PAUL CONNOLLY
versus
TUSKER INVESTMENTS (PVT) LTD
and
PARKS & WILDLIFE MANAGEMENT AUTHORITY
and
ENVIRONMENTAL MANAGEMENT AGENCY

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 8 July 2021

Date of written judgment: 15 July 2021

Urgent chamber application

Adv F. Mahere, for the applicant
Adv D. Ochieng, for the first respondent
Mr *W. Zhangazha,* for the second respondent
No appearance for the third respondent

MAFUSIRE J

[1] Siansimba is a campsite in the Zambezi Valley. It is owned by the second respondent. The second respondent is a statutory body set up in terms of the Parks and Wildlife Act (*Chapter 20:14*). It has multiple functions. They include, *inter alia*, the power or obligation to control, manage and maintain national parks, botanical gardens, sanctuaries, and recreational parks for the purposes specified in that Act. In this application, the applicant seeks a number of interim interdicts against the respondents. Against the first respondent, a private company duly incorporated in accordance with the laws of this country, the applicant seeks an order directing it, and any person acting through it, to immediately stop any construction on Siansimba Campsite, and to remove forthwith any construction materials from it, including any structures that have been put in place thus far.

[2] Against the second and third respondents, the applicant seeks the suspension of the operation of any permit, and the suspension of the operation of any lease agreement entered into in favour of the first respondent. Although not being precise, it is evident that the suspensions are sought in respect of Siansimba. The third respondent is another statutory body set up in terms of the Environmental Management Act, (*Chapter 20:27*). Its remit includes, *inter alia*, the power or obligation to regulate, monitor, review and approve environmental impact assessments, and the undertaking of any works necessary to, or desirable for, the protection or management of the environment, where it appears to be in the public interest, or where in its opinion an appropriate authority has neglected to do so.

[3] It is part of the interim relief sought by the applicant that in the event that the respondents fail to comply, the Deputy Sheriff be empowered to remove all employees, building materials or structures built by the first respondent, or those acting through them. Further, the applicant also seeks, as part of interim relief, an order of costs against the respondents, jointly and severally, at the scale of legal practitioner and client.

[4] The applicant seeks the interim orders aforesaid pending the determination of another application under the case reference no HC 5327/20, ("the main application"), which is before this court. The main application was filed by the applicant herein, together with twenty four others, on 22 September 2020. Therein the applicants seek an interdict against the first respondent to stop it from constructing or developing Siansimba campsite. The main application was initially filed as an urgent chamber application under a certificate of urgency. However, it was removed from the roll for urgent matters by a judge of this court on the basis that it was not urgent. The parties are agreed that there was no hearing as such, but that, as is the established and widespread practice, only a minute via the Registrar, was dispatched advising that the matter was not urgent. In spite of that, the main application was proceeded with on the ordinary roll. At the hearing of this application, the main application was pending before my brother TAGU J who had indicated that he was arranging set down before the end of the current High Court term on 31 July 2021.

[5] In the present application, the applicant says he is a lawyer. He says his practice is in Victoria Falls. He also says he is a keen conservationist. Distilled, the case for the applicant

and the twenty four others in the main application is this. The second respondent is wrong to remove Siansimba campsite from its control and management and placing it in the control and management of a private entity, the first respondent. By so doing, the second respondent has denied the Zimbabwean public, including themselves, access to the campsite. Only rich foreign tourists will be able to afford the commercial fees the first respondent will inevitably charge. Yet campsites such as Siansimba are the natural heritage of Zimbabweans and their children after them, which are entrusted to the second respondent.

[6] The applicants further argue in the main application that the intended development at Siansimba will destroy the magnificent fauna and flora found in the area. This is not the first natural campsite that the second respondent has given away. The applicants have watched helplessly over the years as one campsite after another is leased to private players. Whilst they understand the second respondent's mandate and its need to put natural resources to sustainable commercial use, this should be balanced against both the public interest and the environmental conservationist imperatives. The public were not consulted before the second respondent granted the permit and the lease to the first respondent in respect of Siansimba. This was in breach of the obligations thrust upon it by the Constitution and statutes such as the Administrative Justice Act (*Chapter 10:28*), the Parks and Wildlife Act, the Regional, Town and Country Planning Act (*Chapter 29:12*) and others, particularly with regards to the right to be consulted for possible objection to any proposed layout plan; the right to administrative conduct that is lawful; the right to have the environment protected for the benefit of present and future generations; the obligation placed on the second respondent to protect the natural landscape and scenery in national parks, and so on.

[7] In the present application, the applicant says that what has prompted him to come back to court under another certificate of urgency is that despite the first and second respondents' denial in affidavits filed by them in the main application, that any construction work was taking place at Siansimba as the parties were still negotiating the lease, and despite asserting that issues to do with environmental impact assessments would be undertaken with the third respondent at the appropriate time, it has turned out that the first respondent has already concluded the lease agreement with the second respondent; has already been granted the

necessary permit to run the camp and, worst of all, has already commenced building operations. The applicant tells of a personal visit to the camp by himself on 20 June 2021 where he noticed, among other things, roads having been paved; large quantities of building materials having been brought on site; considerable excavation work underway, and a team of workers having been brought on site.

[8] The applicant argues that the present urgent application is meant to safeguard the sanctity of the main application. The respondents' conduct seeks to undermine those proceedings. They will be rendered academic should construction at the camp site proceed before the main application is determined. The applicants in the main application have a very strong case. They are likely to succeed. If they do, the relief will be too late if the respondents are not stopped for the time being. What the respondents are aiming at is to present a *fait accompli* at the time of the main application. Then they will seek "forgiveness" instead of permission, and present the enormous costs of construction that the first respondent will have incurred as a legitimate reason for the development to stay put. The balance of convenience favours the freezing of developments now rather than later.

[9] On the *locus standi* to bring the main application and the present one, the applicant cites, among others, s 85 of the Constitution. This provision empowers or entitles, among others, any person acting in their own interests; any person acting as a member, or in the interest of a group, or class of persons; or any person acting in the public interest, to approach a court alleging that a fundamental right or freedom enshrined in Chapter 4 of the Constitution has been, is being, or is likely to be infringed. The applicant also refers to the various provisions of the various Acts referred to above that guarantee certain public rights or privileges over natural resources, and the concomitant rights to be consulted whenever a development has been agreed upon which is likely to change the ecological layout or topographical structure of a national park, or any part of it.

[10] The first and second respondents have vigorously opposed both the main application and the current one. The third respondent has neither filed any papers in either the main application or the current one, nor appeared at the hearing. The first and second respondents' grounds of opposition are multiple. Inevitably, points *in limine* have been raised. At the

hearing, counsel agreed that full argument on both the points *in limine* and the merits would be presented. I would, in my judgment, deal with the points *in limine* first, and only go to the merits if I dismissed them. I readily agreed with that approach. It is expedient.

[10] The main points *in limine* relate to the urgency of the matter and the *locus standi* of the applicant in the present matter, and of himself and the twenty four others in the main matter. The first and second respondents argue that the current application is not urgent. It is a repeat of the main application. The issue of urgency is *res judicata*. In September 2020, this court, after considering the main application, which is really the same as this one, ruled that it was not urgent. It is wrong for the applicant, in fact, an abuse of the court process, to bring the same application in a space of nine months, relying essentially on the same facts and the same arguments. It is wrong for the applicant to ascribe the reason that this court declined to hear the main application on an urgent basis because construction at the site had not commenced. The court never said that.

[11] Still on urgency, the first and second respondents argue that despite launching the main application as an urgent one, alleging, among other things, that any delay in the court determining it would render whatever remedy it would grant afterwards a *brutum fulmen*, the applicant and the twenty four others, have not only persisted with the main application on the ordinary roll, but also that in doing so, have been so lackadaisical that it was left to the first respondent to arrange its set down. The point about this argument is that, firstly, the applicant's argument of an irreparable harm is fallacious, because if it were genuine, he and the twenty fours would have abandoned the main application after this court had refused to hear it on an urgent basis, because any relief afterwards would be academic. But they are carrying on. There is no threat of an irreparable harm because the applicants seek mere restorative relief. If they succeed, the development at the camp site will be demolished, and any foreign matter brought to site will be carted away. Secondly, it was the first respondent that made all the effort to paginate the record in the main application, supply an index and arrange the set down, when it is the applicants who are the *dominus litis*.

[12] On *locus standi*, the first and second respondents argue that the reliance by the applicant and the twenty four others on s 85 of the Constitution is misplaced. The entitlement given in

that provision is for the vindication of rights enshrined in Chapter 12, not just any other perceived right. The applicants ought to have decided the specific capacity in which they are approaching the court, rather than take a buckshot approach. This position has been settled by the Constitutional Court in *Mpofu v ZERA & Ors* CCZ 13/20. The purported rights sought to be enforced by the applicant herein, and by himself and the twenty four others in the main application, are foreign to Chapter 12.

[13] For the other point *in limine,* the first and second respondents impugn the certificate of urgency on the basis that the legal practitioner that signed it did not apply his or her mind to the issue because a great deal of the averments therein are almost verbatim those in the main application, yet the certificate of urgency in that application was filed by a different legal practitioner. Furthermore, in the current application, the certificate of urgency refers to "*... some 25 (Twenty Five) applicants...*", yet there is only one.

[14] On the merits, the first and second respondents, argue that apart from lacking *locus standi* in both the current proceedings and the main application, the applicants have not established any *prima facie* right as is available to themselves as will be capable of enforcement by way of an interdict. The respondents have not done anything outside the law. The right to lease out facilities in the national parks is permissible. Among other powers, the second respondent is mandate to consider strategies for the sustainable use of the natural resources under its care and management. Domestic tourism, which apparently the applicants wish to preserve for themselves, cannot sustain the running of these national parks because the incomes are insignificant. At any rate, there still remain several other campsites in the Zambezi Valley that have not been let out to private players. The applicants can still make use of them. There is no danger of any irreparable harm because if the applicants succeed in the main application, the first respondent will simply dismantle the camp and remove its materials from site.

[15] Here now is my ruling. I consider the matter urgent. It may be that in the present matter the applicant seeks essentially the same relief that he and the others failed to get in the main matter on an urgent basis. The respondents condemn the applicant for suggesting that urgency in the main matter was refused because construction at the site had not yet started. But the applicant's suggestion in that regard is quite excusable. My attention has been drawn to

averments in the respondents' opposing affidavits in the main matter, to the effect that the applicants had jumped the gun because no lease had yet been granted as the respondents were still negotiating. The respondents also averred therein that it was premature for the first respondent to be running with issues to do with environmental assessments, let alone construction, before the lease and the permit had been granted. In his own affidavit in the main application, the applicant acknowledged that construction at the site was yet to begin.

[16] If the applicants had jumped the gun in the main application, certainly not in this one. It is common cause that some kind of construction has begun. The applicant's allegations that excavation is in progress; that a large workforce and considerable building materials have been brought to site, and that roads have been paved, are not in dispute. Apparently these activities started between the refusal by this court to deal with the main matter on an urgent basis and now. Thus, such a fundamental change in circumstances does not make the question of urgency *res judicata*, as argued by the respondents.

[17] Regarding the alleged laidback approach by the applicants in the main application in setting it down for hearing, I accept the argument by counsel that the lockdown measures imposed by governments the world over, including ours at the beginning of this year, in efforts to check the spread of the covid-19 pandemic, severely restricted the pace at which matters could be prosecuted through the courts, given that access was now so strictly limited. This would be more the case with the main application which this court had already refused to deal with on an urgent basis.

[18] It is not clear from the record when exactly this court rejected the purported urgency in the matter. But what is clear is that the first and second respondents filed their notices of opposition on 29 September 2020 and 30 September 2020 respectively. The applicants filed their answering affidavits on 26 October 2020 and 19 November 2020 (in reverse order). They filed their heads of argument on 14 December 2020. I am mindful of the respondents' argument that in terms of r 236 (3) of Order 32 of the Rules of this court, where an applicant does not file his or her answering affidavit within 30 days of the respondent's notice of opposition, the respondent may proceed to set the matter down himself/ herself, or apply for its dismissal for

want of prosecution. However, it is self-evident that there has been no appreciable delay by the applicants in prosecuting the main application. They were substantially within the timelines.

[19] On *locus standi*, I am satisfied that the applicant has the right and the substantial interest to ensure that the main application is not undermined by anything done to render nugatory the remedy that he seeks there together with the other applicants. Whether he and the other applicants therein will in fact be able to convince the court that they have the requisite *locus standi in judicio* for the remedies that they seek therein is not an aspect that I should concern myself with in the current proceedings. The applicant's case herein is that there is a matter pending before this court but that the actions of the respondents in the interim jeopardise the efficacy of the order that he and the other applicants are waiting for in the main application. But at any rate, *prima facie*, the applicants seem to have the requisite *locus standi*. Some of the rights that they want to vindicate are enshrined in Chapter 4 of the Constitution, for example, the environmental rights in terms of s 73; the right to administrative justice in terms of s 68, and the right to a fair hearing in terms of s 69. At this stage, I do not consider it my duty to assess the applicants' prospects of success in asserting those rights in the main application.

[20] It also seems to me that the respondents have misconstrued the *ratio decidendi* of *Mpofu v ZERA & Ors* above. In that case, the Constitutional Court acknowledged that the sentiments that in claiming *locus standi* under s 85(1) of the Constitution, a person should act in one capacity in approaching a court, and not act in two or more capacities in one proceeding, had been endorsed in the case of *Nkomo v Minister of Local Government, Rural & Urban Development & Ors* 2016 (1) ZLR 113 (CC), p 18. But in *Mpofu's* case the court went on to state, at p 3:

> "Although this Court has suggested that one must act in one capacity only under s 85(1) of the Constitution, where the circumstances so dictate and one avers that he or she is acting in two or more capacities, that alone, it would appear to me, on the basis of a broad and generous approach to standing that s 85(1) portends, cannot be a basis for denying audience if at least one of the capacities does entitle the applicant to standing."

[21] Thus, it is not a rule of thumb that in approaching a court under s 85(1) of the Constitution, an applicant much select only one capacity and stay bound by it. In fact, in the *Mpofu* case, the court went on to cite with approval, an opinion and an authority to the effect

that a litigant may have standing both to act in the public interest and to act in the interests of persons who cannot act in their own name. In the circumstances, I hold that the applicant has the requisite *locus standi in judicio* and hereby dismiss the preliminary objection.

[22] The objection regarding the certificate of urgency is, with all due deference, frivolous. I consider it as one of those that are raised merely as "*a mandatory ritual*"[1]. The lawyers issuing out the certificates of urgency in both the main application and in this one are dealing with almost identical subject matters. The major issues that drove the applicants in the main application to approach the court on an urgent basis are still alive in the current application. I have looked at both certificates scrupulously. Whilst there may be convergence in the choice of expressions in some paragraphs, nevertheless I am satisfied that the legal practitioner in the current matter did exercise independence of mind in scrutinising the averments in the founding affidavit and certifying the matter as one of urgency. His or her[2] reference to "*... some 25 (Twenty Five) Applicants...*"[3] with which the respondents have taken issue, is faultless. Plainly, he or she is referring to the applicants in the main application, not this one. I dismiss this point *in limine* too.

[23] On the merits, the requirements for an interim interdict are so well known as to require no citation of authorities beyond the *locus classicus Setlogelo v Setlogelo* 1914 AD 221. An applicant must show a *prima facie* right having been infringed, or about to be infringed, even if it be open to some doubt; an apprehension of an irreparable harm if the interdict is not granted; a balance of convenience favouring the granting of the interdict; the prospects of success on the merits, and the absence of any other satisfactory remedy.

[24] Legal principles are not an exact science like mathematics where, for instance, one plus one is always equals to two. These factors for an interdict are looked at objectively, cumulatively and in the context of the facts. One or other of them may be more important in some cases than they may be in others. There can be no doubt that the applicant has a *prima facie* right to insist on maintaining the status *quo ante* until the main application is determined.

[1] *Rufasha v Bindura University of Science Education & Ors* 2016 (2) ZLR 668 (H)
[2] The name does not on its own lead to any identification of the gender of the legal practitioner.
[3] Para 5.4

The respondents brand the interdict that he seeks as merely restorative. On that basis they argue that the harm feared is reparable because if he succeeds, the first respondent will simply demolish whatever structures it will have put in place and restore the place to its original condition. But that is too superficial. In the main application, the applicants condemn the development at Siansimba for the destruction being caused to the environment. If roads are being paved, how do they get demolished? How will the fauna and flora being destroyed in the process recover to their original pristine condition?

[25] The balance of convenience eminently favours that construction be halted until the main matter is determined. It is no longer a long wait. As indicated before, the matter is likely to be determined in the next few days given the assurance given by my brother TAGU J, unless of course circumstances beyond control militate against that. The nature of the remedy being sought is such that there can be no other alternative. There is likely to be greater prejudice to the applicants if the interdict is not granted than to the respondents if it is granted. If the construction is stopped, but the applicants lose in the main matter, the first respondent, possibly together with the second, will probably miss their targets and probably suffer some financial loss. But this cannot be such loss as may not be compensated by an award of damages, should they persist. On the other hand, if the applicants succeed after the destruction of the environment has occurred, there is no way any human efforts can repair nature to exactly the condition it is in. Only nature will repair itself, but probably after generations. Thus, it is so logical to impose a moratorium on construction.

[26] The interdict sought is merited. It shall be granted. However, the draft order is widely cast. Only the interdict to halt the physical development and the operation of the campsite by the first respondent should be adequate for the purpose. Therefore, the following relief is hereby granted:

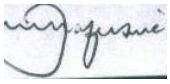
Pending the determination of the main application before this court under the case reference no HC 5327/20:

i/ The first respondent, and any person acting through it, shall immediately cease any further construction or development on Siansimba Campsite in the Zambezi Valley.

ii/ The operation of any permit granted by the second or third respondent in relation to the operation of Siansimba Campsite by the first respondent is hereby suspended.

iii/ The operation of any lease agreement between the first and second respondents in relation to the operation of Siansimba Campsite by the first respondent is hereby suspended.

15 July 2021



Whatman & Stewart, legal practitioners for the applicant
Kevin J. Arnott, legal practitioners for the first respondent
Chinogwenya & Zhangazha, legal practitioners for the second respondent