

ZIMBABWE ENVIRONMENTAL LAW ASSOCIATION
and
ZAKEU NHACHI
and
ROSEMARY MARUWA JENA
and
ELIAS MATSVERUKA
and
MAYIMBOTI MAYIMBOTI
and
ISAAC ZIWENJERE
versus
ANJIN INVESTMENTS (PRIVATE) LIMITED
and
MARANGE RESOURCES (PRIVATE) LIMITED
and
DIAMOND MINING COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 5 November 2013 and 17 June 2015

Opposed Matter

T.Mpofu, for the plaintiffs
F Mahere, for the 1st defendant
I. Ndudzo, for the 2nd and 3rd defendants

TAKUVA J: Plaintiffs issued summons claiming the following:

- (a) a declaratur that the first to the third defendants waste discharges into the Odzi, Singwizi and Save Rivers are unlawful and have polluted the rivers with untreated effluent, raw sewage, metals and chemicals.
- (b) an interdict prohibiting the defendants from discharging their waste material in any form, into the Odzi, Singwizi and Save rivers.

- (c) the first to the third defendants jointly and severally the one paying the others to be absolved shall pay costs of suit on a legal practitioner and client scale.

The facts are as follows:

The first to the third defendants are mining companies involved in diamond exploration and mining in the Marange Communal Lands. In conducting their mining and exploration activities, the first and the second defendants discharge their untreated waste material and effluent into the Odzi River at intervals of approximately two weeks, while the third defendant does the same into Singwizi River. Further the first to the third defendants discharge untreated human waste into the rivers. The two rivers are tributaries of the same river. These discharges heavily pollute the Save and Odzi rivers resulting in the rivers being silted, muddied, dirty and loaded with chemical and metal deposits including iron, chromium and nickel.

The second to the sixth plaintiffs are inhabitants of the riparian villages living on the banks of the Odzi, Singwizi and Save rivers. They depend heavily on these rivers for their subsistence including using the waters for drinking, bathing, watering livestock, gardening and fishing. As a result of the pollution, the water in the rivers is no longer fit for the above mentioned purposes. Also, the pollution has destroyed aquatic life like fish and disturbed the ecosystem in the rivers. Such discharges expose the second to the sixth plaintiffs to risks of contaminating diseases such as cancer, cholera, typhoid, dental and skeletal fluorosis. This conduct by the first to the third defendants violets the Environmental Management Act [*Chapter 20:27*].

Alternatively, it was contended that the waste discharges constitute a nuisance hindering the plaintiffs from enjoying the usage of the public rivers as they have traditionally done for many years. Further, the discharges by the defendants are unreasonable and unlawful in that defendants are obliged to treat and contain their waste material before discharging it into public water bodies.

The defendants entered appearance to defend and subsequently filed special pleas. The first defendant in its special plea contended the following:

- (1) Plaintiffs have not exhausted their remedies under the Environmental Management Act [*Chapter 20:27*] for the protection of their rights.

- (2) The plaintiffs are not entitled to an interdict of the nature sought in that a satisfactory remedy exists in section 10(1)(b)(xiii) of the Environmental Management Act which would afford the plaintiffs the relief they seek in the instant proceedings.

As regards the first ground, the first defendant in its heads of argument contended that

- (a) the proper forum for the plaintiff's to lodge their claim is with the Environmental Management Agency in accordance with section 10(1)(b)(xiii) of the Act for the protection of their rights.
- (b) under section 10(xiii) of the Act, the Environmental Management Agency has the power to serve written orders on any persons requiring them to undertake or adopt such measures as are specified in the orders to protect the environment.
- (c) the plaintiffs should have approached the Environmental Management Agency to exercise its power under section 10(b)(iii) of the Act to regulate and monetarily discharge ore emission of the pollutants and hazardous substances which the plaintiff's claim are being discharged by the defendants into the environment.
- (d) the remedies provided under the Act are effective despite the fact that they are not judicial or *quasi judicial*.

As regards the second ground it was submitted that an interdict should not be granted *in casu* because there exists an alternative remedy under the Environmental Management Act. Reliance was placed on the following cases: *Setlogelo v Setlogelo* 1914 AD 22, *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511(S) and *Reserve Bank of Rhodesia v Rhodesia Railways* 1966 (3) SA 656(SR).

In their special plea in bar, the second and the third defendants apart from quoting the Act in extenso raised the same argument as raised by the first defendant in respect of the alleged failure by the plaintiffs to exhaust domestic remedies. However, the second and the third defendants raised a further ground namely non joinder of the Environmental Management Agency. The argument is that since the agency is interested in the administration of the environment and environmental issues, it should have been joined as a party by the plaintiffs. The non-citation of Environmental Management Agency, so the argument went is fatal to the

plaintiff's case. Reliance was placed on section 10(1) of the Act which stipulates the functions of the Agency and *Tiriboyi v Jani and Anor* 2004 (1) ZLR 420(HC).

The plaintiff's argued in their heads that the defendant's grounds in their special pleas have no valid basis and ought to be dismissed with costs. As regards exhaustion of domestic remedies, it was submitted that:

- (1) the Environmental Management Act provides no forum which can determine the issues raised by the plaintiffs. In other words, there is no forum given judicial or quasi-judicial functions to determine disputes between parties. There is no Environmental Court in the same manner that the Labour Act for instance establishing the Labour Court and gives it exclusive jurisdiction over employment matters (s 89(6) of the Labour Act) see also *Tuso v City of Harare* HH 1/2004.
- (2) if the Agency was to assume a judicial function, it would clearly be acting ultra vires the Environmental Management Act since there is no legal basis or it to do so.
- (3) there is nothing in the Act that compels aggrieved persons to approach Environmental Management Agency for relief or intervention. Likewise, there is nothing in the Act compelling Environmental Management Agency to accept complaints from the public or to investigate such complaints.
- (4) the defendants have simply pointed to the general functions and powers of Environmental Management Agency without showing the provisions which empower EMA to determine disputes between parties – see *Kanonhuwa v Cotton Company of Zimbabwe Ltd* 1998(1) ZLR 68(H) and *Tutani v Minister of Labour and Others* 1987(2) ZLR 88 (H).
- (5) the plaintiff's claim includes the common law delict of nuisance which can only be dealt with by this court which has inherent jurisdiction to issue a declaratur. There is no other forum that can grant the relief sought by the plaintiffs.

NON JOINDER OF EMA

The plaintiff's submitted as follows:

- (1) that EMA neither has direct and substantial interest in the matter nor does it stand to be prejudiced in any way if the order as granted without notice to it – *Rose v Arnold & Ors* 1995(2) ZLR 17 (H).

- (2) EMA's interest can only be that the interdict would complement its work of policing the environment.
- (3) that in any event R87(1) of this court's rules adequately deals with this objection. Essentially, it provides that no cause of action shall be defeated by reason of the non-joinder of a party and the court may determine the issues in so far as they affect the rights and interest of persons who are parties to the matter see *Nyamaveda v Georgias* 1988 (2) ZLR 422 (S).
- (4) that the joinder of EMA is unnecessary in this matter. More significantly, even if it is so necessary, the non-joinder does not bar the claim.

Herbestein & Van Winsen in *The Civil Practice of the High Courts of South Africa*, 5th ed vol 1 at p 598 state that:

“.....a special plea is one that does not raise a defence on the merits of the case just as its name implies, sets up some special defence which has as its object either to delay the proceedings (a dilatory plea) or to object to the jurisdiction of the court (a declinatory plea) or to quash the action altogether (a peremptory plea).”

By nature special pleas do not concern the merits of the action. Rather they seek to interpose, some defence not apparent *ex facie* the pleadings.

Returning to the case *in casu*, the argument that this court lacks jurisdiction to entertain the present action in particular with regard to the nature of the relief sought is without merit in my view. Section 14 of the High Court Act [*Chapter 7:06*] provides as follows:

“The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination”.

It is common cause *in casu*, that the plaintiffs seek a declaratory order as the relief. It has not been argued that Environmental Management Agency has power to issue declaratory orders. The requirements for issuing a declaratory order were discussed in *Munn Publishing (Pvt) Ltd v ZBC* 1994(1) ZLR 337 (s) at 343 – 344 where Gubbay CJ (as he then was) held that:

“The condition precedent to the grant of a declaratory order is that the applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court”.

See *United Watch & Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409(c) at 415 in fine, *Milani & Anor v South African Medical & Dental Council & Anor* 1990 (1) SA 899 (T) at 902 G – H. The interest must relate to an existing future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. See *Anglo-Transval Collieries Ltd v SA Mutual Life Assurance* 50e 1997 (3) SA 631 (T) at 635 G – H. But the existence of an actual dispute between persons interested is not a statutory requirement to an exercise by the court of jurisdiction. See Exp: *NELL* 1963 (1) SA 754 (A) at 759 (H) 760 A. Nor does the availability of another remedy render the grant of a declaratory order incompetent. See *Geloon Investments (Pvt) Ltd v Adair Properties (Pvt) Ltd* 1969(2) RLR 120 (G) at 128A-B; 1969 (3) SA 142 @ at 144 D – F.

This then, is the first stage in the determination by the court.

At the second stage of the enquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s 14. What constitutes a proper case was considered by Williamson J in *Adbro Investments Co. Ltd v Minister of the Interior & Ors* 1961 (3) SA 283 (G) at 285 B – C, to be one which, generally speaking, showed that :-

“.....despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation said to be due by respondent. I think that a proper case for a purely declaratory order is not made out if the result is merely a decision on a matter which is really of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant’s position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought”.

In *casu*, it has not been submitted that the plaintiffs have not direct and substantial interest in the subject matter. Quite evidently, there is a glaring need for a declaration as to the existence of a legal right claimed by the plaintiffs. However, once it is conceded that EMA can not issue such a declaratory order, the matter should end here in that the alternative remedy argument becomes sterile. Any further argument is tantamount to waffling in my view. For this reason, the point *in limine* relating to lack of jurisdiction in the form of a special plea is dismissed.

As regards non joinder of Environmental Management Agency the law, as enshrined in Rule 87(1) of this court’s rules is crystal clear in that even assuming there is non – joinder this

would not defeat plaintiff's claim. Consequently, the special plea of non-joinder is accordingly dismissed. There was some considerable material on the requirements of an interdict. In my view, this cannot be a basis for a special plea as it is a matter of evidence to be decided on the merits of the case in the trial.

Accordingly it is ordered that the special pleas by the first, second and third defendants be and are hereby dismissed with costs.

Scanlen & Holderness, 1st, 2nd, 3rd, 4th, 5th, 6th plaintiffs legal practitioner's
Defence Legal services, 1st defendants legal practitioner
Mutamangira & Associates, 2nd and 3rd defendants legal practitioners