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Judgment No. SC 33/08
Civil Appeal No. 279/06

DR ANNAMORE JAMU v CITY OF HARARE

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GARWE JA
HARARE, JULY 15, 2008 & January 26 ,2009

E Matinenga, for the appellant

D Kanokanga, for the respondent

ZIYAMBI JA: This is an appeal against a judgment of the Administrative Court refusing the appellant special consent to establish a residential clinic with a capacity for fifteen beds at her surgery at Stand 17330 Harare Township of Salisbury Township lands, otherwise known as 42 Duiker Crescent, Borrowdale West ("the premises").

The appellant is a practising medical doctor. She operates, with the necessary permit from the respondent, a private surgery on the premises. She applied to the respondent for a special permit in terms of s 26(3) of the Regional Town and Country Planning Act [*Cap* 29:12] to convert the surgery into a residential clinic with fifteen (15) beds so that patients would be admitted there for treatment and convalescence. The application drew two objections one of which was from a residents' association which comprised of, *inter alia*, three immediate neighbours of the appellant. The grounds of their objection were that the proposed facility would, expose their families to harmful bacteria carrying infectious diseases and to litter dropped by persons awaiting visiting hours, or

participants in vending activities outside the Clinic; and that it would result in increased human and vehicular traffic (including ambulances at all hours) causing a noise nuisance.

The application was refused by the respondent on the following grounds, namely, that –

> "(a) The objections raised are material especially from a health point of view and there are no special circumstances which justify the Local Authority to grant a special consent permit for a Residential clinic within this particular neighbourhood.
>
> (b) Arising out of the advertising and notification procedures of this application, two objections (including a residents' petition against the proposal) were received. This indicates a general rejection of the proposal within this neighbourhood.
>
> (c) The size of the stand, which is only 4087 square metres and its location is neither ideal nor adequate for a residential clinic of this nature."

As indicated above the Administrative Court dismissed the appeal by the appellant against that decision.

The grounds of appeal as amended at the hearing are two fold, namely that the Administrative Court misdirected itself in law in taking a restrictive approach to the issue of need in special consent applications; and secondly, that the decision of the Administrative Court is one that could not reasonably be arrived at having regard to the situation of similar facilities in residential areas, the ability of the court to grant a permit with conditions addressing the concern raised by the respondent's department of health, and the unfounded and unsubstantiated medical fears expressed by one of the objectors.

Mr *Matinenga* contended that the issue of need was overstated by the court *a quo* and that this approach was contrary to the flexible approach adopted by this Court in the *City of Salisbury v Sagit Trust Ltd*, 1981 ZLR 479(S).

The basis on which the court *a quo* dismissed the appeal by the appellant was the following:

> "This property is situated in a crescent and a potentially busy road. There will be a substantial increase in human and vehicular traffic if the development is allowed. The vehicles will have to go past the proposed clinic and houses around the area in order to access the clinic. This is a one- way traffic (*sic)* where there are no alternatives of accessing and departing from the area. Borrowdale road is also a very busy road. Putting up a clinic on Duiker Crescent will necessarily increase traffic on this road and cause traffic congestion. The single road (Duiker Crescent) may not be adequate to cope with the anticipated increase in traffic flow. The extra traffic will cause an increase in activities in that area which may be a nuisance.
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> The stand is 4087 square metres. The respondent's position is that the stand is neither adequate nor ideal for a residential clinic of the nature proposed. The stand is small from a traffic point of view and there is not going to be sufficient parking space. The clinic is located on a narrow closed road on a sharp curve. It is desirable that a public place such as a clinic be located on a site where there is plenty of space. The respondent's contention is that this site does not have sufficient space for onsite street parking. There was no evidence proffered as to the number of parking bays currently available. The city authorities compared this clinic with Avenues Clinic and West End Clinic in the city centre where there are many roads and satisfactory road networks accessing these places. The court's view is that it is not sound town planning to permit a clinic where there is no free movement of traffic and insufficient parking space. We are of the view that this issue should be decided in the respondent's favour.
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> The increase in the activities around that area will ultimately result in noise level going up. This is a residential area which is expected to be quiet in the night. Once patients are admitted overnight it follows that there will be activities at the clinic on a 24 hour basis. If a patient becomes seriously sick at night doctors and ambulances will need to be called, generating some noise in a residential area which is expected to be peaceful and quiet during the night. A surgery has no visitors in the night compared to a clinic which has patients admitted and has an impact on traffic. The situation of this property is unsuitable for the proposed use.
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> The existence of another clinic in the locality offering similar services to the public shows that there is no special need for another clinic. This proposed clinic is about one kilometer away from Dandaro Clinic… . No pressing need was shown for an

additional clinic. The public would not be seriously disadvantaged if the proposed development was not permitted."

In support of his contention Mr *Matinenga*, referred us to the following passage of the judgment of the court *a quo* –

"Appellant states in her application to the authorities that the project is, 'necessary and valuable to the community because it brings medical facilities to proximity'. She did not allude to the existence of another clinic in her application. There is no doubt that this clinic would be valuable to the community. Whether it is necessary is the issue in view of the existence of another clinic in the vicinity and the objections raised. The need here is clearly for appellant's commercial benefit and not for the benefit of the public. The fact that her immediate neighbours objected to the proposed development means that no public advantage will be seen to accrue if the proposed development goes ahead. No good and sufficient reasons have been shown for appellant to be permitted to develop a clinic.

The respondent on the other hand was able to show that the place is not appropriate for the development of a clinic from a town planning point of view. Appellant was unable to show that the public will be disadvantaged if the proposed use is not allowed. As put by PITTMAN J in *Amalgamated Sales (Pvt) Ltd v The City of Salisbury T* 1280, 'It is not enough for the applicant to show that the proposed use would in some way be of advantage to the public in the area. There must be a positive need for the use in the sense that the public will suffer serious disadvantage if the obtrusive use is not allowed. There is a difference between a use which if allowed will be of advantage to the public, and a use which if not allowed will put the public at a disadvantage. That difference must be recognized because otherwise special consent uses instead of being jealously controlled as obtrusive but necessary will become obtrusive and frequent…'.

It is the duty of every town planning authority to be satisfied before it grants any special consent, that there is a real need for that particular development in that area. It has to be satisfied that the residents of that area will be disadvantaged if that development is disallowed. The appellant has failed to establish the need for this clinic."

This Court, in *City of Salisbury v Sagit Trust Ltd (supra)* at p488-9 quoted with approval the following passage from *Edwards J's judgment in Tobacco Warehouse & Export Co. (1946) Ltd v City Council of Salisbury & Ors (1966) T.1002 and T.1012*:

"Need is a factor proper to be taken into account before a special consent is granted, but it is not in all cases essential. The claim of convenience or other planning considerations may, without amounting to positive need be strong enough to justify granting consent. For example, a particular type of use may be a non-

> conforming use in a particular zone, but, in a particular instance-the present is one-its non-conformity may be so little obnoxious that its advantages may justify its introduction even if the public would not be gravely disadvantaged if it were not introduced. The essential test is whether the proposed use or development is desirable… ."

Thus the approach of the courts in recent decisions, as set out in the *Sagit case (supra),* is that although need is a factor to be taken into account before special consent is granted, the essential test is whether the proposed development is desirable.

It seems to me that the court *a quo* in coming to a conclusion gave careful consideration to all aspects of the matter. For example it took into account not only the respondent's views as to the unsuitability of the place for the proposed use both from a health and a nuisance point of view but also the appellant's views as to the desirability of, and necessity for, a clinic in the area. It considered whether the discretion of the respondent had been properly exercised. Having agreed with the finding of the respondent that the property was unsuitable for the proposed use, it went on to consider whether there was a need for the proposed development and found that no need had been shown to exist for it.

The court *a quo* adopted the correct approach. As it was said in the *Sagit* case, (*supra),* at p490F-491A:

> "In any scheme which is concerned with human activity such as living in a modern city a degree of flexibility is necessary to achieve at the right balance. It is because hard and fast rules do not always produce the best results that the scheme provides for a special consent procedure. It would be wrong to so minimize that flexibility by a rigid application of a rule to detract from its advantages. It is necessary for the court in every case to apply its mind to all the facts and circumstances, as well as to the need for some degree of certainty and uniformity. But it should not shrink from looking carefully at all the separate considerations to see just how strictly to apply the guide-lines that have been evolved by its experience. It must nevertheless be on guard against allowing an obtrusive activity to be established which will upset the

> amenities of the area, and it must not be persuaded to allow this by "a welter of excuses for a use for which no real need exists", to use the words of PITTMAN,P., in *MacWelond's case* (*supra).*"

In the circumstances it cannot be said that the issue of need was overstated. The appellant had alleged in her application that the proposed development was necessary. In my view it was proper for the court *a quo,* having found the proposed development to be undesirable, to consider whether, notwithstanding its undesirability, it was necessary.

With reference to the second ground of appeal, I am of the view that the conclusion by the court a quo was sound and based on a careful analysis of all the evidence. I therefore find no merit in the second ground of appeal.

Accordingly no basis has been shown for interference with the decision of the court *a quo*.

The appeal is therefore dismissed with costs.

SANDURA JA: I agree

GARWE JA: I agree

T H Chitapi & Associates, appellant's legal practitioners

Kanokanga & Partners, respondent's legal practitioners