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### Moses Lukwanda and 9 others v Zambia Airforce Projects Limited and 7 others CAZ/08/323/2019

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**Moses Lukwanda and 9 others v Zambia Airforce Projects Limited and 7 others**  
**CAZ/08/323/2019**

Pamela Towela Sambo<sup>1</sup>

**Facts**

On the 17<sup>th</sup> February 2020, the Court of Appeal for Zambia rendered its ruling granting an injunction in the case of *Moses Lukwanda and 9 others v Zambia Airforce Projects Limited and 7 others* CAZ/08/323/2019. The procedural history of this case in the Lusaka High Court is that the appellants, nine headmen from around Chongwe district, together with the Chalimbana River Headwaters Conservation Trust initiated legal action against the Zambia Air Force Projects Limited and four other private investors for commencing developmental projects on the Lusaka East Forest Reserve, popularly known as Lusaka East Forest Reserve No. 27 or simply “Forest 27,” contrary to the provisions of both the Environmental Management Act (EMA) No. 12 of 2011 and the Water Resources Management Act No. 21 of 2011. The Zambia Environmental Management Agency (ZEMA) and the Water Resources Management Authority (WRMA) were also joined to the cause for breach of their statutory duties in respect of the impugned developmental projects in Forest 27.

The Appellants sought a declaration that the *Busoli* people resident in and around Chongwe, together with the general public had an unrestricted right to access clean and uncontaminated water from the Chalimbana River for their consumption, which right was threatened or likely to be threatened owing to the impugned development by the Respondents in an environmentally and ecologically sensitive area. Accordingly, the appellants sought a declaration preventing the respondents from continuing construction works in Forest 27, an order of injunction restraining the continuation of the developmental project and any other reliefs that the court might deem fit.

In the Lusaka High Court, the matter was heard by two judges. By order of interim injunction dated May 16, 2019, the first Lusaka High Court judge ordered and directed that the respondents, whether by themselves or by their servants, agents or otherwise, were restrained from carrying out any further building and construction works or any other restricted actions

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on or about the environmentally and ecologically sensitive area. After this well-reasoned and environmentally friendly order, the first Lusaka High Court judge tendered a recusal and was therefore unable to hear the subsequent proceedings.

The matter was then re-allocated to the second Lusaka High Court judge, before whom the application for confirmation of interim injunction was heard *inter partes*. In a ruling dated July 29 2019, the Lusaka High Court vacated the order of interim injunction that had restrained the respondents from continuing the construction works in and around Forest 27, on the questionable basis that:

Having considered the guidelines whether to confirm or vacate the interim order earlier granted by this court, as there is only one High Court, I have no hesitation in forming a firm opinion that this is not a fit and proper case to confirm the interim injunction order granted on May 16, 2019. It is accordingly vacated. The interlocutory application raised important environmental issues, which are matters of constitutional and tremendous public interest. The justice of this case is that I make no order as to costs. Put differently, each party is to bear own costs. The Plaintiffs are granted leave to appeal to the more superior Court of Appeal.

Following this ruling by the Lusaka High Court, the appellants renewed their application for an interim injunction before the Court of Appeal.

### **Holding**

The Court of Appeal found the application for an interim injunction meritorious and accordingly granted it. The five respondent investors are presently restrained from continuing with their developmental works in and about the Lusaka East Forest Reserve Number 27, until this injunction is vacated by the 1<sup>st</sup> Respondent, ZAF Projects Limited, by complying with the pre-conditions issued earlier by the 6<sup>th</sup> Respondent, the Zambia Environmental Management Agency; and obtaining an order of the Court of Appeal to that effect, or until further order of the court. The court awarded costs of the application to the appellants.

### **Significance**

This Court of Appeal decision, despite being an interim order, sends a strong message beyond the legal fraternity that global environmental protection must be actualized in Zambia as it is akin to protection of human life and other organisms that support human sustenance. Post 2011, Zambia has seen progressive environmental laws both in the Constitution and several Acts of Parliament. The major problem has been a lack of compliance and enforcement.<sup>2</sup> It is now time for the courts to breathe life into these legal provisions.

To start with, the appellants' claims are mainly centred around legislation related to water resources management and the environment.<sup>3</sup> The Water Resources Management Act is purposed to *inter alia*, provide for the management, development, conservation, protection and preservation of the water resource and its ecosystems; equitable, reasonable and sustainable utilisation of the water resource; and guarantee adequate and sustainable water access for the poor and vulnerable members of the society.<sup>4</sup> The facts of this case show that, in a broader view, the respondent investors have acted in total disregard of these provisions in relation to management, preservation, conservation and protection of the Chalimbana River Catchment and Lusaka Aquifer System, which are also environmentally and ecologically sensitive areas in terms of several legal provisions.<sup>5</sup>

According to the appellants, the construction that was going on in the Forest 27 area has been occasioning water contamination from effluent discharge at the ZAF Twin Palm Housing Project, which is next to the Kingsland Project, further resulting in destruction of the forest, with the eventual consequence of affecting other surrounding rivers, thereby impacting negatively on public access to clean and safe water. The ruling is therefore on *terra firma* in granting the injunction in favour of environmental wellbeing.

The ruling rightly makes repeated reference to the right to a clean, safe and healthy environment. It is therefore important to fully appreciate what the right entails. The right to a clean, safe and healthy environment provided in section 4 of the Environmental Management Act has not had judicial interpretation since 2011 when it was introduced. In this ruling, the

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<sup>2</sup> P. T. Sambo, (2019) 'The Environmental Management Act (2011): a basis for the growth of an environmental ethos and good environmental governance in Zambia?' *Nomos Verlagsgesellschaft mbH & Co. KG*, 647-664 at 651- 652, 658 - 663.

<sup>3</sup> Water Resources Management Act No. 21 of 2011 and Environmental Management Act No. 12 of 2011

<sup>4</sup> Preamble, Water Resources Management Act, No. 21 of 2011

<sup>5</sup> Articles 253 (g), 255 (d) and (e) and 256 of the Constitution; Section 8 (c ) and (d) of the Forests Act No. 4 of 2015; Section 24 of the Environmental Management Act No. 12 of 2011

Court of Appeal recognises that the right to a clean, safe and healthy environment “makes it abundantly clear that an aggrieved person may commence an action in relation to any perceived disobedience to the provisions of the Environmental Management Act.” Although the Court of Appeal was not specifically tasked with interrogating the import of Section 4 of the Environmental Management Act, it nonetheless proceeded to emphasise the need to actualise this important right in the context of Zambia.

According to renowned environmental lawyer, Professor Abdul Haseeb Ansari, the right to a healthy environment has been gaining prominence, greater emphasis and all states, big and small, rich and poor, developed and developing, in principle have accepted the idea of sustainable development.<sup>6</sup> Accordingly, most states have enacted legislation that incorporates the right to life as a fundamental right and the right to a healthy environment is a vital aspect of the right to life. Without a healthy environment, it would be impossible to sustain an acceptable quality of life or even life itself.<sup>7</sup>

Section 4(1) of the Environmental Management Act provides that “subject to the Constitution, every person living in Zambia has the right to a clean, safe and healthy environment,” while section 4(2) continues with the provision that “the right to a clean, safe and healthy environment shall include the right of access to the various elements of the environment for recreational, education, health, spiritual, cultural and economic purposes”. These two clauses of Section 4 are important in that the right to a clean, safe and healthy environment in Zambia is extended to all aspects of the environment - water, air, soil, forests, culture and many others. Section 4(3) provides that “a person may, where the right in subsection (1) is threatened or is likely to be threatened as a result of an act or omission of any person, bring an action against the person whose act or omission is likely to cause harm to human health or the environment”. The provision emphasises that *a person may* bring an action where the right to a clean, safe and healthy environment is *threatened or is likely to be threatened*.

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<sup>6</sup> S. Yogamalar and A. Haseeb Ansari (2015) ‘Right to a healthful environment: Flagship of Fundamental Human Rights- An international Perspective, October 2015, 20th International Academic Conference Proceedings, Madrid, Spain, available at <http://www.iises.net/proceedings/20th-international-academic-conference-madrid/front-page>, 541; Abdul Haseeb Ansari. (1998). Right to a healthy environment as a means to ensure environmental justice: An Overview with special reference to India, Philippines and Malaysia, 4 MLJ xxv-xliii. United Nation Report June 1962. <http://www.un-documents.net/unchedec.htm>

<sup>7</sup> N. B. Hashim, (2013) ‘Constitutional Recognition of Right to Healthy Environment: The way forward,’ *Procedia - Social and Behavioral Sciences* 105 (2013) 204 - 210, at 206- 210, Available online at [www.sciencedirect.com](http://www.sciencedirect.com)

The import of the right to a clean, safe and healthy environment is that any juridical person may commence an action in the event of both threatened and actual environmental damage.<sup>8</sup> The legal action by the affected person, “may seek to prevent, stop or discontinue any activity or omission which threatens, or is likely to cause harm to, human health or the environment.”<sup>9</sup> Section 4(3) is a universal provision in the sense that any person can initiate legal action in furtherance of environmental protection, whether or not they are directly affected. This is a departure from usual practice where the right to bring an action is based on actual injury being occasioned to the person bringing the action.

Section 4(3) of EMA regulates *locus standi* in environmental matters. This concept is referred to as the *action popularis*, which means an action to obtain a remedy by a person or a group in the name of the general public, without the necessity of representation authorisation from the victims of the harm.<sup>10</sup> The *locus standi* provision in EMA is universal in the sense that any person can bring the action, whether or not they are directly affected. This new position is recognition that environmental matters are matters of general public interest, and further that the general public should have a right to seek redress for environmental law wrongs. The nature and scope of the remedies that can be sought are alive to both the general harmful effects of pollution on the environment and the possible harm caused to the individual.

The ruling bases the granting of the injunction on the right to a clean, safe and healthy environment, which essentially guarantees the exercise of the right to life. It is for this reason that in India, the environmental right has been given judicial interpretation akin to the right to life. As far back as 1990, the constitutional bench of the Indian Supreme Court had made the link between environmental quality and the right to life. In the case *Charan Lal Sahu etc. v. Union of India and Others* (1990) AIR 1480, the Supreme Court interpreted the right to life guaranteed by article 21 of the Constitution to include the right to a wholesome environment. In other Indian cases such as *Subhash Kumar v. State of Bihar* (1991) 1 SCC 598, the Court observed that the “right to life includes the right of enjoyment of pollution-free water and air

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<sup>8</sup> P. T. Sambo, (2019) “The Environmental Management Act (2011): a basis for the growth of an environmental ethos and good environmental governance in Zambia?” *Nomos Verlagsgesellschaft mbH & Co. KG*, 647-664 at 651 and 657.

<sup>9</sup> Section 4 (a) and (b) of the Environmental Management Act No. 12 of 2011

<sup>10</sup> W Aceves “Actio Popularis – The Class Action in International Law” (2003) *University of Chicago Legal Forum* 360.

for full enjoyment of life,” and by implication that all governmental agencies “could no longer rest content with unimplemented measures for the abatement and prevention of pollution as they would be compelled by the courts to take positive measures to improve the environment.” These decisions were reaffirmed in *M.C. Mehta v. Union of India* (1987) SCR 819 where the Supreme Court held that “life, public health and ecology have priority over unemployment and loss of revenue”.

The broad scope of the right to clean and healthy environment has also been affirmed in Kenyan Courts in the case of *Peter K. Waweru v Republic* [2006] eKLR by the Court stating, *inter alia*, that “the right of life is not just a matter of keeping body and soul together because in this modern age, that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man ...”

The Court of Appeal ruling effectively discounts the Lusaka High Court view that the appellants needed to adduce evidence to show that the project would contaminate or adversely affect the environment and further that it was not sufficient for the applicants to proclaim that they had a cause of action or that their rights had been threatened. The enforcement of the right to a clean, safe and healthy environment does not require such evidence as the Lusaka High Court anticipated because environmental protection must be given utmost importance.

This ruling stands out as an unrivalled precedent from the Zambian courts because it recognises that injunctions are an important tool for enforcing environmental law; and further that the State Proceedings Act does not bar the granting of injunctions against parastatals and other privately incorporated companies in which the State has an interest. The Court pronounced itself on this in relation to the respondent investors in specific terms that the immunity in relation to injunctions in the State Proceedings Act only applies to the State or a public officer executing official duties, and does not provide immunity for commercial entities incorporated by the State and further that the Legislature did not intend to protect private companies incorporated or engaged by the State to carry out various activities.<sup>11</sup>

This view corrects the erroneous view of the Lusaka High Court that it was in the public interest that adequate facilities be provided to the men and women serving in ZAF Projects Limited, to continue with developments that flew in the teeth of environmental law. From the facts of the

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<sup>11</sup> *Moses Lukwanda and 9 others v Zambia Airforce Projects Limited and 7 others* CAZ/08/323/2019 at 22 - 23

case, the preservation of a pristine environment in Forest 27 is what fits into the definition of public interest, as it facilitates important environmental and ecological processes that are responsible for water regeneration. Environmental matters must be given priority and balanced in terms of the sustainable development requirements of countries. The development trajectory must not at any time lose sight of environmental protection. The ruling goes further to clarify that contrary to the respondents' argument, there was nothing in the provisions of section 106 of the Environmental Management Act which compels members of the public to first seek recourse to the Director General of ZEMA, before going to Court for redress in the event of environmental injury. In essence, this means that the Director General of ZEMA is empowered to issue compliance orders against environmental offenders without the necessity of invoking the powers of the courts, which in themselves can operate independently in the environmental interest.

In analysing the need to grant the injunction applied for, the ruling ably traverses important precedent and concludes that injunctions are important in enforcing environmental compliance and consequently, the life-saving right to a clean, safe and healthy environment in Zambia. The Court was rightly mindful that at that juncture, it had not been called upon to make a final determination on the merits of the entire case, but rather decide whether on the facts before it "there was a probability that the Appellants were entitled to relief" in the form of an interim injunction. The Court analysis progressed to its logical conclusion that the five respondent investors were perpetuating a breach in relation to an environmentally sensitive area in line with the Constitution and the Environmental Management Act, which in itself, amounted to a serious question to be tried.<sup>12</sup>

It must give immense pride to every Zambian, whether environmentally inclined or not, that one of the country's apex courts, the Court of Appeal, recognises that:

Disputes to do with the environment reside in a hallowed place and should enjoy the principles that apply to loss of land where one does not have to prove irreparable injury...once damaged, the environment, like land, cannot quite be

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<sup>12</sup> Ibid at 27

restored to its original state and the damage may result in untold suffering for generations”.<sup>13</sup>

In conclusion, the main issues for the court to determine, in line with the appellants’ claims are solely within the ambit of unambiguous environmental law provisions. Environmentalists keenly await the hearing of the matter on its substantive merits.

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<sup>13</sup> Moses Lukwanda and 9 others v Zambia Airforce Projects Limited and 7 others CAZ/08/323/2019 at 33