

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

(Civil Jurisdiction)

2008/HP/668

BETWEEN:

SOBEK LODGES LIMITED

APPLICANT

AND

ZAMBIA WILDLIFE AUTHORITY

RESPONDENT

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 27th day of May, 2011.

For the applicant: Mr. K. Chenda of Messrs Simeza Sangwa and Associates.

For the respondent: Mr. S. Simuchoba of Messrs NKM and Associates.

JUDGMENT

Cases referred to:

1. *Crave v Mills 7H and N 913.*
2. *Construction and Investments Holdings Limited v William Jacks and Company Limited (1972) Z.R. 66.*
3. *Mohamed v The Attorney General (1982) Z.R. 49.*
4. *Lenton Holdings Limited v Moyo (1982) Z.R. 55.*
5. *Chilufya v Kangunda (1999) Z.R. 166.*
6. *Chimambo and Others v Commissioner of Lands and Another (2008) Volume 1, Z.R. 1.*
7. *Anti-Corruption Commission v Barnett Development Corporation Limited (2008) Volume 1 Z.R. 69.*

Legislation referred to:

1. *Lands Act, Cap 184.*
2. *Lands and Deeds Registry Act, Cap 185, ss 33, 34, 76, and 81.*
3. *Zambia Wildlife Act Number 12 of 1998.*
4. *National Parks and Wildlife Act s. 29 (repealed).*

5. *Forest Act, cap 199.*
6. *High Court, Act, Cap 27, Order 6, Rule 2; 15; Rules 15 and 16; and 30, Rule 11.*

Work referred to:

1. *Phipson on Evidence, Seventeenth Edition (Thomson Reuters Legal Limited, 2010).*

This action was commenced on 10th July, 2008, by originating summons pursuant to Order 6, Rule 2; and Order 30, Rule 11 of the High Court Rules. By the originating summons, the applicant seeks to remove the caveat lodged in respect Lot 5504/M Livingstone. The originating summons is supported by an affidavit sworn by Mr. Andrew William Anderson; a director in the applicant company. Mr. Anderson avers as follows: that the applicant company is the registered and beneficial owner of Lot 5504/M Livingstone. The title to the Lot was obtained by the applicant company on 26 September, 1991.

On 12th October, 1993, the respondent lodged a caveat against the property in dispute on the ground that the certificate of title was granted to the applicant company in error because the land which is the subject of the title is in the National Park. Mr. Anderson deposed that apart from requesting the applicant company to surrender the title, the respondent has not taken any steps to address the alleged irregularity. The respondent maintains that the applicant should surrender the title deeds in exchange for a Tourism Concession Agreement.

On 8th November, 2010, the respondent filed an affidavit in opposition. The affidavit in opposition is sworn by Mr. Jacob Elliot Chulu; the Acting Director General of the respondent. Mr. Chulu deposed as follows: the certificate of

title which the applicant holds in respect of Lot 5504/M is located in Mosi-oa-tunya National Park, and was issued in error as explained in a letter dated 24th April, 2008; addressed to the applicant. The letter in question is in the following terms.

24th April, 2008.

*The Director
Marimba River Lodge
Sobek River Lodge
P.O Box 60957
Livingstone.
Tel/Fax 03 324189*

Dear Sir,

Re: APPLICATION FOR ISSUANCE OF AUTHORIZATION AND/OR LICENCE TO OPERATE BOAT CRUISES WITHIN THE MOSI-OA-TUNYA NATIONAL PARK.

Reference is made to your letter AWA/SKW/SLL dated 16th April, 2008, regarding the above mentioned subject matter.

In responding to your application we wish to comment as follows:-

(a) The Maramba River lodge under the current leaseholder of Sobek River lodge site of the proposed development is engulfed within the Mosi-oa-tunya National Park, which is a sensitive area supporting populations of rare and endangered species despite having title deeds with information tabulated in the table below; and

<i>No .</i>	<i>Property Number</i>	<i>Date of issuance of Title</i>	<i>Period of Lease</i>	<i>Size of Property</i>	<i>Title Number</i>	<i>Current Lease Holder</i>	<i>National Park</i>
<i>1.</i>	<i>L/5504/M</i>	<i>26/09/91</i>	<i>99 years</i>	<i>5.8199ha</i>	<i>L.3693</i>	<i>Sobek River Lodge</i>	<i>Mosi-oa-tunya</i>

(b)The title deed was issued well after the Mosi-oa-tunya National Park was declared so i.e. as indicated above, the title deed was issued on 26th September, 1991, while the Mosi-oa-tunya National Park was declared a National Park on 25th February, 1972.

It is in view of the above that before the Zambia Wildlife Authority (ZAWA) can consider your application, we wish to advise management of Maramba River lodge under the current leaseholder of Sobek River lodge to surrender the title deed to the Commissioner of Lands and thereafter negotiate a Tourism Concession Agreement (TCA) with ZAWA. As we urgently wait for your response, it is our sincere hope that this matter shall now be brought to rest for the benefit of sustainable tourism development of the Mosi-oa-tunya National Park, the entire tourism sector, and the nation at large. However, do not hesitate to contact the undersigned should you require further clarification.

Yours faithfully

Dr. Lewis Saiwana

DIRECTOR GENERAL

c.c. The Director

Research, Planning and Information.

The Director Conservation and Management.

The Manager - Tourism Development and Marketing.

The Regional Manager - Central Region.

The Warden - Mosi - oa - tunya Area Management Unit.

The Commissioner of Lands - Ministry of Lands.

The Director - Environmental Council of Zambia.

The Town Clerk - Livingstone City Council.

Mr. Chulu then went on to make the following averments in the affidavit in opposition:

"4 That it is trite law that the Commissioner of Lands can on behalf of the President make a grant or disposition of land that is free or unencumbered to any person who qualifies under the law.

5 The land for which the applicant holds title is in the Mosi-oa-tunya National Park, which therefore cannot be said to be free or encumbered land; the Mosi-oa-tunya National Park became so on 25th February, 1972, and the incompetent title was issued on 26th September, 1991.

6 The Commissioner of Lands has power to administer land in accordance to the provisions of the Lands Act. There is no provision in the said Act to override the provisions of the law relating to National Parks which law is at par with the Lands Act.

7 Being a National Park, the legally competent status the applicant company can aspire for can only derive a Tourism Concession Agreement with the respondent authority.

8 The applicant company is abusing Court process by insisting to litigate in the hope of crystallising a manifest legality.

9 I depose to the above conscientiously.

I have deliberately quoted the preceding paragraphs verbatim in order to make the point that Order v, Rule 15 of the High Court Rules proscribes the inclusion of legal arguments or conclusions in an affidavit when it provides as follows:

"An affidavit shall not contain extraneous matters by way of objection, prayer, or legal argument, or conclusion."

Rule 16 of Order 5 goes on to provide that:

"Every affidavit shall contain only a statement of fact and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true."

In view of the foregoing, I will not consider paragraphs 4, 5, 6, 7, and 8 of the affidavit in opposition because the paragraphs in question contravene Order v, Rules 15 and 16 of the High Court Rules.

Although the action was commenced on 10th July, 2008, it was not until 5th November, 2010, that the respondent filed an affidavit in opposition. The essence of the affidavit in opposition is that first, the applicant's title to the property is illegal because the property is situated in a National Park; and second, that the applicant can only acquire an interest in the property through a Tourism Concession Agreement.

Later, on 26th November, 2010, the applicant filed written submissions on behalf of the applicant. In the submissions it was stated as follows: on 26th September, 1991, the applicant was issued with a certificate of title to Lot 5504/m Livingstone for an initial term of 99; years, from 1st April, 1991. On 12th October, 1993, the respondent lodged a caveat on the property on the ground that the title to the property was issued to the applicant in error because the subject property is situated in a National Park. Further, the respondent requested the applicant to surrender the certificate of title to the property to enable the Commissioner of Lands cancel the certificate of title. And thereafter the applicant would be at liberty to enter into a Tourism Concession Agreement with the respondent in order to carry on its business activities in the area. The applicant did not accede to the request by the respondent. Instead, on 10th July, 2008, the applicant by the originating summons moved the Court and requested for an order to remove the caveat.

Mr. Chenda submitted further as follows: that the law that governs National Parks is the Zambia Wildlife Act Number 12 of 1998. Section 13 (1) (b) of the Act enacts, that:

"13 (a) Nothing in this Act shall be construed as preventing or restricting the granting in respect of any land within a National Park___

(a).....

(b) *For any purpose not consistent with this Act, of any right, title, interest or authority under any written law.*

Mr. Chenda went on to argue that the import of the preceding provisions is that, contrary to the assertion of the respondent, there is no prohibition to the grant and acquisition of an interest in land situated in a National Park. Further, that in the instant case, there is no inconsistency between the Zambia Wildlife Act, and the Lands Act. Consequently, the respondent contends that there is nothing illegal or irregular about alienating the property in dispute to the applicant. Mr. Chenda pointed out that, the respondent has not cited any law to aid the proposition that a certificate of title cannot be given to any person in a National Park. Further, Mr. Chenda submitted that the suggestion by the respondent that the only mode of acquiring interest in land in a National Park is through a Tourism Concession Agreement is not supported by any legal provision(s); certainly, not the Zambia Wildlife Act.

Mr. Chenda furthermore submitted that a certificate of title is conclusive evidence of title to land. In aid of this submission, Mr. Chenda relied on section 33 of the Lands and Deeds Registry Act. And the case of *Chilufya v Kangunda (1999) Z.R. 166*. Mr. Chenda further drew my attention to the case of *Anti-Corruption Commission v Barnett Development Corporation Limited (2008) Volume I Z.R. 69*, where it was held that:

“Under section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title. However, under section 34 of the same Act, a certificate of title can be challenged and cancelled for fraud or reason of impropriety in its acquisition.”

In the instant case it was argued by Mr. Chenda that there is no allegation that the applicant acquired the title to the property fraudulently. In the

premises, it was urged that the applicant's title to the property in dispute is impeccable, and can only be impeached by citing the relevant law as opposed to mounting a feeble opposition to the removal of the caveat.

Mr. Chenda also submitted that the nature and effect of a caveat was the subject of judicial exposition in the case of *Construction and Investment Holdings Limited v William Jacks and Company Zambia Limited (1972) Z.R. 66*, where Scott J. observed as follows:

"The effect of a caveat is that the Registrar of Lands and Deeds is forbidden to make any entry on the register having the effect of charging or transferring or otherwise affecting the estate or interest protected by the caveat. The registered proprietor is therefore prevented from showing a clear title."

Scott J, went on to pronounce the circumstances which give rise to the right to place a caveat over land as follows:

"Only if a person has or purports to have an enforceable interest in land may he be justified in interfering with the rights of the registered proprietor by lodging a caveat. The caveator's cause for lodging a caveat is dependent upon his claim to be entitled to an interest in land and that "reasonable" in this sense means "justifiable"."

In addition, Mr. Chenda drew my attention to sections 76 and 77 of the Lands and Deeds Registry Act. Section 76 defines the circumstances when a caveat may be registered as follows:

"76 Any person___

- (a) claiming to be entitled to or to be beneficially interested in any land or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission or of any trust expressed or implied, or otherwise howsoever; or*
- (b) transferring any estate or interest in land to any other person to be held in trust; or*
- (c) being an intending purchaser or mortgagee of any land:*

May at any time lodge with the Registrar a caveat in Form 8 in the Schedule.

Section 77 prescribes the manner of registering a caveat when it provides that:

“77 Every caveat shall be signed by the caveator or by his attorney or agent, and shall state with sufficient certainty the nature of the estate or interest claimed by the caveator, with such other information and evidence as may be required by any regulations under this Act, and shall appoint a place or give an address within 4.83 kilometres of the Registry of or to which notices and proceedings relating to such caveat may be served or addressed.”

Mr. Chenda argued that in the instant case, the respondent registered the caveat on the basis that it considers the alienation of the property in issue to the applicant to be illegal or an irregular. However, Mr. Chenda submitted that from the point of view of the *William Jacks* case, a caveator’s cause for lodging a caveat ought to be dependent on a claim to an interest in the land. In the instant case, Mr. Chenda argued that the respondent has no cause or justification to place and maintain the caveat because it has not demonstrated any beneficial interest, in the property as required by section 76 of the Lands and Deeds Registry Act.

Furthermore, Mr. Chenda argued that the lodging of a caveat is not a final remedy; it is an interim measure. Yet in this case, the respondent has deployed the caveat as a final remedy. And has not taken any further steps since lodging the caveat on 12th October, 1993.

Mr. Chenda, also submitted that it is trite law that *“he who alleges must prove.”* Hence the person initiating civil proceedings must generally speaking prove their case in order to succeed in their claim. In support of this

submission, my attention was drawn to the observation of Ngulube D.C.J. as he was then, in the case of *Mohamed v The Attorney General (1982) Z.R. 49*:

“An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to judgment. I would not accept the proposition that even if a plaintiff’s case has collapsed of its inanity or for some reason or other, judgment should nevertheless be given to him on the ground that defences set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence.”

Mr. Chenda also argued that there is a reversal of the burden of proof under the Lands and Deeds Registry Act with respect to applications for removal of a caveat. Thus, Mr. Chenda argued that it is not for the applicant to show why the caveat should be removed. It is instead, for the caveator to justify why the caveat should not be removed. To support the preceding argument, Mr. Chenda referred to section 81. (1) of the Lands and Deeds Registry Act which is expressed in the following terms:

“81 (1) such Registered proprietor or other interested person may, if he thinks fit, summon the caveator, or the person on whose behalf such caveat has been lodged, to attend before the Court or a judge thereof to show cause why such caveat should not be removed.”

Section 81 (2) of the Act goes on to provide that:

“Such Court or judge upon proof that such a person has been summoned, may make such order in the premises, either ex parte or otherwise, as to such Court or judge seems meet.”

Mr. Chenda urged that in the instant case, by glossing over the statutory requirement___ section 76 of the Lands and Deeds Registry Act___ to demonstrate a beneficial interest in respect of the subject property, the

respondent has not discharged the statutory burden of proof. The failure to discharge the burden of proof, Mr. Chenda submitted is fatal to the opposition to remove the caveat.

In the circumstances, Mr. Chenda urged that:

- (a) There is no legal basis for the respondent to place and maintain a caveat over the subject property; and
- (b) The respondent has lamentably failed to discharge its burden of proof by showing cause why the caveat should not be removed.

Ultimately, Mr. Chenda pressed that I should order the removal of the caveat. And the respondent should be condemned in costs.

In response, on 8th February, 2011, Mr. Simuchoba filed the respondent's submissions. Mr. Simuchoba submitted as follows: Mosi-oa-tunya National Park number 17 was gazetted on 25th February, 1972___ by statutory instrument number 44 of 1972. The statutory instrument was issued pursuant to the repealed National Parks and Wildlife Act. On 26th September, 1991, the applicant obtained title to Lot 5504/M Livingstone, on a 99 year lease. Lot 5504/M is within National Park number 17. When the respondent learnt that a certificate of title had been issued to the applicant, it lodged a caveat on 12th October, 1993. In addition, the respondent urged the applicant to surrender the certificate of title in exchange of a Tourism Concession Agreement. The applicant is said to have spurned the offer.

Mr. Simuchoba submitted that the respondent is alive to the provisions of section 13 of the Zambia Wildlife Act. However, he argued that on the authority of the case of *Chimambo and Others v Commissioner of Lands and*

Others (2008) Volume 2 Z.R. 1, a National Park is a protected area which is encumbered, and is not amenable to the grant of title, even where such grant may be for a purpose(s) consistent with the Act; without the consent of the respondent.

Mr. Simuchoba argued further as follows: that although the Commissioner of Lands can on the authority of the *Chimambo case* make a grant or disposition of land that is free or unencumbered, he cannot do so in respect of land that comprises a National Park. The Commissioner of Lands power to administer land is limited to the Lands Act. He cannot in the administration of the Lands Act override the provisions of other Acts of Parliament such as the Zambia Wildlife Act. The other Acts, Mr. Simuchoba submitted are at par with the Lands Act.

Mr. Simuchoba also submitted that in granting title to the applicant, the Commissioner of Lands whose power to grant land is derived from and limited to the Lands Act ignored the provisions of the Zambia Wildlife Act. And the respondent was not involved or consulted to ensure that the purpose of the grant was not inconsistent with the Zambia Wildlife Act. Had the respondent been consulted, the respondent would only have agreed to the issuance of a Tourism Concession Agreement, and not a certificate of title.

Mr. Simuchoba argued that although the law does not preclude the issuance of certificate of title in National Parks, the respondent prefers to grant a Tourism Concession Agreement and always objects to the issuance of certificates of title. Mr. Simuchoba submitted that the position taken by the respondent regarding issuance of certificates of title, is aimed at maintaining order and preservation of the objects of a National Park. Furthermore, Mr.

Simuchoba submitted that the continued subsistence of the caveat is justified because of the failure by the applicant to surrender the certificate of title to the Commissioner of Lands

On 31st March, 2011, Mr. Chenda filed a reply in response to the respondent's final submissions. In the reply, Mr. Chenda submitted that despite the unequivocal burden of proof cast by section 81 of the Lands and Deeds Registry Act referred to above, the respondent has conveniently neglected to address the issue why the caveat which was lodged in 1993, continues to be registered to date. Furthermore, Mr. Chenda argued that the respondent has not disputed the assertion that the caveat was registered because the property is situated in the National Park. In fact, Mr. Chenda went on to argue that the respondent's sole exhibit attached to the affidavit in opposition which has been reproduced and, referred to above, confirms the respondent's major contention that the caveat was registered because the property is situated in the National Park. Mr. Chenda submitted that it is noteworthy that the letter referred to above, was at the material time copied to the Commissioner of Lands. In the circumstances, Mr. Chenda posited that if the respondent had a legal grievance the Commissioner of Lands would have acted on the grievance.

Mr. Chenda strenuously argued that no matter how aggrieved the respondent is, one cannot overlook the criteria established by law for the registration of a caveat. Namely, that a caveator should disclose a beneficial interest in the land as provided for by section 76 of the Lands and Deeds Registry Act, and also as interpreted by the *William Jacks* case referred to above.

Mr. Chenda also submitted that the legislation in force at the material time; the National Parks and Wildlife Act in section 29 expressly allowed alienation of land in National Park when it provided as follows:

“29 (1) Nothing in this Act shall be constructed as preventing or restricting the granting in respect of any land within a National Park__

(a) Of any mining right, or other right, title, interest or authority necessary or convenient for the enjoyment of a mining right; and

(b) For any purpose not inconsistent with this Act, of any right, title, interest, or authority, or any written law.”

Mr. Chenda argued that the respondent has in its submissions made a startling proposition that the applicant is to be blamed for the continued registration of the caveat because it has not acceded to the respondent’s call to surrender the certificate of title for cancellation. Mr. Chenda submitted that this erroneous proposition confirms the applicant’s contention that for as long as the applicant refuses to yield, the respondent will abuse the caveat as if it were a final remedy, and will not see any need to take further legal steps or measures in this matter

Mr. Chenda argued that the demand by the respondent for the cancellation of the applicant’s certificate of title is illegal and an abuse of the administrative powers conferred on the respondent. In any event, Mr. Chenda argued that the demand flies in the teeth of section 33 of the Lands and Deeds Registry Act, and the decision of the Supreme Court in the *Barnett Development Corporation* case. Namely, that the grant of a certificate of title is conclusive evidence of ownership of land.

As regards the *Chimambo case*, Mr. Chenda submitted that the case does not aid the respondent. And is in any case distinguishable from the instant case for the following reasons. First, whilst the *Chimambo case*, touched on the Lands Act; which came into force on 13th September, 1995, the property in dispute was alienated well before the Lands Act came into force. Second, while the Supreme Court in the *Chimambo case* made pronouncements on the Forest Act, the provisions of the Zambia Wildlife Act or any of its preceding enactments were not in issue and were therefore not alluded to by the Supreme Court as suggested by the respondent. Third, there is nowhere in the holding of the *Chibombo case*, where the Supreme Court identified a legal requirement for the Commissioner of Lands to consult other statutory bodies before alienating land. In the premises, Mr. Chenda submitted that there is no legal justification for the continued registration of the caveat.

Furthermore, Mr. Chenda argued that the respondent's contention that the grant of a Tourism Concession Agreement was a more appropriate course of action to take as opposed to the issuance of a certificate to title, has nothing to do with the applicant. Mr. Chenda went on to argue that a perusal of the certificate of title which was exhibited by the applicant in the affidavit in support dated 10th July, 2008, reveals an underlying lease between the President of the Republic of Zambia, and the applicant. The lease sets out the terms and conditions upon which the property in dispute was alienated to the applicant. Mr. Chenda urged that the respondent's purported grievance with the President's delegate; the Commissioner of Lands must be pursued by the respondent by seeking appropriate legal redress without having to rely on the illegal and unjustified registration of a caveat, which is in any case interfering with the applicant's rights as the registered proprietor of the subject property.

I am indebted to counsel for their well researched submissions and spirited arguments. The law relating to the administration of caveats is located in sections 76 to 83 of the Lands and Deeds Registry Act, chapter 185 of the laws of Zambia. In so far as the instant case is concerned, the pertinent section is section 76. Section 76 enacts as follows:

“76 Any person ___

- (a) claiming to be entitled to or to be beneficially interested in land or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission, or any trust expressed or implied, or otherwise howsoever; or*
- (b) transferring any estate or interest in land to any other person to be held in trust; or*
- (c) being an intending purchaser or mortgagee of any land:*

May at anytime lodge with the Registrar a caveat in Form 8 in the Schedule.”

The *locus classicus* in explaining the nature and effect of a caveat is in my opinion the dictum of Scott J, in the case of Construction and Investment Holdings Limited v William Jacks and Company (Zambia) Limited (1972) Z.R. 66, at P 68 as follows:

“...if one looks at this Ordinance one observes that, where a person lodges a caveat under s. 49, the Registrar is forbidden to make any entry on the register having the effect of charging or transferring or otherwise affecting the estate or interest protected by a caveat. This means that the registered proprietor is prevented from showing a clear title and dealing with his property as he might wish to do and would be able to do but for the caveat. It seems to me to be necessary, therefore, to ask in what circumstances another person would have the right to prevent the registered proprietor dealing freely with the property registered in his name and to my mind the answer should be if that other person has or purports to have, an enforceable interest in the property in question. If that other person has not and does not even purport to have any such interest in the property, then he should not in my opinion be justified in interfering with the rights of the registered proprietor. I would say that a caveator’s cause for lodging a caveat is dependent upon his claim to be entitled to an interest in the land, and that “reasonable” in those circumstances must mean the same as “justifiable.” If he has not a justifiable claim then he cannot be said to have reasonable cause for lodging the caveat and if he is not able to justify his

claim it must follow that his action in lodging a caveat was without reasonable cause. If his claim is not justifiable and he interferes with the rights of the registered proprietor so that the latter suffers damages it would appear to me that it is only right and proper that such damage should be laid at the door of the person who by his action, caused it. One might therefore say caveat caveator."

Although the Section that was the subject of construction in the *William Jack's* case, may not be in *pari materia* with section 76 of the Lands and Deeds Registry Act, the dictum by Scott J, no doubt explains lucidly, the underlying purpose or function of a caveat.

Another case that is of assistance in explaining the nature and effect of a caveat is the case of *Lenton Holdings Limited v Moyo (1984) Z.R. 55*. The *Lenton Holding Limited* case is directly in point because it considered sections, 76 and 77 of the Lands and Deeds Registry Act. In the course of the judgment delivered by Ngulube D.C.J. it was observed that:

"Although the terms of s. 76 (a) would appear to be very wide indeed, as can be seen, yet they would not, in our considered opinion go so far as to cover rights which are otherwise recognisable as being lawfully claimed or held. However, section 77 (1) which we have set out would appear to require that the caveat should disclose the interest claimed."

Thus the Supreme Court held after construing sections 76 and 77 of the Lands and Deeds Registry that to be effective, a caveat should disclose the interest claimed.

In the instant case, the applicant contends on one hand that the respondent has no enforceable interest in land to justify the interference of the rights of the applicant by lodging a caveat. On the other hand, the respondent contends on the authority of the *Chimambo* case that a National Park is a protected area which is encumbered and therefore not amenable to the grant of title without the consent of the respondent. In order to appreciate

the position taken by the respondent, it is necessary in my opinion to visit the *Chimambo case*. The facts giving rise to the *Chimambo case* are that a Local Forest No. 27, situated in Lusaka East, was de-gazetted in 1983. The forest was de-gazetted after some members of the community near the forest noticed that the Chalimbana river catchment area was being destroyed; resulting in the environment being degraded to their disadvantage. Thus, pressure was mounted on Government to re-gazette the Forest. The government yielded to the pressure, and accordingly, the forest was re-gazetted sometime in 1996.

In the meanwhile, in the intervening period when the forest remained de-gazetted, some land was alienated. It is the alienation of that land that prompted the applicants in the *Chimambo case* to seek an order of *certiorari* to quash the Commissioner of Lands decision to allocate the land in issue as being *void ab initio*. The Supreme Court in upholding the trial judge in the *Chimambo case*, held that the Commissioner of Lands can on behalf of the President make a grant or disposition of land that is free or unencumbered to any person who qualifies under the law. The Supreme Court went on to hold that the power of the Commissioner of Lands to allocate the land during the period the forest was de-gazetted cannot be impeached. This was so because the land was vacant State land. And was available for allocation to deserving persons. Lastly, the Supreme Court held that the Commissioner of Lands power to administer land is limited to the Lands Act. And that there is no provision in the Lands Act which allows the Commissioner of Lands to override the provisions of the Forest Act; an Act of Parliament which is at par with the Lands Act.

It is instructive to note in the *Chimambo case* the observation of the Supreme Court at page 9 as follows:

“From the affidavit evidence and submissions made before the trial Court and indeed before us, it was never is dispute that between 1983 and 1996, the entire land comprised in the former Local forest 27 was legally speaking, State land and free from the provisions of the Forest Act, the 1st respondent was entitled as a matter of law to parcel out free portions of the land to deserving applicants.”

It is clear from the preceding dictum that the Commissioner of Lands is empowered to alienate State land to deserving applicants so long as the land is unencumbered.

The question therefore that falls to be considered and determined in light of the decision in the *Chimambo* case is whether or not the discretion of the Commissioner of the Lands to allocate land to in an National Park applicant is fettered by the Zambia Wildlife Act. It is important to recall that it was held in the *Chimambo* case that the power of the Commissioner of Lands to administer land is limited to the Lands Act, and that there is no provision in the Lands Act which allows the Commissioner of Lands to override the provisions of other Acts of Parliament which are at par with the Lands Act, such as the Forest Act.

Be that as it may, section 13 (1) (b) of the Zambia Wildlife Act as follows:

“13 (1) Nothing in this Act shall be constructed as preventing or restricting the granting in respect of any land within a National Park_____

(a).....

(b) For any purpose not inconsistent with this Act, of any right, title, interest, or authority under any written law....”

Therefore, the Commissioner of Lands is not by section 13 (1) of the Zambia Wildlife Act proscribed from granting any right, title, or interest, in a National Park as long as such grant is consistent with the objectives of the Zambia Wildlife Act. Thus the grant of any right, title, or interest in a National Park by the Commissioner of Lands can only be lawfully impeached if it is demonstrated, and proved that the grant of such right, title, or interest, is

inconsistent with the objectives of the Zambia Wildlife Act. Needless to interpolate that such a cause of action would in any event primarily lie against the Commissioner of Lands.

The question that however remains unanswered, on the facts of this case is whether or not the respondent is justified in maintaining the caveat in issue. In answering this question it is important to put into perspective not only the requirements for registration of a caveat, as provided for in section 76 of the Lands and Deeds Registry Act, but also the procedure for the removal of a caveat contained in section 81 (1) of the Act. Section 81 (1) provides that:

“Such Registered Proprietor or other interested person may, if he thinks fit, summon the caveator or the person on whose such caveat has been lodged, to attend before the Court or a judge thereof to show cause why such caveat should not be removed.”

Clearly, section 81 (1) of the Lands and Deeds Registry Act, imports the question of the burden of proof. The general rule relating to the burden of proof in civil cases is stated as follows by the learned authors of Phipson on Evidence, seventeenth edition (Thomson Reuters (Legal) Limited 2010) paragraph 6-06 at page 151:

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.”

The learned authors of Phipson on Evidence, (supra) continue in paragraph 6-06 at page 151 as follows:

“This rule is adopted principally because it is just that he who invokes the aid of the law should be first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The burden of proof is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged

throughout the trial exactly where the pleading place it, and never shifting in deciding which party asserts the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form; the latter the pleader can frequently vary at will."

Although the originating proceedings in an application for the removal of a caveat is at the instance of an applicant, section 81 of the Lands and Deeds Registry places the burden of showing cause why a caveat should not be removed on the respondent (s). Further, in deciding whether or not a caveat should be removed, a Court should in my opinion bear in mind, the provisions of section 76 of the Lands and Deeds Registry Act. That is to say, that in the first place, before a caveat is registered the Registrar must be satisfied that the person intending to register a caveat must be:

- (a) entitled to land;
- (b) beneficially interested in the land;
- (c) in the process of transferring some interest in land to some other person; or
- (d) is an intending purchaser or mortgagee of the land in issue.

Thus, a person intending to register a caveat must disclose an enforceable interest in the property. And if i may add, the enforceable interest must be lawfully claimed and justifiable as provided for in section 76 of the Lands and Deeds Registry Act.

In the instant case, the respondent, claims in the main that the certificate of title held by the applicant was issued without: consulting the respondent; and regard to the overriding needs or objectives of the National Park to be preserved. These are not in my opinion recognised grounds___ legally___ for the registration of a caveat. In any event there is no requirement under the Zambia Wildlife Act that the Commissioner of Lands should consult the respondent whenever he alienates land in a National Park.

In order to justify the registration, nay, continued registration of a caveat, a caveator is required in my opinion to demonstrate that he is entitled to the

land; is beneficially interested in the land; is in the process of transferring some interest in land to some other person; or is an intending purchaser or mortgagee of the land in issue.

In the instant case the respondent has not demonstrated any lawful cause__ outlined above__, why in terms of section 81 (1) of the Lands and Deeds Registry Act, the caveat should not be removed. I accordingly order that the caveat registered on 12th October, 1993, be removed forthwith. And costs follow the event.

Leave to appeal is hereby granted.

**Dr. P. Matibini, SC.
HIGH COURT JUDGE**