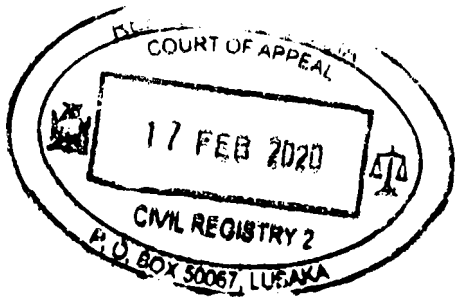
IN THE COURT OF APPEAL OF ZAMBIA **CAZ/08/323/2019**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

MOSES LUKWANDA (Senior Headman Maoma)	**1ST APPELLANT**
REGIS NKOMESHYA (Senior Headman Nkomeshya)	**2ND APPELLANT**
MAXWELL MWAMPEKANYA (Headman Mwampekanya)	**3RD APPELLANT**
ANDREW KAYUMBA (Headman Kapamangoma)	**4th APPELLANT**
GABRIEL MUKANKAULWA (Headman Mukankaulwa)	**5th APPELLANT**
BEATRICE MWANJELEKA (Headman Kabeleka)	**6th APPELLANT**
DANIEL CHILETE (Headman Kayombo)	**7th APPELLANT**
JOSHUA TATILE (Headman Kapuka)	**8th APPELLANT**
CHOLWE NKOMESHYA (Princess of the Soli People)	**9th APPELLANT**
CHALIMBANA HEADWATERS CONSERVATION TRUST LTD	**10th APPELLANT**

AND

ZAMBIA AIRFORCE PROJECTS LIMITED	**1ST RESPONDENT**
KINGSLAND CITY INVESTMENT LIMITED	**2ND RESPONDENT**
DRIMTOWN INVESTMENT LIMITED	**3RD RESPONDENT**
SHANGRILA INVESTMENT LIMITED	**4TH RESPONDENT**
DATONG CONSTRUCTION LIMITED	**5TH RESPONDENT**
ZAMBIA ENVIRONMENTAL MANAGEMENT AGENCY	**6TH RESPONDENT**
WATER RESOURCES MANAGEMENT AUTHORITY	**7TH RESPONDENT**
THE ATTORNEY GENERAL	**8TH RESPONDENT**

CORAM: HONOURABLE JUDGE M. M. KONDOLO SC

For the Appellants	*: Mr. M. Nchito, SC and Ms. N Chibuye of Messrs Nchito & Nchito*
For the 1st Respondent	*: Lt. Col. A Chitembwe & Lt. Col. S. Sikaaswe*
For the 2nd, 3rd & 4th Respondent	*: Mr. Kombe & Mrs. K. Pashota of Messrs Andrew & Partners*

For The 5th Respondent : Absent

For The 6th Respondent : Mr. M. Kumwenda – In-House Counsel

For The 7th Respondent : Mr. C. Ngaba In-House Counsel

For The 8th Respondent : Absent

J U D G M E N T

CASES REFERRED TO:

1. **Hilda Ngulube v The Attorney General & Others, Appeal No. 114/2016**
2. **Grandpa Group Ltd v Ford Motor Co. Ltd (1972) FSCR, 103)**
3. **GO-TV Broadcasting Limited v Zambia National Broadcasting Corporations Limited and the Attorney General, Cause No. 2017/HP/017**
4. **Salomon v Salomon & Co. (1897) A.C. 22**
5. **Associated Chemicals Limited v Hills and Delamain Zambia Limited and Another (1999) Z.R. 9.**
6. **Madison Investment Property and Advisory Company Limited v Peter Kanyinji Selected Judgment No. 48 of 2019**
7. **American Cyanamid v Ethicon (1975) AC 396**
8. **Preston v Luck [1884] 27 C.D. 497**
9. **Turnkey Properties v Lusaka West Development Company Limited, BSK Chiti and Zambia State Insurance Corporation Ltd (1984) ZR 85**
10. **Shell & BP v Conidaris & Others (1975 ZR 174 (S.C)**
11. **Hilary Bernard Mukosa v Michael Ronaldson (1993 - 1994) Z.R. 26 (S.C.)**
12. **Sanofi-Aventis Deutschland GMBH V Alphapharm Pty Ltd (NO 3) [2018] FCA 2060**

LEGISLATIONS REFERRED TO:

1. **The Court of Appeals Rules, 2016, Laws of Zambia**
2. **The Environmental Management Act No. 12 of 2011, Laws of Zambia**
3. **The State Proceedings Act, Chapter 71, Laws of Zambia**

OTHER WORKS REFERRED TO:

1. **Gower and Davies: Principles of Modern Company Law 8th Edition, Paul L Davies: Thomson: Sweet and Maxwell (2008)**

This is a renewed application for an interim injunction made pursuant to **Order 7 Rules (1) and (2) of the Court of Appeals Rules, 2016** and **Section 4(1) and (4) of the Environmental Management Act No. 112 of 2011** . This application rests on proceedings commenced by the Applicant before the High Court seeking the following reliefs;

1. An injunction restraining the Defendants by themselves, their servants or agents or otherwise whosoever from continuing construction works or further development s in the area;
2. An Order that the Defendants should obey the Protection Order of 22nd September, 2017;
3. An order declaring that the developments are a threat not only yo the Chalimbana River Catchment but the greater Lusaka Aquifer System;
4. A declaration that the Busoli people and the general public have a right to access clean and uncontaminated water for their consumption and use which is threatened by the impugned development by the Defendants;
5. A declaration that the developments in the area are a threat to the Plaintiffs and general public's right to a clean, safe and healthy

environment pursuant to Section 4 of the Environmental Management Act No. 12 of 2011;

6. An order that the Defendants by themselves, their servants or agents or otherwise whomsoever be prevented or stopped from continuing construction works or further developments in the environmentally sensitive area.
7. An order compelling the Defendants to take measures to protect the environment by restoring the degraded area to its consition immediately prior to the start of the developments pursuant to Section 4 and 110 of the Act;
8. Costs; and
9. Such other reliefs as the Court may deem fit.

The lower Court initially granted an *ex-parte* Order of injunction which was later discharged by a Ruling dated 29th July 2019. As indicated earlier, the Applicants have renewed the application before this Court. The application was heard *inter-partes* and was supported by an Affidavit dated 10th October, 2019 and sworn by Robert Chembo, the Secretary of Chalimbana Headwaters Conservation Trust Ltd who are the 10th Defendant herein.

He attested that the purpose of the action commenced in the High Court was to prevent the Respondents from developing a building project in Lusaka East Forest Reserve No.27 which is ecologically and environmentally sensitive and is also a critical and sensitive underground recharge area known as the Chalimbana Catchment area. He stated that it provides 50-

60% of Lusaka City's entire water supply and the source of the Chalimbana River and its tributaries that flow into the Chongwe River and other streams that are all part of the greater Lusaka underground water aquifer.

He further attested that the 1st to 5th Defendants' developments are destroying the recharge area and disrupting the process of replenishing Lusaka's underground aquifer and if not stopped, will have irreversible consequences such as drying boreholes and wells. He stated that the Appellants and other Chongwe residents had been affected by such things as the Chongwe River drying up and the failure to stop these construction works further infringes on the Appellants' and the general public's right to access clean and safe water.

The deponent accused the Respondents of not having obtained an Environmental Impact Assessment ("**EIS**") or necessary approvals before commencement of the project resulting in the Zambia Environmental Management Agency ("**ZEMA**") the 6th Respondent, issuing a Protection Order in September 2017, instructing the Respondents to stop the constructions works. He added that the Concession Agreements signed between the 1st, 3rd, 4th and 5th Respondents required that all necessary environmental consents be obtained but this had and has not been done to date.

It was further attested after the Protection Order issued, the 6th Respondent on 7th February, 2019, issued a Decision Letter with mandatory conditions to be complied with before resuming the construction project.

The decision letter, at paragraphs 3.1.3 and 3.1.5 imposed the following conditions;

> ***3.1.3 Project implementation shall only commence once Zambia Air Force Projects Company Limited complies with the requirements of the Water Resources Management Act No. 21 of 2011 and provide proof to the Agency.***
>
> ***3.1.5 Zambia Air Force Projects Company Limited shall prepare and submit for approval a comprehensive hydrological study of the Chalimbana Sub-catchment prior to project implementation.***

It was attested that the Respondents have not complied with the pre-conditions set forth by the 6th Respondent and if the 1st to 5th Respondent are not restrained from carrying on with their construction project, the area in contention will be irretrievably damaged before the final determination at trial.

The 1st Respondents filed an Affidavit in opposition dated 25th November, 2019, sworn by Colonel Edgar Lungu in which he attested that paragraphs 5, 6, 7 8, and 9 of the Applicants' Affidavit were not supported by any exhibits or substantiated by any evidence or expert report.

These are the paragraphs in which the Applicants attested that 50-60% of the Lusaka City's water supply is sourced from underground water; that

the Forest No. 27 is known as the Chalimbana Catchment area which is the source of the Chalimbana river which together with its tributaries and other streams flow into the Chongwe river and also replenishes the Lusaka aquifer which was at risk of drying up, and that the Chongwe river had already dried up on account of the 1st to 5th Respondents' construction activities.

It was disputed that the Respondents' activities were infringing on the general public's right to clean drinking water as all construction was being done under the watchful eye of the 6th Respondent who had approved the project with attendant conditions as set out in the Decision Letter dated 7th February, 2019. It was attested that the Protection Order issued in September 2017 had been superseded by the said Decision Letter.

It was further attested in paragraphs 12, 13 and 14 and 15 as follows;

12. **That in line with the decision letter dated 7th February, 2019, all necessary Environmental Consents are being obtained progressively as some approvals can only be produced by the relevant Regulatory Agencies after a period of time and length studies being conducted as the project is being implemented or indeed after commissioning. In any case, paragraphs 3.1.2. and 3.1.6. of the Decision Letter allows the Defendants through Zambia Airforce Projects Limited to implement the project in line with conditions that may be issued by ZEMA from time to time and to obtain permits throughout the project.**

13. **The Respondents have since submitted reports to the relevant Agencies and are awaiting responses after the same have been studied. Now shown to me is aleter**

marked "EL2" from ZEMA acknowledging some of the reports submitted thus far by the Defendants.

14. **That the Deponent's statement in paragraph 16 is misconceived as the Decision Letter allows Zambia Airforce Company to obtain permits from ZEMA throughout the Project Cycle. The said permits can only be obtained alongside project implementation and therefore continuation of construction is inevitable.**

15. **That I verily believe that the Respondents' continued construction works shall not in any way cause irreparable injury to the Appellants as the works are being carried out in conformity with the set conditions by the Zambia Environmental Management Agency (ZEMA) and Water Resources Management Authority (WARMA) or as the same may be issued from time to time.**

The Applicants' Affidavit stated that the 1st to 5th Respondents had continued its construction works in defiance of the Protection Order dated 22nd September, 2019 and the *ex-parte* Order of Injunction granted by the High Court which had both ordered them to stop construction. The Applicants informed the court that they had even applied for leave to commence contempt proceedings against the Respondents.

The 2nd, 3rd and 4th Respondents filed an Affidavit in opposition dated 25th November, 2019 sworn by Huang Bing the Assistant Managing Director of the 2nd Respondent. The Affidavit essentially repeated the averments in the 1st Respondents Affidavit in opposition and stated that the construction works were being carried out in conformity with the conditions set out by

the 6th and 7th Respondents and they had obtained all the necessary licences and consents.

It was attested that according to a joint investigations report of March 2019 by the 6th and 7th Respondents and the Zambia Bureau of Standards, little or no effluent was being discharged into the Chalimbana River from the Zambia Air Force Housing Complex. He further stated that the construction works would not cause any irreparable injury to the Applicants.

With regard to disobeying the Protection Order and the *ex parte* Order of injunction, the 1st to 4th Respondents attested that they had obeyed both orders and stopped all construction works until the Protection Order was superseded by the Decision Letter and until after the *ex-parte* Order for Injunction was discharged.

The 5th, 6th, 7th and 8th Respondents filed no Affidavits and of these four only the 6th and 7th Respondents attended the hearing which proceeded in their absence.

At the hearing the Applicants relied on their Affidavit in support and submitted that if the injunction was not granted they would suffer irreparable injury. On behalf of the Applicants Mr. Nchito SC, opined that the 6th an 7th Respondents who were the authorities with the responsibility to protect the Appellants seemed limited in what they could do or were just being ignored. He further clarified that the 6th, 7th and 8th Respondents were joined to the action by an Order of Judge Chibabuka who had conduct of

the matter in the High Court but later recused herself and was replaced by Judge Chitabo.

Mr. Nchito, SC submitted that the 6th Respondent issued a Protection Order on 22nd September, 2017 which said that the construction works should stop but the Respondents ignored the Order and continued construction works. He submitted that the 6th Respondent somehow ignored that disobedience and gave the 1st to 5th Respondents another chance by issuing them with a Decision Letter dated 5th February, 2019. He stressed the point that the Respondents continued to disobey the Protection Order from 22nd September, 2017 until February, 2019. He opined that the Protection Notice remains in force and was and still is being disregarded.

State Counsel argued that the Decision Letter which stated that the project was approved at strategic level contained the precondition set out in paragraph 3.1.5 which was being disobeyed by the Respondents. He stated that it was only after being served with the Affidavit for the renewed Injunction that they suddenly woke up and said they had lodged a Hydrological Report for approval. He pointed out that the said Hydrological Report was submitted to ZEMA on 18th November, 2019 and was yet to be approved and project implementation was supposed to begin after approval was obtained.

He submitted that the heart of the Applicants' complaint was that the project would dry up their rivers which was an issue that needed to be settled at trial. He further stated that the 7th Respondent had also been

disregarded because paragraph 3.1.3 of the decision letter required that the **Water Resources Management Act** (WARMA ACT) be complied with prior to implementation of the project. He referred to various sections of the **WARMA ACT** and opined that **Section 71** requires a permit for use of water in projects of this nature especially that Forest No. 27 was a recharge area for the Lusaka aquifer and because building in a recharge area naturally drains it and WARMA needs to give its approval. He opined that was what paragraph 3.1.3. contemplated.

Mr. Nchito, SC responded to the submission in the 1st Respondent's skeleton arguments that the 1st Respondent was entitled to protection under **State Proceedings Act** because it was an agent of the State acting on behalf of the Government which had entered into concession agreements with the 2nd to 5th Respondents. The 1st Respondent in that regard submitted that an injunction against the 1st to 5th Respondents would amount to an injunction agaisnt the State contrary to the provisions of the aforesaid Act.

The Applicants submitted that the 1st Respondent was an ordinary legal person under the Companies Act and is amenable to the jurisdiction of this Court and subject to its injunctive powers. He stated that the High Court case cited by the 1st Respondent was wrong and does not bind this Court. He instead cited the case of ***Hilda Ngulube v The Attorney General & Others,*** in which the Supreme Court granted an injunction against two co-defendants with the State. He pointed out that para 12.1.10 of the concession agreement demands respect for environmental law and

submitted that the Respondents have behaved as though they are immune to environmental law.

It was further submitted that damages cannot suffice in this matter as the damage to the recharge area will be irreversible and that the project be subjected to an injunction until it is established by a Court of competent jurisdiction that there is no damage to the recharge system and underground water of Forest No. 27. He emphasised that the balance of convenience tilted in favour of safeguarding the environment and referred to the **Hilda Ngulube Case** which he cited earlier and in which the supreme Court cited **Grandpa Group Ltd v Ford Motor Co. Ltd (1972) FSCR, 103)** where it was held that; *"It would be wise to delay a new activity rather than damage one that is established."* . He concluded that it would be equally wise to preserve Forest 27 than risk damage.

According to State Counsel, there had been an attempt to create evidence for this hearing such as the Respondents submitting a Hydrological Report to the 6th Respondent on the 18th November, 2019 after being served with process on 5th November, 2019. He concluded by saying that the Respondents had totally disregarded their obligations by disregarding the Protection Order of 22nd September, 2017, the Decision Letter of the 6th Respondent, the requirements of the **WARMA ACT** including having disobeyed the *ex -parte* Order of injunction and he prayed that the application for an injunction be granted.

Lt. Colonel Chitembwe submitted on behalf of the 1st Respondent and placed reliance on the Affidavit in opposition and skeleton arguments in

opposition both filed on 25th November, 2019. He provided some historical background to the effect that in 2013 the State constructed 1, 001 housing units at the Zambia Air Force ("**ZAF**") Twin Palm Base and the current project was for the purpose of constructing supporting infrastructure such as schools, shopping malls, offices etc. In so doing, the State partnered under a Public-Private Partnership with the 2nd, 3rd, 4th and 5th Respondents and Concession Agreements were duly executed with the parties clearly spelt out as the Government of Zambia ("**GRZ**") acting through Zambia Air Force Projects Ltd incorporated as a private limited company as an Agent on the one hand and the concessionaire on the other hand.

It was submitted that even though the 6th Respondent issued a Protection Order on 22nd September, 2017 wherein the project was to stop forthwith, the same Order directed that the developers were to remedy any adverse effects the project may have on the surface water, forest and the surrounding eco-system, the air quality and take appropriate measures to preserve the ecology etc. and flow of surface water in Forest Reserves No. 26 and 27.

Counsel pointed out that a careful look at the Protection Order reveals that there is no time limit given for the developers to adhere to the conditions. However, realizing the need to adhere to environmental requirements attendant to construction or development of projects, the GRZ acting through the 1st Respondent submitted an EIS to ZEMA on 20th October, 2017 for consideration of approval of the project and on 7th

February, 2019, the 6th Respondent stated that the Environmental Project Brief ("**EPB**") had had been approved at strategic level with conditions.

According to Counsel, being approved at strategic level meant that the project could be implemented because when read with paragraph 3.1.2, the conditions to be issued by ZEMA from time to time were not cast in concrete and were thus subject to change from time to time as the project moved on. He stated that there being no time frame given, the Respondents re-submitted the Hydrological, Ecological and Water Management plan on 5th November, 2019 and ZEMA acknowledged the fulfilment of the conditions in the Decision Letter of 7th February, 2019.

He added that the conditions and interactions with the relevant regulatory agencies were on-going with a view of ensuring that the project has no adverse effects to the environment, the local community who in this instance include the Appellant and generally the country of Zambia.

Counsel then submitted that the State incorporated the 1st Respondent as a Special Purpose Vehicle ("**SPV**") through which to execute the project for which it had signed concession agreements. He stated that the State was the principal party whilst the 1st Respondent was an agent through which it would develop the project with the concessionaires and granting an injunction against the 1st to 5th Respondents would amount to injuncting the State contrary to the provisions of the **State Proceedings Act.** He cited the case of **GO-TV Broadcasting Limited v Zambia National Broadcasting Corporations Limited and the Attorney General, Cause No. 2017/HP/017** at pages R19 and R20 where in similar circumstances, the

High Court held that injuncting the 3rd Defendant in that matter would amount to injuncting the state contrary to **Section 16 of the State Proceedings Act**.

Counsel argued that the Applicants had not established a clear right to relief as they had not shown how their rights under **Section 4 of the Environmental Management Act of 2011** ("**EMA**") had been impinged by the project.

He further argued that the Applicants had not shown how they would suffer irreparable injury if the injunction was not granted. He added that the State was, through the 1st Respondent, fulfilling the environmental conditions required for implementation of the project from time to time and that the fears expressed by the Applicants were mere speculation and irreparable injury was unlikely to occur.

It was submitted that the balance of convenience tilted in favour of the State for economic development of the Country which it was doing whilst taking account of the interest of the local communities and the environment through its submission to relevant monitoring and regulatory authorities such as the 6th and 7th Respondents.

Counsel for the 2nd, 3rd and 4th Respondents Mr. Kombe submitted that this matter hinges on **section 4 (1) of the EMA**. He opined that it was quite clear that the issue the Applicants had against the Respondents was their alleged failure to comply with the conditions in the Decision Letter dated 7th February, 2019 and in particular paragraphs 3.1.2 and 3.1.3. He pointed

out that the **EMA** provides for corrective measures to be taken where there is non-compliance with the conditions stated in a decision letter.

Counsel submitted that the same **section 4 of the Act** provides that a person who is threatened has the liberty to go to Court, a tribunal or to any reasonable authority mandated to ensure that their rights are safeguarded. He opined that in *casu*, the Applicants ought to have gone back to ZEMA to seek Orders provided under the Act for corrective measures. He argued that the Applicants had not exhausted the internal procedure as provided by the Act for a person who is aggrieved but had jumped the gun by disregarding the 6th Respondent, and they were trying to use the Courts to perform the statutory functions meant be performed by the Director General of ZEMA.

Mr. Kombe submitted that the Applicants simply felt threatened that there is the possibility of the area being drained whilst in actual fact, at present, there is no contamination of the water nor has the recharge area been drained by the developments undertaken by the Respondents.

He referred to **Section 108** which provides for Orders initiated by the public who feel threatened that their rights are about to be infringed and requires any person aggrieved to provide detailed factual grounds upon which the Director General of ZEMA can act to issue any such Order. He stated that in the event of non-compliance the only corrective measure was to proceed by obtaining a corrective order under **section 106 of the Act** and the Appellants had not shown that they had done so.

Mr. Kombe pointed out that the Concession Agreements were commercial agreements with a fixed duration and to halt any construction at the site will cause delay and irreparable damage which the Applicants cannot atone for. He opined if aggrieved, the Applicants should seek the Orders contained in the **EMA** and not an injunction. He concluded by saying that this is not a proper case in which an injunction Order can be granted and prayed that the application be dismissed with costs.

The 6th and 7th Respondents submissions were neither for nor against the grant of an injunction save for counsel for the 6th Respondent explaining that approval at a strategic level meant that the concept was basically approved, however, the latter part will show that the various individual components require a separate environmental assessments.

Mr. Nchito SC responded by stating that the injunction was being sought because of the threat to the water supply. With regard to the 1st Respondents submission that the Protection Order did not provide time-lines he stated that the 1st first directive in the document very clearly indicated that any construction works should stop forthwith. He pointed out that only the concept had been approved (strategic approval) and paragraphs 3.3.3 and 3.1.5 of the Decision Letter make it clear that the project should not commence prior to that specific impact assessment via the WARMA and the Hydrological Report.

State Counsel referred to **Order 27 of the High Court Rules** and repeated that that the purpose for seeking the injunction was to prevent a wrong from being done. He submitted that the Appellants complaints were

not speculative and there was a clear right to the reliefs being sought from the Court. That if the aquifer is damaged it cannot be fixed and the balance of convenience therefore tilted in favour of the Applicants and the 1st to 5th Respondents who have disregarded environmental law up to this point, cannot aver that the balance of convenience tilts in their favour.

He described Mr. Kombe's submissions on behalf of the 2nd to 4th Respondents as characterizing the Appellants complainant as one of compliance with the Decision Letter. He stated that the Applicants claim was much broader than that because disobedience of the Protection Notice, the Decision Letter and the *ex-parte* injunction illustrate actionable disregard for the law and he referred to the claims set out in the Writ of Summons.

He submitted that the WARMA report referring to the Zambia Air Force Houses and the flow of sewerage and contamination had nothing to do with this project.

He noted Mr. Kombe's submission that the Appellants should have gone to ZEMA for an Order and he pointed out that the Appellants could not go back to the 6th Respondent who the 1st to 5th Respondents had disregarded. He submitted that the EMA allowed an aggrieved party to bring a civil action such as the one before court and he referred **to section 110 of the EMA** and he stated that section **110 (4) of the Act** protects such a plaintiff from a costs order. It was his argument that the remedy provided under **section 106** was not the only remedy available, especially in the circumstances of

this case. He concluded by saying that the Applicants had demonstrated that this was a proper case in which injunctive relief should be granted.

I have considered the arguments by the parties and I shall begin by addressing the 1st Respondent's submission that granting an injunction against the 1st to 5th Respondents will l have the effect of injuncting the State contrary to **section 16 of the State Proceedings Act .** I note that even though the issue was raised and argued by both parties in the lower court, the Judge who dismissed the *ex-parte* injunction did not determine this very important issue in his Ruling.

The **State Proceedings Act** provides that the Court cannot grant an injunction or make an order for specific performance against the State. The provision reads as follows;

> ***16. (1) In any civil proceedings by or against the State the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:***
>
> ***Provided that-***
>
> ***(i) where in any proceedings against the State any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and***

(ii) in any proceedings against the State for the recovery of land or other property, the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the State to the land or property or to the possession thereof.

(2) The court shall not in any civil proceedings grant any injunction or make any order against a public officer if the effect of granting the injunction or making the order would be to give any relief against the State which could not have been obtained in proceedings against the State.

The evidence shows that the 1st Respondent company was incorporated as a private company limited by shares was intended to be an SPV by which the GRZ would advance its interest in the subject project. **Black's Law Dictionary** defines a 'special purpose vehicle' as:

" a business established to perform no function other than to develop, own and operate a large, complex project (single purpose project) especially so as to limit the number of creditors claiming against the project...it provides additional protection for project lenders, which are usually paid only out of the money generated by the entity's business, because there will be fewer competing claims for the money and because the entity will be less likely to be forced into bankruptcy"

The Government elected to incorporate the 1st Respondent as a private limited company in which it would own 99% shares. The nature of a private limited company is that it enjoys a separate legal personality from its shareholders a principal which was championed in the landmark case of **Salomon v Salomon & Co..** In the case of **Associated Chemicals Limited v Hills and Delamain Zambia Limited and Another** the Supreme Court stated that:

> ***"...A principle of the law which is now entrenched is that a company is a distinct legal person different from its members or shareholders".***

In the case of **Madison Investment Property and Advisory Company Limited v Peter Kanyinji**, the Supreme Court discussed the principle of separate legal personality in great detail and stated that a free market heavily relies upon the role of the limited liability company which allows individuals to assume economic risks that they would otherwise be reluctant to assume and it referred to Munbly J in **Ben Hashem v Ali Shayif** who observed the principle of separate legal personality in this passage:

> ***"there has always been a judicial concern not to create commercial uncertainty and undermine the benefits of incorporation. Having incorporated, the shareholders have a legitimate expectation, as do those who deal with the incorporated entity, that the courts will respect the status of the entity and apply the principle in Salomon v Salomon in the ordinary way."***

The Court also indicated that investment confidence would diminish in this Country if the corporate veil was lifted at every turn. It agreed that though the veil can be pierced in certain circumstances, it must be done sparingly.

Section 16 of the State Proceedings Act provides for proceedings against the State and the only proviso is in in relation to a public officer who is defined as "*a person holding or acting in or performing the functions of an office in the civil service of the Government and includes the President, the Vice-President, a Minister, a Junior Minister, the Secretary to the Cabinet, the Attorney-General, the Solicitor-General, the Auditor-General and members of the Zambia Police Force*". The immunity in this Act with regard to Injunctions only applies to the State or a public officer executing his official duties. The Act defines the State as the "Sovereign Republic of Zambia" while an "agent" includes a Contractor but only attaches liability on an agent in tort and not protection.

I take judicial notice that the State has invested in and/or incorporated several commercial and statutory entities in which it holds a complete, majority or significant shareholding/interest for the purpose of advancing its economic developmental and social objectives. Examples of these are ZESCO Limited, Zambia Railways Limited, ZCCM-IH Limited and Industrial Development Company Limited (IDC). The **State Proceedings Act** does not say that it covers commercial entities incorporated by the State and I opine that the legislature did not intend to protect private companies incorporated or engaged by the State to carry out various activities.

It has been argued that the effect of an injunction in this case will amount to ordering an injunction against the State, an argument that holds no water. If this were true, then all Statutory bodies, Parastatals and private contractors that provide goods and services for and on behalf of the Government will be protected by State immunity, an interpretation that is absurd. It matters not how many shares the Government holds in the 1st Respondent Company and it also matters not that the 2nd to 5th Respondents are concessionaires/contractors carrying out work on behalf of the State through the 1st Respondent company, nothing in the **State Proceedings Act** contemplates providing immunity to such entities. This therefore means that an injunction can be ordered against the 1st to 5th Respondents and the principles governing the grant of injunctions will apply as they do in any other application for an injunction.

It is notable the that the 8th Respondent is the Attorney General who neither filed an affidavit in opposition nor skeleton arguments supporting the 1st Respondents argument that it enjoyed protection under the State Proceedings Act.

It was further argued by the Respondents that the matter is prematurely before Court as the Applicants should have started the process by first seeking the relief provided under **section 106 of the Zambia Environmental Management Act No.12 of 2011** before commencing an action in court. **Section 106** reads as follows;

106. (1) The Director-General may, where the Director-General has reasonable grounds to believe that any condition of

a licence issued under this Act has been breached, serve a compliance order on the licensee requiring the licensee to remedy the breach within the period stipulated in the order.

(2) A compliance order issued under subsection (1) may—

(a) suspend the licence with immediate effect if the Director-General considers that the suspension is necessary to prevent or mitigate an imminent risk of significant adverse effects to the environment or to human health occurring; or

(b) require the licensee to take specified measures to prevent or abate any adverse effect.

(3) The Agency may, where a licensee fails to comply with a compliance order—

(a) take the necessary steps to remedy the breach and recover the cost from the licensee in accordance with section one hundred and seven;

(b) vary the conditions of the licence; or

(c) revoke the licence.

(4) A person on whom a compliance order is served shall comply with the requirements of the order by the date or dates specified in the order and if no date is specified, the person shall comply with the order immediately.

(5) A person who contravenes subsection (4) commits an offence and Is liable, upon conviction, to a fine not exceeding three hundred thousand penalty units or to imprisonment for a period not exceeding three years, or to both, and if the person fails to comply with a requirement specified in the compliance order within the Compliance order 160 No. 12 of 2011 Environmental Management specified time, to a further fine not exceeding two thousand penalty units for each day or part of a day after the date specified in the order during which the offence continues.

It is evident that nothing in **section 106** compels members of the public to initiate their grievances with the Director General. The section basically sets out the powers of ZEMA to issue Compliance Orders against offenders, *where the Director-General has reasonable grounds to believe that any condition of a licence issued under this Act has been breached.*

Section 4 (1), (3), (4) of the said Act states as follows;

4. (1) Subject to the Constitution, every person living in Zambia has the right to a clean, safe and healthy environment.

(3) A person may, where the right referred to in subsection (1) is threatened or is likely to be threatened as a result of an act or omission of any other person, bring an action

against the person whose act or omission is likely to cause harm to human health or the environment.

(4) The action referred to in subsection (3) may seek to—

(a) prevent, stop or discontinue any activity or omission, which threatens, or is likely to cause harm to, human health or the environment;

(5) A court, tribunal, appropriate authority, a person or body exercising a public function and any person exercising jurisdiction under this Act shall, in relation to any decision, order, exercise of any power or performance of any function, be guided by the principles set out in section six.

Section 4 of the Act makes it abundantly clear that an aggrieved person *may commence an action* in relation to any perceived disobedience to the provisions of the Act. I find that there was no need for the Applicant to initiate any process before the Director General and the matter is therefore properly before the Courts.

Both parties have propounded and agree on the law regarding the grant of injunctions. The case of **American Cyanamid v Ethicon** is a leading case which set out the general rules regulating the grant of injunctions and in which it was held that a the claimant must show that he has an arguable case and as Lord Cotton said in **Preston v Luck**;

"Of course, in order to entitle the Plaintiffs to an interlocutory injunction, though the court is not called upon to decide finally on the right of the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the Plaintiffs are entitled to relief."

The Applicants have alleged that the **EMA** is being breached by the 1st to 5th Respondents and the breach is occurring in an environmentally sensitive area. They have produced exhibits of the Decision Letter issued by ZEMA and indicated the conditions in the Decision Letter, which in their opinion, have been breached. In this regard, counsel for the 6th and 7th Respondents were present in court but neither of the two filed affidavits in opposition nor skeleton arguments challenging the Appellants assertions. In the premises I find that the Applicants have established that there is a serious question to be tried.

The Appellants allege that the 1st to 5th Respondents have breached the provisions of the Decision letter dated 7th February, 2019; specifically, clauses 3.1.3 and 3.1.5. It is trite that at this stage the Court is not required to delve too deeply into the merits of the main matter and as was said in the case of **Turnkey Properties v Lusaka West Development Company Limited, BSK Chiti and Zambia State Insurance Corporation Ltd[1];**

[1] *Turnkey Properties v Lusaka West Development Company Limited, BSK Chiti and Zambia State Insurance Corporation Ltd, (1984) ZR 85*

"It is improper for a court hearing an interlocutory application to make comments which may have the effect of pre-empting the decision of the issues which are to be decided on the merits at the trial."

However, in determining whether there is a serious question to be tried and whether on the facts before Court there is a probability that the applicant is entitled to relief, the Court is required to consider the evidence before it. In the case of **Hilary Bernard Mukosa v Michael Ronaldson** the Supreme Court explained that there can be no presumption about whether or not the applicant has a good arguable claim to the right he seeks to protect and an injunction will only be granted if the evidence before the court establishes a prima facie case in his favour.

It is important to state from the onset that the forest in which the subject project is being developed is environmentally sensitive which is why the ZEMA has imposed an array of conditions that must be met by the 1st to 5th Respondents in implementing their project. The specifics, as they relate to the forest being a water recharge area and aquifer and the alleged long-term effects of the project on the forest, are a matter for the main trial. The fact however, is that it is an environmentally sensitive area so much so that on 25th September, 2017, ZEMA issued a Protection Order under **section 104 of the EMA** The language used in the Protection Order quite clearly illustrates the environmental sensitivity of the subject area. The order reads as follows;

TO: Datong Construction Limited, Dreamtown Investments Limited, Shagrilla Investment Limited all of Lusaka Districtin the Lusaka Province of the Republic of Zambia

You are ORDERED to:

(a) Take appropriate measures to avoid, remedy and mitigate adverse effects with regard to your proposed construction of Mixed Use Housing and Infrastructure Development on Forest Reserve No. 26 and 27 along Twin PalmRoad near Zambia Air Force Twin Palm Base are of Lusaka District in the Lusaka Province of the Republic of Zambia and to:

i)STOP FORTHWITH any construction works on Forest Reserve No. 26 and No. 27 aforesaid.

ii) Remedy any adverse effects the project may have on the surface water, forest and the surrounding ecosystems.

iii) Remedy the adverse effects on air quality especially caused by the generation of dust from the aforesaid construction activities.

(b) Take appropriate measures to preserve the ecological, biological diversity, archaeological, hydrogeological, physiographical, quality and flow of surface water, within the Lusaka East forest Reserve areas No. 26 and 27.

(c) Prevent the recurrence of the generation of the dust from the site.

FURTHER, you are required to comply with the requirements of this order IMMEDIATELY.

Dated this 22nd day of SEPTEMBER 2017

Director General

According to the Applicants, the 1st to 5th Respondents disobeyed the Protection Order and continued the construction works. There is however no proof of that disobedience, on the material before this Court.

The Respondents submitted that they only resumed works after the ZEMA issued a Decision Letter on 7th February, 2019. According to the Respondents, the Decision Letter was approved at a "strategic level" and the works could resume immediately because, according to them, paragraph 3.1.2 stated that ZEMA would issue conditions from time to time and the conditions were not cast in stone and subject to change as the project moved on.

Paragraph 3.1.2 reads as follows;

3.1.2 Zambia Airforce Company Limited shall implement the project and all environmental management commitments as stated in the Environmental Impact Statement (EIS) with changes as may be made by

Zambia Environmental Agency (ZEMA) and any other conditions that may be issued from time to time.

I note that Paragraph 3.1.2 does not at all state that the project implementation can commence as changes are made from time to time. It simply states that the project shall be implemented as per EIS subject to changes by ZEMA from time to time. It is simply one of the several conditions in the Decision Letter.

The Applicants allege that the Respondents have commenced construction works at the project site despite not complying with clauses 3.1.3 and 3.1.5 whose language indicates that they are pre-conditions to project implementation. Paragraph 3.1.3 reads as follows;

3.1.3 Project implementation shall only commence once Zambia Air Force Projects Company Limited complies with the requirements of the Water Resources Management Act No. 21 of 2011 and provides proof to the Agency.

On the material before this Court, the 1st to 5th Respondents have not shown that they complied with the condition set out in paragraph 3.1.3.

Paragraph 3.1.5 treads as follows;

3.1.5 Zambia Air Force Projects Company Limited shall prepare and submit for approval a comprehensive hydrological study of the Chalimbana Sub-catchment prior to project implementation.

Counsel for the Respondents submitted that there being no time frame given, the 1st Respondent re-submitted the Hydrological, Ecological and Water Management plan on 5th November, 2019 and the 6th Respondent acknowledged the fulfilment of the conditions in the Decision Letter of 7th February, 2019.

Quite contrary to the submissions by Counsel for the 1st Respondent, Paragraphs 3.1.3 and 3.1.5 are clearly pre-conditions or conditions precedent to the 1st to 5th Respondents implementing the project. The acknowledgment referred to by Counsel for the 1st Respondent stated that the *"EPB [environmental project brief] had been approved with conditions"*.

On the material before this Court, I find that the Applicants have established that there is not only a serious question to be tried but a probability that they are entitled to relief.

The second requirement for the grant of an injunction is that the Applicant must show that he will suffer irreparable injury if the injunction is not granted. In the case of **Shell & BP v Conidaris & Others)** it was held that;

> ***"A court will not generally grant an interlocutory injunction ..... unless the injunction is necessary to protect the plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means "injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired."***

In this regard I would state that disputes to do with damage to the environment reside in a hallowed place and should enjoy the principles that apply to loss of land where one does not have to prove irreparable injury. **Section 4(1) of the Zambia Environmental Management Act** No. 11 of *2012* states that,

> ***"Subject to the Constitution, every person living in Zambia has the right to a clean, safe and healthy environment"***

and **section 6 (a)** says as follows,

> ***"The following principles shall be applied in achieving the purpose of this Act: (a) the environment is the common heritage of present and future generations".***

In my view one does not need to prove that damage to the environment will result in irreparable injury because once damaged, the environment, like land cannot be quite restored to its original state and the damage may result in untold suffering for generations.

As earlier indicated, both parties argued on the balance of convenience. In the **American Cyanamid Case** Lord Diplock said;

> ***"...The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to***

be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies."

In the more recent case of **Sanofi-Aventis Deutschland GMBH v Alphapharm Pty,** similar sentiments were expressed when the Court said that in considering the balance of convenience, it is necessary to assess the harm to the applicant if there is no injunction, and the prejudice or harm to the respondent if an injunction is imposed. As part of the consideration, the Court must also consider whether damages are likely to be an adequate remedy for the applicant if its rights are upheld in the final hearing but if no injunction is granted. Conversely, a counter consideration is whether damages are likely to give adequate compensation to the respondent, and any affected third party, if the interlocutory injunction is subsequently found to be wrongly granted and whether the respondent is likely to suffer irreparable harm.

I agree with the Respondents submission that the subject project is of such magnitude that should the injunction be granted and the case is ultimately decided in their favour, the Applicants may find it difficult or even impossible to adequately compensate losses that could be incurred as a

direct result of the injunction. This however, has to be carefully weighed against the potential irreversible injury that might be suffered by an entire city and its surrounding areas if the injunction is not granted.

Taking into account my opinion that where there is a danger of serious harm to the environment, irreparable injury need not be proved and the fact that damage to the environment presents potential and on-going harm to both present and future generations, I find that the balance of convenience tilts in favour of the Applicants.

On account of the forgoing the application for an injunction is successful and the 1st to 5th Respondents are restrained from continuing works on the area covered by the Decision Letter issued to the 1st Respondent on 7th February, 2019 in respect of the project entitled, "*Proposed Mixed Use Infrastructure Developmental Lots 2 & 3 ZAF Twin Palm Base, Lusaka by Zambia Air Force Projects Company Limited*" until this injunction is vacated by the 1st Respondent complying with the pre-conditions contained in paragraphs 3.1.3 and 3.1.5 of the Decision Letter and obtaining an order from this court to that effect or until further order of this Court.

Costs are granted to the Appellants.

Dated at Lusaka this 17th day of February, 2020

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JUDGE M.M. KONDOLO, SC
COURT OF APPEAL JUDGE