

MARTHA MUZITHE KANGWA AND OTHERS
v
ENVIRONMENTAL COUNCIL OF ZAMBIA
NASALA CEMENT LIMITED
ATTORNEY GENERAL

HIGH COURT
MUSONDA, J.
16th DECEMBER, 2011
2008/HP/245

[1] Administrative law - Legitimate expectation - Whether it was proper for a Minister to cancel a project earlier on approved by a fellow Minister.

This was an action initiated by the plaintiffs seeking a declaration that the Environmental Impact Statement prepared by the second defendant was fictitious, inaccurate, and fraudulent.

Held:

1. Internationally, it is now recognised that mandatory provisions to ensure participation in matters affecting the environment create a corresponding right of the public to participate.
2. A certificate of title is evidence of proprietorship.
3. The Minister of Local Government, having approved the location of the project, a fellow Cabinet Minister could not overrule such a decision because she was *functus officio*.
4. The second defendant legitimately expected that no other Minister could reverse that decision which was a legal legitimate expectation

Cases referred to:

1. *Kajing Tubjic and Others v Ekran Biid and Others*, (21st June 1995) High Court Kuala Lumpur.
2. *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Limited* [1972] 1 ALL E.R. 280.
3. *Jesus Manuel vera Rivera National Resources* (Supreme Court of Justice, 21st September 1999).
4. *Ambica Quarry Works v State of Gujarat and Others* (Air 1987 SC 1073).
5. *Subar Kumar v State of Bihar* Air (191) SC 420.
6. *Cambridge Water Company Limited v Eastern Counties Leather Plc* [1994] 1 ALL E.R 80.
7. *Ballard v Tomslinson* [1885] 29 Ch. D. 115.
8. *Nyasula and Others v Konkola Copper Mines and Others* 2007/HP/1286 (unreported).

9. Movement Social De Petit Camp/Valentia v Minister of Environment and Quality of Life, Mauritius Appeal Tribunal, (Case No. 2194).October, 2000).
10. Ridge v Baldwin [1964] A.C. 40.
11. R v Smith [1844] 5 Q.B. 614.
12. Cooper v Wandsworth Board of Works [1863] 14 CB. N.S.18.
13. Vodacom v Communication Authority (Appeal 98/2008).
14. R v The Attorney General of Northern Rhodesia and the Minister of Labour and Mines for Northern Rhodesia ex parte Kenneth Allen (1963-1964) N.R.L.R 26.
15. Narmada Rachao Andola v Union of India and Others [1994] I.S.C.R. 546.

Legislation referred to:

1. Environmental Protection and Pollution Control Act cap 204.
2. Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations Statutory Instrument No. 28 of 1997.
3. Environmental Management Act No. 12 of 2011.
4. Mines and Minerals Development Act No. 7 of 2008.
5. Mines and Minerals (Environmental) Regulations, Statutory Instrument No. 29 of 1997.
6. Explosives Act, cap 115.
7. Town and Country Planning Act, cap 283.
8. Lands and Deeds Registry Act, cap 185.
9. Local Government Act, cap 281.
10. Factories Act, cap 441.
11. Public Health Act, cap295.

Work referred to:

1. Justice I. M. Mambilimba, Judicial Review, (Paper presented to a seminar held at Kafue Gorge, 19th April, 2004).

B.C. Mutale with L. Kalaluka and K.Kaunda of Messrs Ellis and Company for the plaintiffs.

C. Chibesakunda for the 1st defendant.

M. Chitundu of Messrs Chifumu Banda and Associates and L.Linyama of Messrs Eric Silwamba and company for the 2nd defendant.

Mulenga M.S. Assistant Senior State Advocate in the Attorney General chambers for the 3rd defendant.

MUSONDA, J.: This was an action by the plaintiffs seeking a declaration that the Environmental Impact Statement prepared by the second defendant was fictitious, inaccurate and fraudulent. The second defendant had no authority to approve a mining and mineral processing project as per statutory instrument No. 29 of 1997. The location of the project is less proportionate for a mining project of that magnitude and that the plant be re-located. This Court nullifies the decision later authored by the first defendant. There was a prayer for general and punitive damages, interest and costs. Before the

commencement of the trial the Attorney General was joined to the proceedings.

The last day of the trial all the three plaintiffs' advocates did not attend despite the matter being adjourned with their consent and no explanation was advanced. However, they filed submissions within time, while the second defendant's advocates did not submit. The Court proceeded as it is trite that in such circumstances no procedural injustice arises.

The evidence as laid by the plaintiffs was that PW1, Martha Muzithe Kangwa is a farmer in the area and the lead plaintiff testifying for the other 27, where the cement factory was being set in Makeni. There are more than 50 farmers in that area. In April, 2008, she was approached by a Mr. Zimba from NASLA Cement who was requesting to buy part of her land for the purpose of making a road to a farm plot which they were to buy from Mrs. Hamusonde. She inquired and learnt that the land was for Mr. Jabbar of NASLA Cement. Mr. Jabbar told her that the land was for agricultural purposes. However, she was not a willing seller.

Later, she was approached by Mrs. Hamusonde, who informed her that Mr. Jabbar wanted to buy her land for agricultural purposes that was in May/June 2009. She later saw trees being cut on the larger portion of the Hill and saw ZESCO connecting power and excavation works commenced on site and the structure came up. A meeting of farmers was called. And they resolved to approach the first defendant as regulator. The first defendant requested them to put their grievance in writing, which they did. Their concern was that there was no environmental impact assessment concerning the project. The other concern was that it was an agricultural area being turned into a mining area without consultation.

A later search at the first defendant's library revealed that the Environmental Impact Assessment was actually there and had a list of those consulted. The names attached were not farmers in the immediate area i.e. Farms 755 and 193. The first defendant did not respond, they then appealed to the Minister and later engaged lawyers around November 2009. The Minister wrote to their lawyers that she wanted to meet stakeholders. A site visit was conducted, there were farmers, the Minister and ECZ. After the visit a meeting was held, and the Minister ordered the cessation of operations and a copy of the later was delivered to NASLA who did not cease operations, and they instructed their lawyers to commence legal proceedings, after which second defendant ceased, but once in a while you could see vehicles in sight.

There was a public hearing at which second defendant presented a paper. The main complaint was that the second defendant did not conduct research on the negative impact cement production could have on egg, milk production and the boreholes and pollution neighbouring people. The road was in bad shape to sustain the transportation of materials, she prayed that the Court grants her and her co-plaintiffs the relief sought.

In cross-examination by Mr. Linyama, she said she had no document that she owned nor did the other plaintiffs exhibit any documentary proof that they owned the land. She said the land was too

small for cement production (33 hectares) she was not aware that there were lime deposits. She said though she reads newspapers, she did not see the advertisements. She conceded the Minister never read any of the documents. She alluded to a letter written by PW4 to Jabbar Zakaria, in which they conditioned the acceptance of the project on mitigatory measures being put in place. She was shown "RSP1" which was the Lusaka Province Planning Authority memo authorizing the change of use. She was also shown approval by the Minister of Local Government and the approval by the Planning Authority for the erection of the cement plant. The first defendant approved the project subject to conditions. The witness said she could not remember where she got the documents she presented in Court.

Cross-examined by Mr. Chitundu, she said she was aware second defendant owns two properties in Makeni and they are on title. The decision to approve the project was in 2009, first defendant considered the Environmental Assessment report, and took stakeholders input into account and the first defendant made a site inspection. There were no objections from the plaintiffs. She did not know everyone from the surrounding farms. She did not attend a meeting on 27th June, where Mr. Khuzwayo was.

She was not aware the second defendant had received a licence to blast from the mines and blasting could be conducted safely and that not every plaintiff is a neighbor to second defendant. The first and second defendants were not invited by the Ministers, only their advocates were informed. She was not sure if there was anybody from the Ministry of Mines. The position of the first defendant was that the second defendant had addressed the concerns of the plaintiffs.

PW2 was Chimwanga Maseka a hydrogeologist, who has a BSC in Mineral Science and a Masters Degree in Hydrogeology and Ground Water Management obtained from University of Zambia in 1982, New South Wales Australia in 1994 respectively. He placed reliance on the report he filed in Court.

In cross-examination, PW2 admitted that he did site visit the farms to assess. What he did was visual observation. He admitted it was necessary to carry out the water assessment. The witness when cross-examined by Mr. Linyama admitted that he did not know the projects' water consumption figures nor the consumption for the farms. He did not know the boreholes at Mr. Mwiinga's farm. He visited Mrs. Kangwa's farm, Mrs. Musoja and Mr. Mwiyawa. At Mrs. Kangwa a borehole had just been cited. Mining operations extract a lot of water. Even farming can positively or negatively affect water. He said he was an expert in blasting. He cited a borehole at Mrs. Kangwa's farm, how she waters vegetables was not his business. He did not know the conditions the first defendant attached to the project. He did not know the allowable water pollution.

PW2 was Frank Bwalya, a Senior Land Surveyor. He produced a copy of a work plan for Subdivisions 36, 37 and 38 of Subdivision A, of Farm 755. He testified that there was a site plan of Farm 755 which was approved by his office and he produced it as part of his evidence. In cross-examination, he stated that the subdivision proposals were lodged with the approvals of the planning authority. He did not know how many subdivisions there were, as it was the first time he was handling the matter.

PW4 was Andre Conradies Stucki a farmer in Makeni. His farm is about a kilometre away from the second defendant's plant while the first witness is in front of the second defendant. The excavations are about 500 metres from the boundary. He produces bananas, and he has cattle and about 200 pigs and grows sunflower and there is 10 hectares for fragrance oils. He wrote to the second defendant stating his concerns. He opposed the project as the fishes can collapse, the water table goes lower instead of finding water at 30 meters, in April you get water at 90 meters and such a bang might cause some livestock to be unproductive.

In cross-examination by Ms Chibesakunda, he said he was not aware there was an environmental Impact Assessment, nor was he aware there was an advertisement in the Zambia Daily Mail. He was not aware of the law.

In cross-examination by Mr. Linyama, the witness admitted that he authored the letter agreeing to the project subject to mitigatory measures being put in a place a year after the first defendant approved the project. The first defendant had initiated to meet him, but he was busy. He said in principle he was for development. He established the piggery at the farm during the currency of these proceedings. He admitted not having looked at the documents the second defendant submitted.

PW5 was Richard Allen Scortie, Production Coordinator of Happy Aces Poultry Farm. He testified that the location of the farm was chosen because of its remoteness and isolation as ideal for a poultry breeding farm. There are 10 poultry breeding houses each measuring 130m x 12. There has been a US\$1,500,000.00 invested in the project. The farm is a 20 hectares farm, 1 hectare is cropping land, while 1 hectare is used for a banana plantation. The remaining 18 hectares is for game animals for which a permit has already been obtained from Zambia Wild life Authority.

His concerns were that the cement factory would lead to: (i) disruptions of bore hole water; (ii) noise from explosions; (iii) vibrating from blasting; (iv) dust from heavy motor vehicles (earth moving and trucks); (v) deterioration of gravel road to Makeni due to high volume of heavy duty trucks. He said over 283 trucks with the capacity of twenty five tons a day will be using the gravel road.

In cross-examination by Ms. Chibesakunda, the witness stated that noxious effects and gases, dust are detrimental to poultry. He said based on tonnages for 15 ton trucks we are talking of 206 trips while 30 tons would be 86 trips.

Cross-examined by Mr. Linyama he admitted that there are mitigatory measures the second defendant will put in place. He said he never saw advertisements in the newspapers. When he was shown the advertisements, he conceded that the first defendant had advertised to the public. He said he could not say that out of 27 people, nobody saw the advertisements. He said he had not seen the second defendant's trucks, so he could not know how many. He said he was objecting to the project mitigatory factors notwithstanding.

Cross-examined by Mr. Chitundu, the witness said he had not read the Environmental Assessment which the second defendant will put in place, he could not object if measures were put in place. He had not read the first defendant's approval of the project. He exclaimed in cross-examination that, "I now see that there are conditions to be met, page 213 of the second defendant's bundle, ECZ approved it on the criteria being met."

PW6 was Aaron Banda a production controller of Hybrid Poultry Farm. He testified that he breeds chicks. One farm is located 5 kilometers from the second defendant's farm and another 600, which has 50,000. He valued the chicks at USD3 million, and the breeding stock at USD8.5 million. He went on that they locate farms 6 kilometers away from human habitation. The mining and the traffic in the road will impact negatively on chickens' respiratory, diseases, and water supply will be affected.

In cross-examination by Ms. Chibesakunda, he said he was not aware there was an environment impact assessment. He said he did not see the advertisements. Cross-examined by Mr. Linyama he agreed that Chinese Top Motors was 10 meters away. There was human activity. Happy Acres was a rented farm they do not own it. He said he did not know the amount of noise when, they are blasting. He agreed that the first defendant gave the second defendant conditions to mitigate the environmental impact. He said any project impacts negatively on the environment. He would be happy if mitigatory measures were put in place. Cross-examined by Mr. Chitundu, he said he was not aware views were solicited by the first defendant.

PW7 was Evan Mudolo a mining engineer, who holds a bachelor's degree in mining from the University of Zambia obtained in 1994. He has worked for Zambia Consolidated Copper Mines (ZCCM), and Zambezi Portland Limited. He worked as explosive engineer at Africa Explosives (Plc), and Lumwana Mine respectively. He went on that the distances from the proposed quarry/blasting area to the immediate neighbours were as follows:

- (a) PW4 from 754 217 meters and Farm No. 753 = 0 meters,
- (b) Mrs. Kangwa: Farm No. 193 279 meters,
- (c) Mr. Masocha: Farm No. 755 S/D 36 0 meters

He said the distance falls below 598 meters contained in the Explosives Act.

When cross-examined by Ms. Chibesakunda, he admitted that he was not privy to any method of blasting by the second defendant, he only looked at the Explosive Act. He did not refer to the second defendant's report, in his report, he did not know the explosives the second defendant will be using. There was no danger building or mixing house. He said if you are using 100kgs of explosives, the safer distance to a building is 31 meters, to a public building is 30 meters.

PW8 was Paul Francis Mc Millan, a veterinary surgeon with very impressive professional qualifications and he practices in England. He is also a recognized specialist in Poultry Health and Production with over 30 years experience. He was requested by Hybrid Poultry Happy Acres Farm to give a professional opinion on the likely poultry health and production impact of the development of a

limestone quarry and cement factory close to the said Happy Acres Farm. He has visited all the Hybrid Poultry Farms in Zambia on a number of times.

He said stress of birds is likely to emanate from:

- (i) Sudden noise from blasting;
- (ii) Secondary noise from ground vibration associated with blasting, mechanized handling of spoil and factory operation and the effect of such vibrations;
- (iii) Air pressure from blasting; and
- (iv) Suspended dust and fumes.

Poultry, like all birds have a more efficient respiratory system than those of mammals. This makes the birds more susceptible to fumes, which explains why canaries were used in mines as primitive bio-sensors. It therefore follows that the close proximity of 900 meters between the proposed mining operations, and the poultry farms, make it extremely likely that most of the poultry will be exposed to the stressors referred to above on an ongoing basis, and some periodically.

Modern breeding poultry are not immune to physiological effects of environmental stressors and as such, a practical consequence therefrom is the likely diversion of effort from production into stress responses.

Even if the birds do not die at the time of stress, rupture of the developing ova in the abdomen can lead to death from secondary peritonitis, physical stress depresses the immune system, and result in losses due to banal infections.

In cross-examination by Mr. Chibesakunda ,the witness stated that he did not refer to the second defendant's documents. He said what was written here was his opinion as he was familiar with the actual farm as consultant to Hybrid. He looked at the map, and internet searches and quarrying activities. The report is based on how poultry behaves in such an environment. These were not facts related to the farm, as there was no development. His evidence therefore was not project specific.

In cross-examination by Mr. Linyama, the witness said the materials used were referenced. He thought he had sufficient information. He did not go to the site before to wrote the report. He did not look at the bundles of documents. He did not look at the first defendant's (ECZ) decision letter. He said if he had seen the letter from the first defendant outlining the mitigatory measures his opinion must have been stronger. He admitted that the second defendant was being directed by the first defendant. He said his report only reflected concerns and not facts. He further said a research can answer many questions, he is a practical clinical veterinarian. He did not know the methods used by Chilanga cement and Oriental Quarries. He was not clear what methods will be implemented. The report for the project was prepared by people on the ground, he did not go on the ground before he prepared the report.

Stakeholders provided in the scoping process report as affected people did not actually exist as farms could recognize these names. Furthermore, none of the existing neighbours had attended the scoping meeting which was minuted in the Environmental Impact Assessment document. In addition,

the community was apprehensive about the potential impact that would arise if the project was to go ahead.

In the company of another inspector from ZEMA, the witness went to the site and asked the second defendant's representatives to be present during the inspection. They were represented by a Mr. Shahid Ahmed the site Manager, and Mr. Nasir Sattar the Project Director.

During the inspection, it was noted that the access road to the site had been rehabilitated and a bridge had been constructed over an annual stream that flows in the south western direction. The inspection revealed that the construction works at the site had advanced with a number of pieces of equipment being installed. Production had not yet begun. The storage shed was almost complete at the time of inspection.

The second defendant was directed to make available the individuals they claimed to have been consulted within four days to enable ECZ verify the corrections of the same. The second defendant did not make available. That was the plaintiffs' case.

DW1 was Catherine Nachangwe Mukumba and environmental inspector who received the Environmental Impact Assessment prepared by the second defendant. She sent the EIA to Mine Safety Department and Kafue District Council. She advertised twice a week for three conservative weeks. The comments received were positive, and they were positive and they were written. When the second defendant produced a list of names they did not correspond to what was on the ground. The first defendant did not charge the second defendant for the wrong information. She said wrong information could affect the project.

In cross-examination, she said the comments of Mine Safety and Kafue District Council was that the project should go ahead.

DW2 was James Mulolo Mulolo a Senior Inspector of ECZ. He testified that he received a report from a member of the public that the second defendant had started constructing a cement plant without consulting neighbours as provided by the Environmental Impact Assessment scoping process. The names of the said persons within the specified time and instead requested for more time (21 days) to attend to the directive. A list submitted by the second defendant after the directive on 10th August 2005, was not reflective of people owning properties in that area. On 1st September, 2009, ECZ suspended its decision to approve the cement project and the second defendant was directed to cease operations. In a meeting on 3rd September, 2009, it was established that the second defendant had gone ahead with the construction works without obtaining mining (prospecting) licence and change of land use which they later obtained and submitted on 23rd October, 2009.

Between October 26th to 28th, 2009, the second defendants met stakeholders who included t Pw1 the lead plaintiff, Mr. Mumba of Farm 11 said the project is good as long as negative impacts are mitigated, Col Katongo, Mr. Bonaventure Mutale objected to the project absolutely. Mr. Musocha of

Farm 36, the National Trust for the Disabled of Farm No. 7 said they were consulting lawyers. Mr. Mutale of Farm No. 19 said the project was good, Mrs. Kangwa of Farm No. 193 said the project was seating on 80 acres which was too small, and Mr. Lombe of Farm No. 9 said the EIA was fraudulently done. The witness accompanied the Minister who suspended the project under Section 6(4) of the repealed Act, to which ECZ had to oblige.

In cross-examination by Mr. Linyama, the witness said the approval of the project was in 2008 and objections came in 2009. The (ECZ) advertised and public hearings were done in line with the law. He was not aware of any technical objection. The approval was conditional on the second defendant meeting conditions of other approval agencies.

DW3 was Maxwell Zulu, the Executive Secretary of the Lusaka Planning Authority. He testified that the Authority received an application from second defendant on 23rd July, 2008, by a minute dated 22nd July, 2008, written by its Managing Director Razzak Sattor, concerning Farm No. 37/38/755a Makeni, Kafue. The Authority notified the public by public notice on page 25 of the third defendant's bundle of documents. The notice affords the public an opportunity to make objection they may have. The second defendant was also asked to submit the Environmental Impact Assessment Report, and a decision letter of the Environmental Council of Zambia considering the nature of the application, there was need to understand the consequences of the proposed land use. The consideration of the application was deferred for more than 6 months to allow the applicant to satisfy all the necessary requirements, such as the Environment Impact Assessment, the decision letter from Environment Council of Zambia, and to receive public objections received by the Lusaka Planning Authority or the Minister of Local Government and Housing concerning the second defendant's application for change land use.

The second defendant met all the necessary requirements for the change of land use, the Lusaka Planning Authority recommended the application to the Minister of Local Government and Housing for approval. On 6th October, 2009, the Minister of Local Government and Housing approved the application for change of land use from Horticultural (Agriculture) to Industrial (cement production) see third defendant's bundle of documents pages 18-23. The second defendant followed all the laid down procedures in their application for change of land use. The Lusaka Planning Authority also followed all the laid down procedures in change of land as is stipulated in the Town and Country Planning Act chapter 283 of the laws of Zambia.

When cross-examined by Mr. Kalaluka, Mr. Zulu said he gave notice to the public from 29th July 2008 up until 2009. There was a typographical error 2007, and yet the advertisement was run in 2008, the date should have been 11th August 2008. There were no objections received. The application was sent to the Minister in October. They asked for the Environmental Impact Assessment as a way of consultation with stakeholders. This was put in the Zambia Daily Mail.

When re-examined by Mr. Linyama, Mr. Zulu said the process was subjected to stringent processes within the planning authority and there was no objection in writing.

DW4 was Rajak Sattar Pardesi who is one of the Directors of the second defendant. He testified that the second defendant was issued with an investment licence on 20th February, 2008, by the Zambia Development Agency upon being satisfied that it had investment in excess of USD8 million (Eight Million) though the investment now in form of plant and machinery has exceeded the sum of USD11 million (Eleven Million). In May, 2008, the second defendant acquired land in extent of 33.0643 hectares being sub-divisions 37 and 38 of Farm No. 755 from Eustance Mwenda Hamusonde and Judith Hamusonde at a total cost of K74,247,000.00 for the sole purpose of establishing a cement plant as the land contained substantial amount of limestone deposits which is a major raw material for cement production. The second defendant got title to land on 25th September, 2008, title No. 79135, and 79137.

The land having been zoned for Horticultural (small holdings) usage was changed to cement production after approval by the Minister of Local Government on 6th October, 2009. Thereafter, the second defendant engaged an environmental consultant approved by the first defendant (ECZ) to prepare an Environmental Impact Assessment in the name of Fly Dragon Limited who worked in conjunction with Tropical Environmental Consultants. There was a scoping exercise. The first defendant (ECZ) placed notices in the Times of Zambia, Zambia Daily Mail and The Post Newspapers, on 6th October, 2008.

Following full compliance of the law by the second defendant, and upon the first defendant being satisfied, wrote a decision letter dated 5th December, 2008, to approve the cement project, subject to a number of conditions so as to ensure the project's possible adverse effects on the environment and other activities in the area are reduced or mitigated to acceptable levels, see copy of decision letter on pages 211 216 of the second defendant's bundle of documents filed on 28th February, 2011.

Among the conditions contained in the letter of approval included:

- (i) Obtaining written clearance from the Kafue District Council;
- (ii) Placing sufficient waste bins in strategic points at the plant;
- (iii) Adhering to permissible levels of dust emissions;
- (iv) Using Ministry of Mines and Minerals Development approved explosives for blasting; and
- (v) Operations in form of blasting quarrying and transportation of limestone being restricted to day time hours.

The second defendant had to be compliant with Waste Management Regulations, Water Pollution Control Regulations, Air Pollution Control Regulation, and Hazardous Waste Management Regulations. Further authorization of the cement project had to be obtained under:

- Public Health Act;
- Town and Country Planning Act;
- Local Government Act;

- Factories Act. And

The second defendant upon project approval contracted manufacturers of machinery in China, procured transformer from ZESCO to connect electricity. Money spent on lodging of Chinese engineers, buying the transformer, housing its engineers and money spent on the small scale mining license came to about K660 million. The average of K30 million per month is being expended on salaries, and other expenses on a non-productive entity.

The positive advantages of the project are:

(i) Creation of more than 300 jobs, provision of cheap cement in Zambia, addition to tax revenue, add to the manufacturing industry improve on the social amenities in the area, help to reduce poverty levels in Zambia.

In cross-examination by Mr. Mutale, SC, the witness stated that they had technical experts who took out samples, there were geologists from the geology department. They obtained an exploration licence and a mining licence, see page 265 and 376 of the second defendant's bundle of documents. The witness said the second defendant responded to the stakeholders' meeting of 26th November, 2010, at Sunset Villa, see page 382 of the second defendant's bundle. The report indicated that they will be carrying open quarrying, mining and blasting. The plant will carter for 500 tons which is about 10-12 trucks per day. There are many mitigating measures to reduce noise.

Cross-examined by Mr. Kunda, the witness said he did not agree that they did not comply with the law as they had been suspended twice. They later provided documents, and the suspension was lifted. They continued construction when the suspension was lifted.

DW5 was Shadreck Yona Nsongela an Environmental consultant. He holds a Master of Science degree in Agronomy. He further holds professional qualifications in Environmental Management, Environmental Impact Assessment, Strategic Environmental Assessment, Cumulative Impact Assessment, Pollution Control and Project Management. He has 20 years experience; 17 of those in environment management. He worked for the first defendant for 10 years as Environmental Education and Communications Officer, Environmental Impact Assessment Officer, and Principal Environmental Inspector, the final position he held.

The witness said he had undertaken a physical review of more than 200 Environmental Impact Assessment reports, and inspected several development projects including mining projects when he worked for the first defendant. He was for five years in-charge of the Environmental Impact Assessment process in Zambia. His firm is a duly appointed Environmental Consultant for Lafarge Cement and he renders advisory services to Lafarge for improved environmental performance. His firm is a registered environmental consultant with the first defendant. Among other Environmental Impact Assessment reports he has undertaken under his firm which are in excess of thirty (30) include Luiji Gold Mine in Mumbwa, proposed EMCO Coal Mines in Sinazongwe, Tycoon Manganese Mine in Mansa, and Chambishi Metals on the Copperbelt.

The first defendant recommended him to the second defendant in 2009, to undertake stakeholder's consultation process and develop an Environmental Management plan incorporating stakeholders' views. He did prepare the public consultation report for the second defendant in December, 2009, which appears on pages 274-289 of the second defendant bundle of documents of 28th February, 2011.

Based on the findings on the public consultation process he developed for the second defendant, an Environmental Management Plan which addresses all issues of concern raised by the stakeholders (who are plaintiffs in this matter) and this appears on pages 305 to 369 of the second defendant's bundle of documents of 28th February, 2011.

He concluded that with his academic and professional qualifications and the relevant vast work experience under the second defendant and his firm, he was fully satisfied that the Environmental Management Plan fully addresses all the stakeholders' issues of concern in relation to the proposed cement project.

DW6 Ricky Mumba, an environmental consultant. He is the Managing Consultant Environmental Management, Urban Design and Livelihoods Specialist under the name and style of SEW Consult. His qualifications are Bachelor of Science BSC in Education, Masters of Science MSC in Environmental Studies obtained at Loughborough University in the United Kingdom, Masters of Philosophy M phil Sustainable Urban Livelihoods obtained from the same University in the United Kingdom. He is a member of the following professional bodies: (i) Institute of Environmental Management and Assessment (IEMA UK); (ii) Chartered Institute of Waste Management (CIWM UK); (iii) International Water Association and (iv) Water and Sanitation Association of Zambia (WASAZA).

He has been engaged as a consultant in several assignments for the preparation and study of Environmental Impacts of several projects in Zambia, see page 39 of the Environmental Analysis Reports filed into Court on the 27th day of October, 2011. The second defendant engaged SEW Consult to analyze the impact of the second defendant's cement plant project on the environment of Makeni West in the Lusaka Province.

He led a team of experts to undertake a comprehensive study on the viability of mitigating any adverse effects the said project might have on the natural and artificial environment and the team rendered its report.

He undertook several tests that form the basis of the Report, and he attested that the Environmental Analysis Report filed on 27th October, 2011, contains true and fair findings of the tests conducted.

The plaintiffs' submissions have highlighted the plaintiff's evidence and that of the defendants which has been summarized in this judgment. I will therefore only consider the legal arguments submitted on the behalf of the plaintiffs.

It was argued that no notice nor consultations was conducted in accordance with the law as stated by PW1, PW4, PW6 and PW7. The decision of the Malaysian Court in *Kajing Tubfic and Others v Ekran Biid and Others*(1), was referred to regarding non-consultation of stakeholders.

In *Agricultural, Horticultural and Forestry Industry Training v Aylesbury Mushrooms Limited* (2), it was held that the order of a Minister of Labour made after failing or neglecting to consult one of the organizations he was mandated to consult by statute would have no application to the members of the organization not consulted. Internationally, it is now recognized that mandatory provisions to ensure public participation in matters affecting the environment create a corresponding right of the public to participate.

The plaintiffs attacked the exercise of power by the Lusaka Planning Authority and the Minister of Local Government to grant the change of the Authority as being unreasonable and contrary to section 19(2) of the Town and Country Planning Act chapter 283 of the laws of Zambia. A Venezuelan case of *Jesus Manuel Vera Rivera v Ministry of the Environment and Renewable Natural Resources*,(3) where the Venezuelan Forest Sectoral Service denied the plaintiff therein authorization to occupy land for the exploitation of a mining lease granted by the Ministry of Mining and Energy it was held that:

“The State should never have granted the mining lease to the plaintiff and thus the corresponding resolutions were illegal. This was the consequence of an inconsistent analysis that ignored the incompatibility of the proposed mining, and the forest activities within an area legally established as a reserve.”

In the case of *Ambica Quarry Works v State of Gujarat and Others*(4), the State government rejected an application for renewal of a mining lease. The appeal centered on the question of a proper balance between the need for exploitation of the mineral resources lying within forest areas, the preservation of ecological balance, and curbing environmental deterioration. In dismissing the appeal the Court stated:

“The primary duty...was to the community and that duty took precedence in these cases. The obligation to society must predominate over the obligation to the individual.”

The case of *Subar Kumar v State of Bihar Air*,(5), dealt with pollution which undermines the right to life. While the case of *Cambridge Water Company Limited v Eastern Counties Leather Plc*, (6), dealt with *loci standii* in environmental law, which is agreeably wide. In *Ballad v Tomlinson*(7), in which Lindley CJ observed:

“No man has a right to use his own land in such a way as to be a nuisance to his neighbor and whether the nuisance is affected by sending filth into his neighbour's land or putting poisonous matter on his own land, and allowing it to escape on his neighbour's land, etc”

My decision in *Nyasulu and Others v Konkola Copper Mines and Others* (8), where I said:

“This judgment may appear to be investor unfriendly, but that is having a dim view to KCM's don't care attitude whether human life which is sacrosanct in our Constitution was lost or not.

International investors should observe high environmental standards, that is a global approach.”

The plaintiffs wound up their submission that there was blatant disregard of the law.

For the first defendant, it was submitted that:

“However, exploitation of natural resources must be sustainable for the preservation of the ecosystem for both current and future generations. The ECZ is mandated to ensure that sustainable development is factored into Zambia's developmental programme and agenda. The Zambia Environmental Management Agency in the discharge of its mandate follows the International Best Practice principles that advocate the taking of timely action to eliminate or minimize environmental pollution, degradation, and damage. The Environmental Management Act also incorporates both the polluter pays and the extended producer responsibility principles, both of which place ultimate responsibility for the consequences of developmental activities of the developer.”

It was argued that the cement project fell under the regulatory authority of the Agency pursuant to the Minerals and Development Act No. 7 of 2008; Environmental Protection and Pollution Control Act chapter 2001 of the laws of Zambia, the Environmental Protection and Pollution (Environment Impact Assessment) Regulations No. 28 of 1997, especially Regulation 3(1) and 7(2) (a).

For the Agency it was submitted that the Agency (first defendant) did not act unreasonably in granting approval. The case of Movement Social de Petit Camp/Valentia v Minister of Environment and Quality of Life,(9). Movement Social de Petit Camp (the appellant) appealed against the decision of the Ministry of Environment and Quality of Life granting an EIA licence to Maunlaut Production Limited (MP Ltd) to operate a factory at the DBM Industrial Estate, Valentia. The appellant argued that the factory would cause numerous environmental problems including dust, ash, smoke emissions, water pollution, and noise pollution. The decision of the Minister of Environment and Quality of Life granting the EIA license was affirmed because the Minister did not act unreasonably in granting the EIA licence.

In the Indian case of Narmada Bachao Andola v Union of India and Others (15), the issue before the Court was whether the environment clearance granted by the union of India had been granted without proper study and understanding of the environmental impact of the project, and whether the environmental conditions imposed by the Ministry of Environment had been violated and if so, what the legal effect of the violation was. It was held that the evidence disclosed that the government had been deeply concerned with the environmental aspects of the project, and because there was a difference of opinion between the Ministries of Water Reserves and the Environment, and Forests, the matter was dealt with by the Prime Minister who gave clearance for the project to proceed. The Court ordered compensatory measures for environmental protection in compliance with the scheme framed by the Government, and ordered the construction to continue while the alleviatory measures were carried out.

The first defendant was within its statutory authority when it received, considered and approved the EIA prepared and submitted by the second defendant, and the first defendant complied with the laid down procedures. In a nutshell, that was the first defendant's submission.

Let me put the facts of this litigation in historical context for easy of reference. The first part quotes from the second defendant documents with pages:

- (i) On 20th February 2008, the Zambia Development Agency granted NASLA Cement Limited an Investment Licence No. 20A 0125/02/2008, page 4.
- (ii) On 17th, May, the second defendant bought land from Judith C. Hamusonde, page 6.
- (iii) On 25th September the second defendant obtained title to land to subdivision 37 and 38 of Farm 755, pages 189-205.
- (iv) On July, 2008, Fly Dragon Limited prepared an Environmental Impact Assessment with minutes of the Scoping exercise dated 27th June, 2008, pages 14-15.
- (v) On 2nd August, 2008, this was forwarded to ECZ.
- (vi) On 21st August, 2008, Teal Exploration consented that the second defendant can mine limestone/Dilomite, pages 183-184.

(vii) On 23rd September, 2008, the second defendant requested ECZ for authority to construct storage sheds, page 187.

(viii) On 24th September 2008, ECZ wrote back that they were reviewing the submitted Environmental Impact Statement. A decision will be made later. Because of the rains ECZ granted approval to construct storage sheds. The Council in same letter categorically asked the second defendant to note:

“That this is not an approval for your cement factory and construction of the said storage sheds should only commence once ECZ inspectors have assessed the site”

(ix) On 3rd October, 6th October, and 7th October, 2008, the Environmental Council called for comments on the second defendant's project in Zambia Daily Mail, Times of Zambia and the Post Newspaper respectively.

(x) On 5th December 2008, ECZ approved the project proposal. Attached to the approval was the Decision letter which listed the conditions the project was subject to, conditions to mitigate the negative Environmental Impact. The second defendant had also to comply with Waste Management Regulation S.I No 71 of 1993, Water Pollution Control Regulation S.I. No. 72 of 1993, Air Pollution Control Regulations S.I No. 141 of 1996, Hazardous Waste Management Regulation S.I No. 125 of 2001. The second defendant had to be compliant with:

- (i) Mines and Minerals Development Act,
- (ii) Public Health Act,
- (iii) Explosives Act,
- (iv) Town and Country Planning Act,
- (v) Local Government Act,
- (vi) Factories Act, see pages 211 - 216
- (xi) The Council warned the second defendant that, the decision letter can be suspended or cancelled without notice.

(xii) The points the first defendant was making was compliance with the relevant laws was a continuous process and the Council's regulatory role was a continuous exercise. The first defendant was not the absolute approver of the project, it was subject to approval by other governmental agencies. How then do you impute fraud to ECZ, when the project is a Multi-Agency approved project,

(xiii) On 2nd December 2009, the Mines Safety Department approved the project and commented thus:

(1) Systematic controlled blasting could be conducted safely for heaving and fragmenting the limestone materials with reduced noise, dust emission and vibrating without adversely interfering with neighbours,

(2) Before drilling, charging and blasting operation consumes, it's 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.

The Mine Safety Department concluded that it was cardinal that the second defendant implement the conditions made on their approval letter by the first defendant, pages 269-270,

(xiv) On 24th November, 2009, suspended the operations because the stakeholders cited in the Environmental Impact Assessment did not reflect those owning properties around the area, pages 271-276.

In December, 2009, a public compensation report was submitted by DW5 pages 274-289 which was a response to the suspension of operations. There was a Mine Plan report submitted in August, 2009.

(xv) In December, 2009, an Environmental Management Plan (EMP) was submitted to the first defendant authored by an environmental specialist recommended by the first defendant to the second defendant.

(xvi) On 26th October, 2009, the plaintiffs appealed to the Minister who surprisingly wrote to the advocates of the plaintiffs Messrs Ellis and Company that she meets their clients on Monday 23rd November, 2009, at 15:00 hours without the defendants and their advocates whom the Minister knew as she had been approached by Messrs Chifumu Banda and Associates, advocates for the second defendant.

(xvii) On 24th November, 2009, at the behest of the Minister the first defendant suspended operations of the first defendant, who was not heard contrary to the rules of natural justice and operations remain suspended to date.

(xviii) On 19th May, 2010, Kafue District Council approved the project, page 377. A Mr. Khuzwayo represented the Council at a stakeholders' meeting, and swore an affidavit that there was no problem, page 378.

(xix) The basis for pleading that the second defendant obtained first defendant's approval by fraud was that initially the Environmental Impact Assessment contained names of people who were not property owners in that area. The Environmental Council of Zambia did two things, they suspended operations and directed that the scoping exercise be redone with their involvement and this was redone which fact the lead plaintiff PW1 concealed in her evidence as she was consulted.

(xx) In any event when this Court visited the farms, the Court found that the plaintiffs were not residing there and were not title-holders which made tracing them very difficult.

(xxi) The approval is multi-governmental agencies duty i.e. the first defendant.

(xxii) The project was approved by the following expert agencies:

- (a) The Environmental Council of Zambia, which regulates environmental issues;
- (b) The Mine Safety Department, which regulates safety in all mining operations;
- (c) The Lusaka Planning Authority in conjunction with the Minister of Local Government, which ensures that projects are appropriately located;
- (d) Kafue District Council, which ensured that the project conforms to their development plans; and
- (e) The Ministry of Mines which gave the mining licence.

(xxiii) The plaintiffs' consultants who were called were not experts in environmental issues, but experts in segments like mining, water, veterinary surgeon. These were not shown the Environmental Impact Assessment, the Environmental Management Plan, the letter approving the project, which set out conditions to mitigate the Environmental Impact. Their opinions were not a response to the experts in government and those hired by the second defendant.

(xxiv) The second defendant with the help of the first defendant and an environmental expert who advises Lafarge, the biggest cement factory in Zambia drew the Environment Impact Assessment and the Environment Management Plan.

(xxv) By the Minister closing the operations without hearing second defendant, the ECZ which falls under her Ministry and the Ministry of Mines Safety Department and Kafue District Council was catastrophically bad and oppressive decision;

(xxvi) The Minister of Local Government who is at the same level with the Minister of Tourism and Environment having approved the project, the Minister of Tourism and Environment was *functus officio*. The fact being stated here is a Cabinet Minister cannot overrule another Cabinet Minister, just as a High Court Judge cannot overrule another High Court Judge, see approval by the Minister of Local Government at page 266 of second defendant's documents.

(xxvii) While the Minister of Local Government consulted experts in the Ministry the Lusaka Planning Authority, the Minister of Environment and Natural Resources consulted no one.

(xxviii) The professionalism exhibited by the government agencies which dealt with this approval was profound and this is mirrored in these proceedings. They were hard on the second defendant to ensure they comply with the conditions. At one time they suspended them for not doing so.

The legal issues that arise:

- (i) What are the rights of the title-holder to property vis-a-vis a non-title-holder. The surrounding plaintiffs i.e. PW1 not being a title-holder, while second defendant is.
- (ii) What effect did the first scooping where names of those that did not own property were added to the list?
- (iii) What are the legal implications of the Minister of Tourism and Environment only hearing the plaintiffs' advocates and the plaintiffs, without hearing the defendants' advocates, defendants themselves and the ECZ an expert Agency mandated under statute to approve the project.
- (iv) On the evidence of the plaintiffs is their sufficient material for this Court to annul, what was approved by five specialized expert governmental Agencies.
- (v) When is judicial intervention appropriate or tenable in public Law?.

The certificate of title is evidence of proprietorship, see section 54 of the Lands and Deeds Registry Act chapter 185 of the laws of Zambia. 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 second defendant in this case. The president has not granted land to them. They paid for land to Mrs. Hamusonde, but the final authority is the President who executes the lease on behalf of the Republic. Which bestows rights pertaining to land on the title-holder.

The first scoping exercise was nullified by the first defendant, they suspended the operations of the second defendant, which was punitive. They directed the second defendant to do another scoping exercise with the assistance of an expert, which was done with the participation of the Environmental Council (first defendant). There were advertisements by the first defendant in the Times of Zambia, Zambia Daily Mail, the Post for any objections to the project and none were received. What is more is that the majority of those consulted said yes to the project, see DW2's evidence. The plaintiffs cannot therefore be heard that there was no notice to them. To therefore argue that the first defendant authorized the project based on false names of stakeholders is counterfactual or incorrect as the second defendant was punished for that by the first defendant by suspending operations until they, with the participation of the first defendant re-did the scoping exercise. Those falsehoods were cured, see evidence of DW5 Shadreck Yona Nsongela an environmental expert.

In *Ridge v Baldwin* (10), a leading authority on natural justice, the House of Lords said:

“It is well established that the essential requirement of natural justice at least included that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he is to meet”

From the foregoing it is clear that the Hon. Minister of Tourism and Environment violated the rules of natural justice conducted herself in an arbitrary and oppressive manner to order the cessation of operations without hearing the first defendant which is a specialized Agency under her Ministry, and the second defendants who were going to be economically harmed by her decision. Her decision is therefore void ab initio.

Lord Reid went on, I find an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation. The Minister overruled an expert Agency the first defendant without hearing them. She stopped the operations of the second defendant without hearing them. In *R v Smith* (11), Lord Denman C.J., held that even personal knowledge of the offence was no substitute for hearing the officer. His explanation might disprove criminal motive or intent and bring forward other facts in mitigation.

In *Cooper v Wandsworth Board of Works*(12), where an owner had failed to give proper notice to the Board they had under an Act of 1855 authority to demolish any building he had erected and recover the cost from him. The action was brought against the board because they had used the power without giving the owner an opportunity of being heard. The Board maintained that their discretion to order demolition was not a judicial discretion and that any appeal should have been to the Metropolitan

Board of Works. But the Court decided unanimously in favour of the owner, Erle C.J. held that power was subject to a qualification repeatedly recognized that no man is to be deprived of his property without his having an opportunity of being heard. The rule was of universal principle and founded upon the plainest principles of justice. Byles J, went on that, "although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature".

The Minister of Local Government having approved the location of the project a fellow Cabinet Minister cannot overrule such decision as she was *functus officio*. The second defendant legitimately expected that no other Minister could reverse that decision which was a legitimate expectation. The concept of legitimate expectation has been approved by our Supreme Court in *Vodacom v Communication Authority*.⁽¹³⁾ In *R v The Attorney General of Northern Rhodesia and the Minister of Labour and Mines for Northern Rhodesia ex parte Kenneth Allen*,⁽¹⁴⁾ it was held that:

"Where authority can be exercised by a person named in particular legislation or a person so authorized by a person named in particular legislation or a person so authorized by law any act done by such a person is *intra vires* the enabling Act and therefore legal"

The five government Agencies, which approved the project were acting *intra vires* the statutory authority conferred upon them, see findings of fact No. (xxii) and had the relevant expertise and did extensive study of the project before coming to that conclusion. The plaintiffs placed reliance on a pleading of fraud because of the first scoping exercise, where names which did not own property in the area were included. This defect led to the suspension of operations, which was a punishment and the second defendant cannot be punished twice for the same act. Such falsity was not relied upon by the first defendants, as another scoping exercise was ordered, see the evidence of DW2 and DW5 who were credible expert witnesses and neutral and knowledgeable.

The evidence a pleading fraud did not even reach the balance of probability, as the earlier scoping exercise was set aside and yet this must be proved above the balance of probability and below the proof of beyond all reasonable doubt as the allegation is of a criminal nature.

In public law as the Learned Deputy Chief Justice Hon. Mrs. Justice Mambilima said in a paper on Judicial Review and injunctions that she presented to Judges' Seminar at Kafue Gorge on 19th April 2004:

"The purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the judiciary or of the individual Judges for that of the authority constituted by law to decide the matter in question"

In the instant case this Court is being asked by the plaintiffs to overrule expert agencies exercising statutory functions which have not acted unreasonably, illegally, or procedurally improper against them, when they do not even have title to the land in question. In any event it was the Minister of Tourism and Environment who acted in the plaintiffs' favour as she only heard them and their

advocates and suspended operations of the second defendant who was not heard, which has costed the second defendant dearly. The cases cited by the first defendant namely Movement Social de Petit Camp/Valentia v Minister of Environment and Quality Life and Marmada Bachao Andola v Union of India and Others (supra), where it was held that the government was deeply concerned with the environmental aspects of the project, and that the Minister did not act unreasonably are at all fours with facts of this case. Why do I say that?. The first defendant suspended the second defendant's operations twice, imposed conditions to mitigate environment degradation. The Mine Safety Department said they should supervise the detonation of explosives. There was unanimity by these Expert Agencies that the project was environmental friendly. The plaintiffs lamentably failed to show any demonstrable harm. In any event the Agencies especially the first defendant can remedy any harm anytime. In Nyasulu and Others v Konkola Copper Mines (supra), the first defendant shut Mines operations of a powerful multinational for polluting water. This action has been brought prematurely when there has been no demonstrable harm.

For these reasons the action is dismissed with costs to be taxed in default of agreement I order the project to proceed and compliance with the first defendant (ECZ) dictated measures to mitigate any environmental degradation. To order otherwise will discriminate first defendant as Lafarge is even closely located to Chilanga Golf Club, police station, shopping complex more populated than areas surrounding NASLA Cement project. You have 300 employees who will lose employment and they have families to look after. The public interest is served by allowing the project. If there are any environmental violations they will be remedied, just as Konkola Copper Mines remedied water pollution in Nyasulu's case (supra) above.

Plaintiff's claim dismissed.