BROOKLANDS HUNTING SAFARIS (PVT) LTD

Versus

PABST HOLDINGS (PVT) LTD t/a CHAPUNGU RANCH

And

LOWVELD MARKETING SERVICES (PVT) LTD

And

MR WILLIAM PABST

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 28, 30 DECEMBER 2009 AND 7 JANUARY & 27 MAY 2010

S S Mazibisa for applicant
J Tshuma for respondents

Urgent Chamber Application

KAMOCHA J: The applicant was granted on 10 November 2009, a provisional order which was amended to read as follows in the interim order granted:-

> "Pending the finalization of this matter, applicant be and is hereby granted the following relief:-
>
> 1. The respondents be and are hereby ordered and directed to forthwith take all reasonable steps and do every act necessary to unblock or re-connect the passage of water through the underground pipeline from the borehole along the Save River bank on one part of Lot 5 through Lot 8 into the main part of Lot 5 of Devure Ranch;
> 2. If the respondents fail to forthwith unblock the passage of water pumped into the underground pipeline through Lot 8 into the main part of Lot 5 of Devure Ranch, the Deputy Sheriff be and is hereby directed and authorized to act in the respondents' stead and do all acts necessary to unblock the passage of water through the underground pipeline into applicant's Msaize Ranch in Lot 5 of Devure Ranch.
> 3. The members of the Zimbabwe Republic Police, based at Bikita Police Station shall ensure full compliance with this provisional order by all the respondents jointly and severally, whether directly or through their agents or employees."

In the final order the respondents were being called upon to show cause why a final order should not be made in these terms:-

"(1) Pending finalization of the administrative process of the applicant's claim and registration of a permanent servitude of passage of water in favour of Lot 5 of Devure Ranch against the respondent's Lot 8 of Devure Ranch in terms of section 75 of the Water Act [Chapter 20:24], the respondent and all those acting on its behalf be and are hereby interdicted from blocking or interfering with the passage of water through the underground pipelines that run from the part of Lot 5 where the borehole and water pump were installed, through Lot 8, into the rest of Lot 5 of Devure Ranch.

(2) The respondent be and is hereby ordered to pay the costs of suit."

The parties in this matter are registered owners of pieces of land in the Save Conservancy. The applicant owns Lot 5 of Devure Ranch, Save Conservancy, also known as Msaize Ranch while the second respondent owns Lot 8 of Devure Ranch, Save Conservancy also known as Chapungu Ranch.

During the 1991 to 1992 drought period the applicant together with other lot holders of Devure Ranch pooled resources and drilled a borehole and installed an electric water pump along the Save River bank in Lot 5 of Devure Ranch. They laid down underground pipes to carry water from the part of Lot 5 where the borehole was drilled through Lot 8 into the main part of Lot 5 and to other participating lots of Devure Ranch. The participants engaged the Zimbabwe Electricity Supply Authority to install electricity to the electric water pump at the borehole. The borehole seems to be a very prolific one as it has been the main source of water for 17 years for all the lots of Devure Ranch applicant's and 2nd respondent's included.

The applicant alleged that at all material times since the underground pipeline had been laid down through Lot 8, there had always been a common understanding and agreement among the interested parties to the effect that the other lots, including applicant's Lot 5, had an unregistered servitude of passage of water on Lot 8 and that the owner of Lot 8 must not interfere with the flow of water through the underground pipeline in a manner that would be adverse to the servitude of passage enjoyed by the other lots of Devure Ranch.

The respondents were made aware of that arrangement when they took possession of Lot 8 after buying it from Lowveld Marketing Service (Pvt) Ltd. They abided by the arrangement for three years. The respondents, however, changed their minds by July 2009 and instructed their legal practitioners to write to the applicant on 30 July 2009 in the following terms:-

"Dear Sir,

Re: Chapungu Ranch Water Pipeline

We have been consulted by Pabst Holdings (Pvt) Limited, as the owner of Chapungu Ranch in the Save Valley Conservancy, in connection with the pipeline on Chapungu ranch into which you have, with our client's consent, been pumping water from a borehole close to the Save River and from which you have been drawing water for game watering holes on your adjoining ranch Msaize.

Our client intends to expand its operations on Chapungu Ranch which will require the utilization by it of the full capacity of the pipeline.

Our client has requested us to give you notice therefore that with effect from the 1st November 2009 you will need to have made other arrangements for the water currently drawn off the Chapungu ranch pipeline.

Yours faithfully

Coghlan, Welsh & Guest"

On receipt of the above letter, the applicant, through its representative contacted the third respondent in an effort to resolve the issue but it seems that whatever discussions that may have taken place were not fruitful.

Hence on 4 November, 2009 the respondents disconnected or blocked the passage of water through the underground pipeline on the basis that the servitude was not registered against the title deeds of lot 8. As indicated in their letter they wanted exclusive use of the underground pipeline.

As a direct result of the respondent's actions applicant's Msaize Ranch in Lot 5 ran dry. It had no water for both human consumption and wild life in the ranch. There was no water for professional hunter clients who had pre-arranged contracts and bookings to undertake safari hunting on the ranch. The blocking of passage of water gravely threatened the life or existence of wild life which included elephants, impala, eland, wildebeest and leopards. The applicant had 65 employees at the camp and professional hunters were due to commence soon. All these needed access to water, but the respondents had blocked the passage of water into the applicant's ranch without just cause, so the applicant's submission went. Yet on the other hand

no conceivable prejudice would be suffered by the respondents if they were to be ordered to unblock the passage of water into applicant's ranch since applicant had always drawn water through the underground pipeline without any incident ever since the respondents took occupation of Lot 8 of Devure Ranch about three years ago.

In the light of what the respondents have done the applicant has since lodged its application with the Administrative Court claiming a permanent servitude of passage of water to be registered against the title deeds of Lot 8 of Devure Ranch. The respondents were duly served with the requisite notice in writing in terms of section 75 of the Water Act [Chapter 20:24]. Having taken all the necessary steps to acquire a permanent servitude of passage of water the applicant applied for and was granted a provisional order which it now seeks to have confirmed.

The main thrust of the respondents' case was that they had not been made aware at the time they bought Lot 8 that there was any servitude across Lot 8 in favour of Lot 5. In fact there was no servitude registered against the title deeds of lot 8. The position as they understood it was that the underground pipeline was with the permission of the owner of Lot 8. That permission was withdrawable at any time when the owner was in a position to further develop Lot 8. The respondents had never agreed to a servitude over Lot 8. Since they were at liberty to withdraw the permission at any time that suited them they decided to do so by letter of 30 June 2009 quoted above at page 3.

The respondents emphasized that in the absence of a registered servitude over their property or of any agreement to bind them applicant could have no claim for servitude. Consequently, since applicant enjoyed no servitude right over Lot 8 its owners were entitled to withdraw the permission for its pipeline to be used by applicant. They alleged that they were also entitled to disconnect applicant's fixture at Lot 8 from the pipeline without breaching the provisions of section 118 (1) and (c) of the Water Act.

I pause to observe that despite the respondents' above contentions the applicant is entitled to apply to the Administrative Court for servitude. It is that court which shall make a determination as to whether or not to grant the application.

The respondents alleged that applicant had a borehole alongside the Save River, on the eastern side of the property, pumping 20 000 litres of water per hour, which serves its wild life needs. Further, it had a second prolific borehole along Msaize River, on the western side of the property, also pumping 20 000 litres of water per hour. That borehole allegedly provides water for the safari camp, the professional hunters, the large body of employees and managers based there. Close to the first of those boreholes is a dam to which water is pumped for animals.

Further more, the respondents alleged that the applicant had 16 boreholes on Lot 5. In addition to that the applicant had three kilometer frontage on the Save River which it had chosen to fence thus eliminating the use of that large water resource for its wildlife. In the light of the above the respondents concluded that neither humans nor any animals were in any danger.

In response to the respondents' allegations the applicant maintained that the underground pipeline was laid down with financial contributions of all the holders of title to the various lots in Devure Ranch on the agreement and common understanding that all would benefit from the pipeline. The agreement and common understanding had subsisted for 18 years.

The suggestion that the applicant had two prolific boreholes was not entirely correct because one of them had salty water which is unfit for consumption. The other one has no underground pipeline to draw water to the watering holes for wild life and other parts of applicant's Msaize ranch. It is not true that applicant has 16 boreholes on the property. What respondents are referring to as 16 boreholes are 16 places where underground water has been sited but no boreholes have been drilled yet. It was therefore not correct for the respondents to argue that the applicant had failed to disclose material facts to the court.

The respondents complained of the misjoinder of Mr Wilfred Pabst as a third respondent contending that he was a *peregrinus*. The court's jurisdiction had to be founded on or confirmed by his arrest in terms of section 15 of the High Court Act [Chapter 7:06]. But Mr Wilfred Pabst is director and shareholder of Pabst Holdings (Private) Limited and Lowveld Marketing Services (Private) Limited. He is the *alter ego* of companies. It, therefore, seems to me that his joinder does not offend the provisions of section 15 of the High Court Act. In any event, no cause or matter shall be defeated by reason of a misjoinder – see Order 13 Rule 87.

In conclusion it seems to me that the respondents are just being difficult and unreasonable. No conceivable prejudice will be suffered by them flowing from the granting of the order being sought.

In the result, I would confirm the provisional order in terms of the draft on page 2.

Cheda & Partners, applicant's legal practitioners
Messrs Webb, *Low & Barry* respondents' legal practitioners