that have been sold for which payment is being made in instalments is what is the date of disposal because upon disposal of the subdivision, payment of endowment is triggered? I agree that interpretation of that phrase in the section admits of no sophistry and should not be complicated at all. Rocket science is not required to untangle that expression. In my view disposal of the subdivision occurs when the land owner has sold the land and has been paid the purchase price. Such an interpretation resonates with all the other provisions of s 41 which point to the fact that an endowment should be a percentage of the value. The method of determining the value is clearly set out.

The moment a purchase price is agreed, there is a value to work with. There would be no need for the parties to wait for the value to be fixed by the Registrar of Deeds for purposes of duty when the purchase price points to a value. In any event for

transfer purposes, the Registrar of Deed's will determine stamp duty payable based on the purchase price. It is only where there is no purchase price, for instance where the property has been donated, that the Registrar would assess a value for stamp duty purposes. In respect of the stands which have been sold in instalments that does not arise at all.

I however have to be innovative in deciding what has to be paid as endowment where not all the purchase price has been paid. There is no doubt in my mind that endowment must be set aside from what the land owner has received. In other words the land owner and the appropriate authority share what has been received not what potentially will be received, with the latter being entitled to the percentage of whatever instalment is received in terms of condition 7. The landowner cannot be expected to fork out the percentage endowment from its pocket but from that of the purchase price it receives.

The question of an agreed value, or a value determined by the Chief Government valuer arises only where the appropriate authority has misgivings about the value as represented by the purchase price. It is a remedy available to the authority and cannot be used as a weapon of defence by the land owner where the authority has not taken issue with the purchase price.

Regarding those stands that have not been sold, there is no basis for the setting aside of endowment because it cannot be determined and the requirements triggering the claim for it have not come to pass. The claim is therefore pre-mature. The claim for land is not justified at all as there is no condition in the permit directing the first respondent to give the applicant land.

The argument made by Mr *Warara* that the land should be surrendered to the applicant because it is public land ignores completely the provisions of s 41(8) and (9) vesting land set aside for state purposes including regional, primary or secondary roads in the President and in respect of land falling within the jurisdiction of a local authority to be constituted in future, in the President in trust for that local authority.

Mr *Tandi* submitted that even that endowment arising from the subdivisions already sold is not due to the applicant at all as the appropriate local authority under whose jurisdiction the land is located is the second respondent and not the applicant by virtue of Statutory Instrument 149 of 2013. He relied on s 10(1) of the Urban

Councils Act Mr *Warara* strongly contested that proposition submitting that the interest of the second respondent only arises after the promulgation of the Statutory Instrument which incorporated the land into Rusape Urban area for purposes of payment of rates and general administration and not for planning purposes the latter being the exclusive dormain of the applicant. Such incorporation does not revoke the permit whose conditions still have to be satisfied. The permit is not issued in terms of the Urban Concils Act but in terms of the Act and s 10 (1) of the Urban Councils Act does not oust s 66 of the Act.

Section 10 (1) provides:

> "If the whole of a town area, rural district council area or local government area for which a local board has been established is included within the area of another council, the following provisions shall, in addition to any declaration, direction or requirement made or given in terms of subsection (3) or (4) of section four, apply –
>
> (a) all rates, taxes, levies and other changes, including surcharges, due and payable to, or recoverable by, the town council, rural district council or local board, as the case may be, shall be vested in and be recoverable by the council concerned,
> (b) all works and undertakings authorised to be executed and all rights, liabilities and engagements existing by or against or in respect of the town council, rural district council or local board, as the case may be, shall be vested in and attached to and be enforced, carried on and prosecuted by, or against that council and no action, suit or proceeding shall abate or be discontinued or prejudicially affected by the inclusion of the said area within the council area.
> (c) ……..
> (d) All property, movable or immovable, and all moneys of or vested in, the town council, rural district council or local board concerned shall become the property of, or vest in, the municipality or town with effect from the date of the inclusion of the area.
> (e) ……
> (f) ……."

Section 66 (1) of the Act provides that a local planning authority is required to open and maintain a separate development account into which all moneys received are paid. Such money shall be used for purposes set out in subs (2) or such other purpose as the Minister may authorise. Endowment moneys are paid into that account. In Mr *Warara's* view to give effect to s 10(1) of the Urban Councils Act would override s 66 of the Act. I am not persuaded by that argument. If endowment money is administered on behalf of the Minister for the benefit of the public such money would still be so administered by the second respondent on the directions of the Minister, it being the same Minister who presides over both the applicant and

the second respondent.

In my view s 10(1) of the Urban Councils Act does not override s 66 of the Act neither does it revoke a subdivision permit. Quite to the contrary it ensures an orderly transfer of responsibility and authority from one local authority to the other the moment an area is incorporated into a town or city. The Minister issued a permit directing that endowment be paid to the local authority then presiding over the land in issue. He specifically mentioned that the money be paid into its account. It would not leave the first respondent without a permit if one says the endowment should be paid to the second respondent because s 10 (1) (d) specifically transfers the right of the applicant to receive endowment to the second respondent upon incorporation.

This, in my view, is as it should be. It would be absurd if two different local authorities would preside over one area, or if the first respondent were to continue making payments of endowment money to a local authority whose jurisdiction over the area concerned has been ousted by virtue of incorporation while at the same time paying rates and other levies to a different local authority. The subdivision permit issued to the first respondent has been transferred by operation of law to be administered, supervised and managed by the second respondent. For that reason the endowment due in respect of the subdivisions sold must now be paid to the second respondent. The applicant must therefore suffer grief.

In the result, the application is hereby dismissed with costs.

Warara & Associates, Applicant's Legal Practitioners
Kantor & Immerman, 1st Respondent's Legal Practitioners