

(1145)

SCZ Judgment No.
49/2014

IN THE SUPREME COURT OF ZAMBIA
NO.40/2012

APPEAL

HOLDEN

AT

KABWE

SCZ/8/287/2011

(Civil Jurisdiction)

BETWEEN:

MARTHA MUTIZHE KANGWA AND 29 OTHERS
APPELLANTS

AND

ZAMBIA ENVIRONMENTAL MANAGEMENT AGENCY
RESPONDENT

1ST

NASLA CEMENT LIMITED
RESPONDENT

2ND

ATTORNEY GENERAL
RESPONDENT

3RD

Coram: Chibomba, Hamaundu and Wood, JJS.

On 8th May, 2014 and 31st October, 2014

For the Appellants: Mr. N. Nchito, S.C, Mrs. S. Kateka-Messrs Nchito & Nchito.
Mr. K. Kaunda - Messrs Ellis and Co.

For the 1st Respondent: Ms. C. Chibesakunda- In House Legal Counsel.

For the 2nd Respondent: Mr. B. Mutemwa- Messrs Mutemwa Chambers.

For the 3rd Respondent: Ms. C. Mulenga- Ag. Principal State Advocate.

JUDGMENT

WOOD, JS, delivered the Judgment of the Court.

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CASES REFERRED TO:

1. *Zambia Revenue Authority v Hitech Trading Company Limited (2001) Z.R.17.*
2. *Henry Mpanijlwa Siwale and 6 others v Ntapalila Siwale (1999) Z.R.84.*
3. *Munali Insurance Brokers and 1 other v The Attorney General and 1 other (2010) Z.R. 60. Vol 2.*
4. *Anderson Kambela Mazoka and two others vs Levy Patrick Mwanawasa and two others (2005) Z.R. 138.*
5. *Sithole v The State Lotteries Board (1975) Z.R.106.*
6. *Rosemary Chibwe v Austin Chibwe (2001)Z.R.1.*
7. *Communications Authority v Vodacom Zambia Limited (2009) Z.R.196.*
8. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172.*

LEGISLATION REFERRED TO:

1. *The Supreme Court Rules, Chapter 25 of the Laws of Zambia.*
2. *The Rules of the Supreme Court, 1999 Edition, Vol 1.*
3. *The Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations, 1997.*
4. *The Environmental Protection and Pollution Control Act, Cap 204 of the Laws of Zambia.*
5. *The Mines and Minerals Development Act No. 7 of 2008.*

6. *The Explosives Act, Cap 115 of the Laws of Zambia.*

7. *The Town and Country Planning Act, Cap 283 of the Laws of Zambia.*

When this appeal was argued, we had indicated that we would deliver a single judgment covering the motions raised by the appellants and the 2nd respondent as well as the main appeal. We now do so. We propose to deal firstly with the two motions.

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On 30th September, 2013, the appellants filed a motion for leave to adduce further evidence pursuant to Section 25(1)(b)(iii) of the Supreme Court of Zambia Act and Rule 78 of the Supreme Court Rules, Chapter 25 of the Laws of Zambia. At the hearing of this appeal, counsel for the appellants informed us that by consent, the parties request was for the Court to accept the appellants' motion only to the extent that there was a visit to the farms in question on the dates indicated in the motion and which farms are owned as indicated in the motion. Counsel for the appellants requested that the application relating to what livestock may or may not have been on the farms be expunged, as it would be presumptuous to indicate what the learned trial Judge would have recorded during the scene visit.

The motion was accompanied by an affidavit sworn by Mr. Bonaventure Chibamba Mutale, State Counsel, in which he deposed that on 14th April, 2011, the learned trial Judge conducted a site visit to the area of the project in the company of the parties and their advocates. He further deposed that the learned trial Judge

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took notes during the site visit, but that the record from the court below did not have the notes that the court recorded concerning the site visit. That on account of the missing notes, this court should allow the appellants to adduce further evidence at the hearing of this appeal.

In opposing the appellants' application to adduce further evidence, counsel for the third respondent conceded that the notes for the site visit were indeed, missing. It was, however, her submission that the missing court notes are not relevant for the determination of this appeal as the grounds of appeal raised by the appellants are sufficient as are the arguments in support of the grounds of appeal. Counsel for the 3rd respondent argued that

the absence of the site visit notes will not in any way prejudice the appellants' appeal.

It was also contended that the application by the appellants was misconceived as it was brought pursuant to the wrong provisions of the law. Counsel argued that Section 25(1) (b) (iii) of the Supreme Court Act deals with a situation where the court is requested to

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receive evidence of a competent but not compellable witness, which situation does not apply to this case. This argument was extended to Rule 78 of the Supreme Court Rules wherein it was argued that this rule relates to clerical errors by a Judge in documents or processes in any judgment.

We have considered the submissions in respect of the appellants' motion for leave to adduce further evidence. Section 25(1)(b)(iii) of the Supreme Court Act states that:

"25. (1) On the hearing of an appeal in a civil matter, the Court may, if it thinks it necessary or expedient in the interests of justice-

iii) receive the evidence, if tendered, of any witness (including any party) who is a competent but not compellable witness, and if a party makes an application for the purpose, of the husband or wife of that party in cases where the evidence of the husband or wife could not have been given at the trial except on application to the trial court;"

We agree with counsel for the 3rd respondent that making the application under this section is misconceived as the circumstances of this case do not fall within Section 25(1) (b) (iii) of the Supreme Court Act. In our view, the applicable provision would be Section 25(1)(b)(i) of the Supreme Court Rules which reads as follows:

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"25. (1) On the hearing of an appeal in a civil matter, the Court may, if it thinks it necessary or expedient in the interests of justice-

(i) Order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case;"

We also hold the view that Rule 78 of the Supreme Court Rules does not apply to the circumstances of this case as it relates to the correction of errors or omissions in a judgment of the Supreme Court not the High Court.

The calling of further evidence on appeal is discretionary. A party requesting the court to call further evidence on appeal must show that such evidence will have an important influence on the final results of the case or that it will be an affront to one's sense of fairness not to admit such evidence. See *Zambia Revenue Authority v Hitech Trading*¹. We have looked at the grounds of appeal and heads of argument filed in by the appellants and form the view that the arguments advanced therein are sufficient for determining this appeal. The absence of the notes pertaining to the site visit will not prejudice the appellants in any way. We, accordingly, dismiss the appellants' application with costs to the respondents.

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We now turn to the 2nd respondent's motion. On 28th February, 2014, the 2nd respondent filed in its notice of motion for leave to substitute its heads of argument. At the hearing of this appeal, counsel for the appellant informed us that the parties agreed by consent, that the 2nd respondent be allowed to substitute its heads of argument. We accordingly allow the 2nd respondent's application to substitute its heads of argument.

We will now deal with the main appeal. The brief facts of the case are that on 20th February, 2008, the 2nd respondent was issued with an investment licence by the Zambia Development Agency. Thereafter, the 2nd respondent acquired Farm No. 755, Makeni, Lusaka for purposes of setting up a cement plant as the said land contained a substantial amount of lime deposits, which is a major raw material in the production of cement. On 27th June, 2008, the 2nd respondent conducted a scoping exercise at the project site in order to get the views of the persons who may be affected by the project. The 2nd respondent subsequently prepared an Environmental Impact Statement in August, 2008, which was

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submitted to the 1st respondent. On 5th December, 2008, the 1st respondent approved the 2nd respondent's project, with conditions.

On 23rd October, 2009, the appellants wrote a letter to the then Minister of Tourism, Environment and Natural Resources complaining that the 2nd respondent did not consult them during

the formulation of the Environmental Impact Statement. On 23rd November, 2009, the Minister of Tourism, Environment and Natural Resources conducted a visit at the site of the project and consequently ordered the 1st respondent to suspend the project on account of the appellants' complaints. By letter dated 24th November, 2009, the 1st respondent suspended the 2nd respondent's cement project on grounds that the stakeholders consulted in the scoping exercise of 27th June, 2008, did not reflect those owning properties in the area surrounding the project.

On the understanding that the 2nd respondent had conducted some blasting activities on the premises, the appellants filed in a writ of summons on 11th March, 2010, which was subsequently re-amended on 4th February 2011, asking for the following relief:

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- i. A declaratory order that the Environmental Impact Statement Report prepared by the 2nd respondent was fictitious, false, a misrepresentation and in breach of the Environmental Pollution and Control Act, Cap 204 of the Laws of Zambia;

- ii. A declaratory order that the 1st respondent had no authority to consider and approve Environmental Impact Assessment Reports relating to a mining and mineral project as per Statutory Instrument No. 28 of 1997.
 - iii. A declaratory order that the extent of Plots 37a and 38a of Farm 755 Makeni on which the proposed cement plant was located is less proportionate for a mining project of the 2nd respondent's magnitude;
 - iv. An order nullifying the decision letter by the 1st defendant issued sometime in December,2008;
 - v. An order directing the 2nd respondent, its agents, servants or whosoever to cease construction or any operations on Plots 37a and 38a and Farm No. 755 pursuant to Section 4 of the Environmental Management Act No. 12 of 2011;
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- vi. An order directing the re-location of the 2nd respondent's cement plant from Farm No. 755 Makeni;
 - vii. A declaratory order that the change of use of land on Plots 37a and 38a, Farm number 755 by the Lusaka Planning Authority did not comply with Section 22 and 25 of the

Town and Country Planning Act Chapter 283 of the Laws of Zambia.

In its defence, the 2nd respondent stated that all the stake holders were given adequate notice and the views of those that attended were incorporated in the Environmental Impact Statement Report. The 2nd respondent also stated that further views were sought from additional stakeholders and included in a supplementary Environmental Impact Statement. It was argued that all relevant approvals to set up the project were obtained from all the relevant Ministries and that the 1st respondent had the requisite authority to approve any activity that would have an effect on the environment. The 3rd respondent averred that the change of use of land from agriculture to mining was done in accordance with Sections 22 and 25 of the Town and Country Planning Act, Cap 283

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of the Laws of Zambia as all the relevant procedures on change of use of land were followed.

The learned trial Judge dismissed the appellants' claim. In so doing, he found that the appellants whose farms surrounded the 2nd respondent's project did not have title to the land and could, therefore, not enjoy the same rights as the 2nd respondent, a title holder. He also found that the 2nd respondent conducted another scoping exercise with the assistance of an expert and the 1st respondent, in order to include the views of all stake holders. That the second scoping exercise carried out by the 2nd respondent received a positive response from the public and the appellants could not argue that they were not consulted. The learned trial Judge held that the falsehoods referred to by the appellants had been cured by the second scoping exercise. He also found that objections to the project were sought from relevant stake holders through the advertisements placed in the Times of Zambia, Zambia Daily Mail and the Post Newspaper respectively. The learned trial Judge also found that the decision by the then Minister of Tourism

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and Environment to suspend the project was *void ab initio* as it violated the rules of natural justice in that the 1st and 2nd

respondents were not heard. The learned trial Judge held that the five government agencies which approved the project were acting *intra vires* the statutory authority conferred upon them, had the relevant expertise and did an extensive study on the project prior to authorisation. He held that there was unanimity by the Government agencies involved that the project was environmentally friendly and that the appellants had failed to show any demonstrable harm.

The appellants were not satisfied with the judgment and filed in fourteen grounds of appeal. All the parties to this appeal solely relied on their filed heads of argument.

Counsel for the appellants argued grounds one and two of the appeal together. In these two grounds of appeal, it was contended that the learned trial Judge erred in law and in fact when he ruled that the appellants did not have sufficient *locus standi* to commence the action herein as non-title holders.

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Counsel for the appellants submitted that the learned trial Judge erred in law and fact when he ruled that the appellants did not have sufficient *locus standi* to commence the action herein when some of the appellants were title holders. Counsel referred us to certificate of title No. 753/20 in respect of the 16th, 17th and 18th appellants, receipts for payment of land in respect of the 8th appellant dated 7th March, 2013 and a property tax clearance certificate with respect to the 30th appellant dated 28th March, 2013. Counsel also argued that the learned trial Judge ignored the fact that under Regulation 10(1) of the Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations, 1997 the right to be consulted does not attach to ownership of land. It was contended that the holding by the learned trial Judge was misconceived as Regulation 16 of the Environmental Pollution and Control (Environmental Impact Assessment) Regulations requires that all affected and interested persons be consulted. Counsel referred us to the case of *Henry Mpanjilwa Siwale and 6 others v Ntapalila Siwale*² in which the respondent was issued with a certificate of title in respect of customary land that was previously held by the father, to

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the exclusion of his siblings, who were the appellants in that matter. In that case, we held that:

“The appellants were persons who were affected by the grant of the certificate of title to the respondent and were not consulted before this was done. The appellants had as much right to the land as the respondent, being all children to the deceased.”

We have considered the arguments in respect of ground one and two of the appeal. We agree that the right to be consulted in matters pertaining to the environment is not restricted to ownership of land. At page J53 of his judgment, the learned trial Judge stated that:

“The first plaintiff and the other farms surrounding the project have no title to land and cannot enjoy the same rights as a title- holder the 2nd defendant.”

This is contrary to Regulation 10(1) of the Environmental Pollution and Control (Environmental Impact Assessment) Regulations which states that:

“The developer shall, prior to the submission of the Environmental Impact Statement to the council, take all measures necessary to seek the views of the people in the communities which will be affected by the project.”

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Equally under Regulation 16 of the Environmental Pollution and Control (Environmental Impact Assessment) Regulations, the onus on the 1st respondent to consult with the public is not restricted to title holders. The learned trial Judge clearly misdirected himself when he considered the aspect of title as this provision does not restrict consultation to title holders only. It is also our considered view that restricting consultation to title holders would also narrow the scope of the tort of nuisance to litigants who have title deeds. There is merit in grounds one and two of the appeal.

Ground three of the appeal was that the learned trial Judge erred in both law and fact when he ordered the second respondent's mining project to proceed on the evidence before him.

In respect of ground three, counsel for the appellants submitted that the learned trial Judge erred when he allowed the project to continue when the 2nd respondent's witness, Razzak Sattar, conceded in his evidence that the 2nd respondent did not

own a mining licence and would not carry on any mining activities.

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It was submitted that the large scale prospecting licence in respect of Lusaka West was held by a company called TEAL Explorations Limited. Counsel argued that the 2nd respondent's property fell within this area and its request to mine limestone on that site was rejected by TEAL Explorations Limited.

Counsel for the appellants observed that the mining licence that the 2nd respondent relied on belonged to a company called R&M Prospecting Company Limited. It was argued that the 2nd respondent could not claim that it would be using the licence for R&M Prospecting Company Limited in the absence of evidence that the Director of Mines had consented to the transfer of the licence from R&M Prospecting Company Limited to the 2nd respondent, as provided for under Section 55(1) (c) of the Mines and Minerals Act, Chapter 213 of the Laws of Zambia. In support of this argument, counsel referred us to the case of *Munali Insurance Brokers and another v The Attorney General and*

*another*³ in which we stated that where a law requires that a licence be obtained before carrying out

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a certain business, an entity cannot carry out such a business without first obtaining the licence.

In response, counsel for the 2nd respondent submitted that the appellants did not plead the issue of the 2nd respondent not having exploration rights over the land or owning a mining licence. Counsel contended that the learned trial Judge should, therefore, have ignored the evidence on the issue of the mining licence canvassed during cross examination.

We have seriously considered the arguments in respect of ground three of the appeal. We have also looked at the endorsement on the re-amended writ of summons. As correctly observed by counsel for the 2nd respondent, the appellants did not plead the issue of the 2nd respondent not having a mining licence. However, this issue was raised in the evidence of Razzak Sattar, the 2nd respondent's witness and the record of appeal shows that

there was no objection to questions relating to the 2nd respondent owning a prospecting or mining licence. In the case of *Anderson Kambela*

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*Mazoka and two others v Levy Patrick Mwanawasa and two others*⁴, we held *inter alia* that:

“(i)The function of pleadings, is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such.

(ii)In case where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the Court will attach to the evidence of un-pleaded issues.”

The learned trial Judge was, therefore, not precluded from addressing the issue of the mining licence and the appellants were entitled to raise the issue on appeal.

The evidence before the learned trial Judge with regard to the mining licence was that the 2nd respondent had applied for a

mining licence using its sister company, R&M Prospecting Company Limited on 18th March, 2010. On 22 April, 2010 R&M prospecting Company Limited was issued with a Small Scale Mining Licence relating to the mining of limestone, clay and sand. The 2nd respondent's witness, Razzak Sattar, testified that the 2nd

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respondent would be manufacturing cement while R&M Prospecting Company Limited would be mining the raw material with which to manufacture the cement. He also told the court below that the mining licence could not have been issued without the consent of TEAL Explorations Limited. We are inclined to accept that this was indeed the position, having regard to Section 55(1) (c) of the Mines and Minerals Development Act, No 7 of 2008 in which the Director of Mines requires consent before a mining licence can be issued in respect of an area requiring consent.

Further, evidence from Razzak Sattar that it was common practice for cement manufacturers to outsource mining services was not challenged at trial. In our view, the fact that the 2nd

respondent chose to outsource the mining component of its project does not amount to R&M Prospecting Company Limited transferring its mining licence to the 2nd respondent. R&M Prospecting Company Limited can carry out mining activities in the area since it was issued with a licence to carry out small scale mining activities for ten years. Our considered view is that the Environmental Impact

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Assessment carried out by the 2nd respondent in terms of the impact of the mining activities on the environment was sufficient. We do not see the necessity for R&M Prospecting Company Limited to carry out a separate Environmental Impact Assessment in respect of the same project. This ground of appeal is dismissed.

Counsel for the appellants argued grounds four and fourteen of the appeal together. In ground four, counsel contended that the learned trial Judge erred in both law and fact when he ruled that the appellant's witnesses were not experts on environmental issues when the term environment refers to every aspect of life

including mining, agriculture, water and other social economic activities. Ground fourteen of the appeal was that the learned trial Judge erred in both law and fact when he ignored expert evidence to the effect that 33 acres of land was too small an area to safely conduct blasting/mining operations given the fact that some of the appellants properties are within 598 meters from the second respondent's blasting area contrary to the provisions of the Second Schedule of the Explosives Act, Cap 115 of the Laws of Zambia.

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Under these two grounds of appeal, counsel for the appellants submitted that the learned trial Judge erred when he disregarded the evidence of the expert witnesses that the appellants called. It was argued that these witnesses were experts on the environment in accordance with Section 2 of the now repealed Environmental Protection and Pollution Control Act, Cap 204 of the Laws of Zambia. Counsel submitted that the appellants called eight witnesses who are experts on mining, agriculture, poultry, quarrying blasting and explosives respectively. It was argued that the evidence of these witnesses

was based on their skill and training, therefore, the learned trial Judge was entitled to accept their expert evidence. In support of this submission counsel for the appellants referred us to the case of *Sithole v The State Lotteries Board*⁵ in which we stated that:

“The court is entitled to accept an expert's interpretation of evidence where that interpretation is based on special training and skill, but it is not entitled to accept as factually existing something which the expert says he can see but which the court itself is unable to see.”

In response, counsel for the 2nd respondent submitted that the learned trial Judge ought not to have ruled on the issue raised in

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ground four as the issue was not pleaded in the court below. In respect of ground fourteen, counsel for the 2nd respondent submitted that the opinions or inferences of an individual are inadmissible as proof of material facts, except in cases where the individual possesses special skill or knowledge concerning a matter which is before a Judge. He argued that between Mr. Evans Mudolo and Mr. Lubinda Kamutumwa who was a Senior Inspector of Mines in the Mines Safety Department, the latter

possessed more specialised knowledge on the matter that was before court, therefore, his opinion was properly relied upon. Counsel for the 2nd respondent also observed that the opinion rendered by Mr. Mudolo related to the Second Schedule of the Explosives Act, which deals with the manufacture of explosives. He pointed out that the 2nd respondent was interested in the manufacture of cement and not explosives.

We have seriously looked at the arguments advanced in respect of ground four of the appeal. We see no merit in the argument advanced by counsel for the 2nd respondent that the

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learned trial Judge should not have addressed the issues raised in ground four of the appeal as they were not pleaded. The issues in ground four relate to evidence given by the expert witnesses and it is trite that one cannot plead evidence. We do not think that it is improper for the appellants to raise an issue on appeal that was admitted into evidence. See *Anderson Kambela Mazoka and two others v Levy Patrick Mwanawasa and two others*⁴. In any event,

grounds four and fourteen of the appeal are interrelated, that is why the appellants have argued them together.

We do not agree with the finding by the learned trial Judge at page J49 to J59 of his judgment, that the appellants' consultants were not experts on environmental issues, but experts in segments such as mining, water and Veterinary Surgery. In our view, these are all facets of the environment as defined in Section 2 of the now repealed Environmental Protection and Pollution Control Act, Cap 204 of the Laws of Zambia. We, however, accept that it remained for the learned trial Judge to accept or decline the evidence of these witnesses. In the case of *Sithole v The State Lotteries Board*⁵, we

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stated that in a case where the court has nothing more on which to rely to assist it in coming to a conclusion other than the explanations and reasoning of the experts; and where two experts differ in such a case, the court is left to choose between the two opinions.

With respect to the impact of mining activities on the environment, the learned trial Judge had before him the evidence of Evans Mudolo, a witness for the appellants and a report from a Mr. Lubinda Kamutumwa, a Senior Inspector of Mines and Explosives from the Department of Mines, produced by the 2nd respondent. The evidence of Evans Mudolo was that it was not safe to conduct blasting near buildings and human habitation as the vibrations from the blasting could damage buildings. He stated that the distance from the proposed quarry/blasting area to the neighbouring properties owned by the appellants fell below the required minimum distance of 598 meters as prescribed in the Second Schedule of the Explosives Act. On the other hand, the

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relevant portion of the report by Mr. Lubinda Kamutumwa dated 2nd December, 2009, reads as follows:

“RE: COMMENTS AND ASSESSMENT ON THE MINING ACTIVITIES FOR THE PROPOSED NASLA CEMENT PROJECT IN KONGA MAKENI AREA”

COMMENTS:

1. *Systematic and controlled blasting could be conducted safely for heaving and fragmenting limestone materials with reduced noise, dust emissions and vibrating without adversely interfering with neighbours.*
2. *Before drilling, charging and blasting operations commences, it is important that our department is informed so that an inspector of Mines and Explosives is present to give advice on the drilling pattern, type of explosives, delay elements to be used and charging and timing tactics.”*

The learned trial Judge observed that the appellants’ expert witnesses opinions were not a response to the opinions given by the government experts on the project as some of them did not have sight of the Environmental Impact Statement, The Environmental Management Plan and the letter approving the project setting out conditions to mitigate any negative impact the project would have on the environment. We cannot fault the learned trial Judge for arriving at this conclusion. A case in point is the report of Mr. Lubinda Kamutumwa who visited the project site from 31st of

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November, 2009 to 1st December, 2009 and made the report based on his observations at the site, the Environmental Impact Statement as well as the recommendations made by the 1st respondent. Mr. Evans Mudolo, on the other hand, made his observations simply based on the distance of the project site to the nearby farms. He admitted in cross-examination that he did not refer to the 2nd respondent's report, the fourth schedule of the Explosives Act and neither was he aware of the type of explosive material that would be used to mine the limestone.

Regulations 205, 216, 230 and 254 of the Explosives Act cited by counsel for the appellants do not assist the appellants in this case, as they relate to an explosives factory which is described in Section 2 of the Explosives Act as:

"Any place licensed under this Act for manufacturing explosives for sale, and includes a mound, building and magazine, and the work carried on therein or thereon for whatsoever purpose."

These provisions were cited out of context as there is no evidence on the record of appeal before us that the 2nd respondent

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would engage in the manufacturing of explosives as envisaged under the Explosives Act.

Equally, Paul Tramus, a Veterinary Surgeon, who prepared a report on behalf of Hybrid Poultry Farm and Chimwan'ga Maseka, who prepared a report on the impact of the project on the water level admitted that they did not visit the project site, make reference to the mitigatory measures suggested by the 1st respondent or the report by the Senior Inspector of Mines. The appellants' witnesses clearly made their observations without recourse to the mitigatory conditions imposed by the 1st respondent.

We equally do not accept the appellants' argument that 33 acres of land is insufficient for the mining of limestone as this argument is not supported by evidence on record. In so doing, we are fortified by the provisions of the Second Schedule of Regulation 3(2)(4) of the Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations in which the 1st respondent requires a project brief for any project

involving the mining (Including Quarrying and Open-Cast Extraction) of

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Limestone, sand, dolomite, phosphate and clay extractions of two Hectares or more. On the evidence on record, we do not agree that the learned trial Judge was entitled to accept the evidence of the appellants' expert witnesses. We do not find merit in grounds four and fourteen of the appeal.

We propose to deal with grounds five and ten of the appeal together since these two grounds of appeal raise similar issues. Ground five of the appeal was that the learned trial Judge erred when he found that all the relevant agencies had approved the 2nd respondent's project. In ground ten of the appeal, it was contended that the learned trial Judge erred in both law and fact when he concluded that the procedures for change of use of land were complied with when it is not clear in which papers the notices were placed in.

Counsel for the appellants submitted that the finding by the learned trial Judge that the 2nd respondent obtained approval from

all the relevant agencies was perverse as it was not supported by evidence. Counsel urged us to set aside this finding on the

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authority of *Rosemary Chibwe v Austin Chibwe*⁶ in which we held that:

“It is a cardinal principle supported by a plethora of authorities that court’s conclusions must be based on facts stated on record.”

The basis for this ground of appeal appears to be the finding of the learned trial Judge at page J58 and J59 at which he stated that:

“The project was approved by the following agencies: The Environmental Council of Zambia which regulates environmental issues; The Mines safety Department which regulates safety in all mining operations; The Lusaka Planning Authority in conjunction with the Minister of Local Government which ensures that projects are properly located; Kafue district Council which ensures that projects conform to their development plans; and The Ministry of Mines which gave the mining licence.”

We do not find merit in the appellants’ argument that the finding of the learned trial Judge is perverse. On 5th December,

2008, the 1st respondent approved the 2nd respondent's project through a decision letter in which it attached conditions for the

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approval. One of the conditions for approval was that the 2nd respondent should obtain further approval from other relevant agencies. Further, the Mines Safety Department was consulted on the safety of conducting blasting activities at the project site and responded in the affirmative. In the report dated 2nd December, 2009, Mr. Lubinda Kamutumwa advised the 2nd respondent that it was safe to carry out what was termed as systematic and controlled blasting, subject to the supervision of the Mines Safety Department. The Ministry of Mines equally approved the mining activities to be undertaken on the 2nd respondent's premises as evidenced by the issuance of a small-scale mining licence to R&M Prospecting Company Limited for a ten year period. We have sufficiently dealt with the issue of the mining licence in ground three of the appeal and will therefore not repeat ourselves.

The evidence on record also shows that the local authorities properly approved the 2nd respondent's project pursuant to Sections 22 and 25 of the Town and Country Planning Act, Cap 283 of the Laws of Zambia. By letter dated 22nd July, 2008, the 2nd respondent

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applied for change of use of land from agriculture to industrial. On 29th July, 2008, the 3rd respondent placed an advertisement in the Zambia Daily Mail pursuant to Section 18(2) of the Town and Country Planning Act, giving notice to the public on the 2nd respondent's application for change of use of land. On 28th May, 2009, the Lusaka Province Planning Authority held a meeting to consider applications for change of use of land, at which the 2nd respondent's application was considered. The application was sent to the Minister of Local Government and Housing on 8th September, 2009, with a recommendation that it be approved. On 6th October, 2009, the Minister approved the application for change of use of land from horticulture to industrial. Mr. Maxwell Zulu, the 3rd respondent's witness stated that the Lusaka Planning Authority had sight of the 2nd respondent's Environmental Impact

Statement when considering the application for change of use of land.

As submitted by counsel for the 3rd respondent, Mr. Maxwell Zulu was taken to task over the dates in the newspaper advertisements. His explanation, which the learned trial Judge

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accepted, was that the mistake in the dates was a typographical error. He denied that the notices, which were in standard format, were generated for purposes of the trial. The explanation on the dates given by this witness sounded reasonable. We agree with counsel for the 3rd respondent that the appellant's argument that the notices were mere computer printouts prepared for purposes of the proceedings amounted to an allegation of fraud. This allegation was neither pleaded nor substantiated in the court below we therefore cannot entertain it on appeal. See Order 18 Rule 12(18) of the Rules of the Supreme Court, 1999 Edition.

In any event, we do not see how the mistake in the dates prevented the appellants from lodging any objection to the application for change of use of land. The learned trial Judge was

on firm ground when he held that all the relevant government agencies approved the 2nd respondent's project. Grounds five and ten of the appeal lack merit.

Counsel for the appellants argued grounds six and eight of the appeal together. The kernel of these two grounds of appeal was that

(1177)

the learned trial Judge misdirected himself by treating this matter as if it were an application for judicial review when the matter was commenced by way of writ of summons.

We have considered the arguments in respect of this ground of appeal. We do not agree with the finding by the learned trial Judge that the instruction given by the Minister to the 1st respondent, to cancel the 2nd respondent's project due to insufficient consultation was contrary to the rules of natural justice. This is in view of Section 4 of the Environmental Protection and Pollution Control Act which reads as follows:

"The Minister may give to the Council such general or specific directions with respect to the discharge of its functions as he may

consider necessary and the Council shall give effect to those directions.”

In any event, the evidence on record shows that Mr. James Mulolo was part of the team that accompanied the Minister to the project site while the 2nd respondent was represented by their consultant, a Mr. Songela.

It is not in dispute that not all the appellants were consulted during the 2nd respondents scoping exercise held on 27th June,

(1178)

2008. This is what caused the appellants to complain to the Minister. Regulation 8(2) and Regulation 10(2) of the Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations require a developer to ensure that the views of all interested and affected persons are taken into account when preparing an Environmental Impact Statement. Having neglected to consult some members of the community, the 2nd respondent could not entertain any legitimate expectation that its project would not be suspended by the 1st respondent. The instruction by the Minister to the 1st respondent was justified

and in line with the provisions of Section 4 of the Environmental Protection and Pollution Control Act.

We, however, do not agree that the doctrine of legitimate expectation and the principles of natural justice are limited to the realm of judicial review as argued by counsel for the appellants. There is a plethora of cases outside the realm of judicial review in which we have applied the principles of natural justice. A similar argument was raised in the case of *Communications Authority v*

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*Vodacom Zambia Limited*⁷ which was a claim in contract. One of the arguments raised in that case was whether or not the respondent had been treated oppressively and unfairly contrary to the spirit of the Economic Empowerment Act and that the appellants did not perform according to the legitimate expectation that had arisen in the respondent. At page 234 of our judgment, we acknowledged the doctrine of legitimate expectation notwithstanding that the matter was not one under judicial review. Ground six and eight of the appeal lack merit and are hereby dismissed.

Ground seven of the appeal was that the learned trial Judge misdirected itself by considering the 2nd respondents alleged expenses, when the 2nd respondent did not plead or counterclaim the same.

We do not see merit in this ground of appeal. Clearly, counsel for the appellants misapprehended the judgment of the court below in this respect. The learned trial Judge did not consider the

(1180)

expenses outlined in Razzak Sattar's witness statement anywhere in his judgment. In his witness statement, Razzak Sattar stated that the project would create in excess of 300 jobs and this was not disputed by the appellants. It was on this basis that the learned trial Judge held that public interest would be best served by allowing the project to continue so as to preserve the 300 jobs that the project would create.

Counsel for the appellants argued grounds twelve and thirteen of the appeal together. The gist of these two grounds of appeal was that the learned trial Judge erred in law and in fact when he held that the 2nd respondent would be discriminated against if the project was cancelled in view of the activities undertaken at the Chilanga Cement PLC plant which is located within the same vicinity.

There is merit in these two grounds of appeal. The 2nd respondent did not plead discrimination and neither was evidence to this effect adduced before the lower court. There is no evidence

(1181)

on the record of appeal before us on how Chilanga Cement PLC conducts its operations and how these operations affect the environment. The finding on discrimination by the learned trial Judge is not supported by evidence and we accordingly set it aside. See *Wilson Masauso Zulu v Avondale Housing Project Limited*⁸.

Lastly, counsel argued grounds nine and eleven of the appeal together. Ground nine of the appeal was that the learned trial Judge erred by concluding that the defects in the Environmental Impact Assessment Report had been cured when the 2nd respondent's Environmental Management Plan, Environmental Analysis Report and the Summary Report were prepared in the belief that the 2nd respondent would engage in mining operations contrary to the testimony of Razzak Sattar. Ground eleven of the appeal was that the learned trial Judge erred in both law and fact when he concluded that the shortcomings in the 2nd respondent's Environmental Impact Assessment process had been cured contrary to the provisions of the Environmental Protection and Pollution

(1182)

(Environmental Impact Assessment) Regulations, which are couched in mandatory terms.

Counsel for the appellants submitted that the learned trial Judge erred when he held that the second scoping exercise cured the defects in the first Environmental Impact Assessment when the exercise was based on a limited and/or false scope of public views on the potential impact of the project. It was also argued that the second scoping exercise was incapable of rectifying the Environmental Impact Assessment in light of Regulation 8 and Regulation 16 of the Environmental Pollution and Control (Environmental Impact Assessment) Regulations which require a developer and the Zambia Environmental Management Agency to obtain the views of interested and affected parties during the preparation and consideration of the Environmental Impact Statement. It was contended that failure to obtain public views on the project affects the entire process rendering the decision letter irregular.

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Counsel also submitted that the learned trial Judge erred when he ignored the flaws in the evidence of the 2nd respondent,

which indicated that the advertisements for the second scoping exercise were fictitious.

Counsel for the 1st respondent replied only to ground eleven of the appeal. It was submitted that the 1st respondent complied with the Environmental Pollution and Control (Environmental Impact Assessment) Regulations, 1997 when it approved the 2nd respondent's project. Counsel submitted that the evidence on record shows that the 2nd respondent's project was approved with conditions on 5th December, 2008, after a verification inspection at the site and a call for comments, comprising a request for comments from authorizing agencies and an advertisement in the press for two weeks for purposes of enabling the public to comment on the project as required under the regulations.

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Counsel argued that the advertisements placed in the media by the 1st respondent were not meant for the 2nd respondent's

second scoping exercise, but were meant to obtain public views to inform the 1st respondent's decision on whether or not to approve the project. It was argued that there was no second scoping exercise as alleged. What was conducted after the suspension of the decision letter approving the project was a consultative meeting involving

stake holders that were not consulted earlier. Counsel contended that the appellants were precluded from alleging that the advertisements placed by the 1st respondent were fictitious when they did not raise this allegation in the court below.

In response, counsel for the 2nd respondent submitted that ground eleven of the appeal was a radical departure from the pleadings as the Environmental Pollution and Control (Environmental Impact Assessment) Regulations, 1997 was not pleaded in the court below. Counsel also submitted that in any event, these two grounds of appeal lack merit since the 1st and 2nd

(1185)

respondents essentially complied with the process of conducting and approving the Environmental Impact Assessment. Counsel observed that the people consulted did not complain about lack of knowledge concerning the project, but rather about the possible harmful effects of the project on their business, livelihood and health as can be seen by the concerns raised at pages 393 to 394 of volume II of the record of appeal at the stake holders' meeting held at the Makeni Sunset Villa on 26th November, 2010.

We have considered the arguments in respect of grounds nine and eleven of the appeal. We do not agree that ground eleven is a radical departure from the pleadings in the court below because this entire case was premised on whether or not the respondents complied with the provisions of the Environmental Pollution and Control (Environmental Impact Assessment) Regulations, 1997.

We agree with counsel for the 1st respondent that there was only one scoping exercise that was conducted by the 2nd respondent on 27th December, 2008. After complaints from the appellants that

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they were not consulted, the 1st respondent suspended the project and directed the 2nd respondent to consult with the appellants, so as to reflect the appellants' concerns in the Environmental Impact Statement. Between 26th October, 2009 and 8th October, 2009, the 1st and 2nd respondents held consultative meetings with about nine stakeholders whose farms surround the 2nd respondent's project. Of these, two had no objections to the project, three required further consultation with their advocates, while four stakeholders objected to the project. Further consultation was undertaken on 26th November, 2010 at a meeting held at the Makeni Sunset Villas in Lusaka with other stakeholders, including the appellants and two representatives from the Kafue District Council. The Kafue District Council also confirmed attendance in a letter dated 19th May, 2010 that it was also represented at the scoping exercise held on 27th June, 2010.

On the evidence on record, it is evident that the major flaw that the appellants identified in the entire process was the 2nd

respondent's failure to consult them during the preparatory stage of

(1187)

the Environmental Impact Statement. This was confirmed in the letter dated 14th July, 2010 from the 1st respondent to the 2nd respondent, in which the 1st respondent made it clear that the only outstanding issue was the alleged fake stakeholders that the 2nd respondent had consulted. We agree with the finding by the learned trial Judge that this flaw was rectified by the subsequent stakeholders' consultative meetings. Regulation 35 of the Environmental Pollution and Control (Environmental Impact Assessment) Regulations, 1997 which talks about a developer bearing the costs of any remedial measures taken as a result of breach of the conditions set out in the regulations suggests that the 1st respondent may order a developer to undertake steps to correct any errors made in respect of the project. The 1st respondent properly approved the project and attached conditions to mitigate any harmful effects on the environment, which the 2nd respondent has agreed to implement. The appellants failed to prove that the mitigatory measures imposed

by the 1st respondent were insufficient to curb any harmful effects the project may have on the environment. We agree with the learned trial Judge that the

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appellants failed to show any demonstrable harm that they were likely to suffer should the project proceed. These two grounds of appeal lack merit. We accordingly dismiss them.

The sum total of this appeal is that it lacks merit and is accordingly dismissed. The parties shall bear their respective costs.

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H.CHIBOMBA
SUPREME COURT JUDGE

.....
E.M. HAMAUNDU
SUPREME COURT JUDGE

.....
A.M.WOOD
SUPREME COURT JUDGE