

DZIDZAI MARUZANE

And

TENDAI SINARAVO N.O

Versus

MINISTER OF LANDS, AGRICULTURE FISHERIES, WATER & RURAL DEVELOPMENT

And

CHARLES MUNNUNGEYI

And

TINASHE GOWIN MUKANDI

HIGH COURT OF ZIMBABWE

ZISENGWE J

MASVINGO, 16 January 2023

Written reasons provided on 6 June 2023

Opposed Application

R Chavi, for the applicant

A Zikiti, for the 1st respondent

Z Mutsami, for 2nd & 3rd respondents

ZISENGWE J: On 16 January 2023, I gave a brief *ex-tempore* judgement partially granting the relief sought by the applicant. The respondent has since requested for the full reasons for that decision and what follows are those reasons.

The order I gave reads as follows:

It is ordered that:

1. *The decision by the 1st respondent to approve the application for a water servitude in favour of the 2nd respondents be and is hereby set aside.*
2. *The matter be and is hereby remitted to the 1st respondent to consider the application for a servitude by 2nd respondent after inviting written representations from the applicants and 2nd and 3rd respondents within 90 days of this order.*
 - 2.1 *Written reasons for the decision arrived at to be furnished*
3. *There shall be no order as to costs.*

The Background

The two applicants and the 2nd respondent occupy two adjacent pieces of agricultural land in the Mkwanzise area of Chiredzi District by virtue of offer letters issued in their favour by the 1st respondent.

The 3rd respondent is the 2nd respondent's business partner. The two are in a joint agricultural venture on the 2nd respondent's 200-hectare farm. The 1st respondent heads the Ministry of Lands, Agriculture, Fisheries, Water and Rural Development.

The farms belonging to the two applicants lie upstream in relation to that of the 2nd respondent. In order to abstract water from an up lying reservoir, the 2nd respondent apparently needs to lay pipelines linking the reservoir to his farm. The pipelines however appear to need to pass through the two applicants' farms. He therefore requires a servitude burdening the applicants' farms. To that end he applied and obtained from the Minister of Lands such a written servitude allowing him to lay those pipelines.

The applicants launched this application averring not only that the servitude is unnecessarily burdensome on them given that it inevitably leads to loss of land (and therefore considerable revenue) on their part but also that they were not properly consulted before the servitude was granted by the 1st respondent. They therefore claimed that their right to be heard was disregarded by the 1st respondent and that the decision of the 1st respondent, being an administrative decision by an administrative body accordingly lends itself to being set aside.

It is common cause that the present application was preceded by another filed by the applicants in the Magistrates court sitting at Chiredzi for an interdict. According to the applicants in that application they sought to have the 2nd and 3rd respondents interdicted from laying their pipelines on their land a process which the latter two had apparently commenced. Further

according to them, the 1st respondents' legal representative indicated that the application for the interdict would not be opposed. It came therefore as a surprise to them that the 1st respondent had apparently reneged on this undertaking and had without as much consulting them proceeded to approve the application for a servitude.

They therefore claimed the applicant's decision had been made in an opaque manner and could not stand up to scrutiny and should therefore be set aside. They therefore brought their application in terms of section 4 (1) of the Administrative Justice Act, [Chapter 10:28] seeking an order in the following terms:

IT IS ORDERED THAT:

- 1. The decision by the 1st respondent to approve the application for (a) water servitude in favour of the 2nd respondent be and is hereby set aside.*
- 2. The 2nd respondent to claim his servitude in terms of part VII of the Water Act [Chapter 20:24].*
- 3. Respondents to pay costs of suit on an attorney and client scale if this application is opposed.*

In opposing the application, the 1st respondent through an affidavit deposed to on his behalf by the permanent secretary in his ministry, John Basera, expressed bewilderment as to the nature of application. He branded it a "wanton disregard of the rules of court". He however insisted that he approved 2nd respondent's application using the powers vested in him in terms of section 72-75 (inclusive) of the Water Act [Chapter 20:24]. He denied that loss in whatever form was likely to be occasioned to the applicants on account of the enjoyment of the servitude by the 2nd respondent.

For their part, the 2nd and 3rd respondents in opposing the application averred that the applicants were being unreasonably obstinate and cantankerous unlike their counter-parts situated downstream from their farm. They indicated that the applicants spurned invitations extended to them which were meant to find common ground and chart the way forward with regards the servitudes. They both denied any impropriety or malfeasance by the 1st respondent in granting the application for the servitude.

They indicated that the applicants waived their right to be heard by spurning the invitation to attend meetings convened for this purpose. If they had attended these meetings, so

the argument went, they could have taken advantage of that platform to register any grievances they may have entertained. In the face of the applicants' intransigence the 1st respondent could not be seen to abdicate his bounden responsibility to consider the application for the servitude.

They further denied that the installation of the pipes would occasion any harm to the enjoyment of the applicants' properties. They maintained that the pipes would be connected to an existing canal and that no new canal would be erected and further that the bulk of the pipes had already been laid beneath the ground and as such the pipes did not in the least pose a threat to the applicant's farming activities.

In my view the dispute stood to be resolved on whether the 1st Respondent had the requisite right to grant the servitude and if so whether the applicants' input was required.

Whether the 1st respondent granted the application for servitude in terms of section 75 of Water Act and if so whether the input of the applicants was required

The 1st respondent insisted in the heads of argument filed on his behalf that he granted the application in terms of section 72-75 of the Water Act. He however did not specify whether it was in terms of section 74 as read with section 75 of the Act as it was in terms of section 73 the latter which is a broad provision permitting an application for a servitude to be made in terms of any law other than the provisions of the Water Act.

Be that as it may section 74 of the Water Act provides as follows:

"74 Certain persons may claim servitude and enter on land.

(1) Subject to this part, any person

(a) who hold a permit; or

(b) who is entitled to control or supervise the use of any water; or

(c) to whom the Minister, the National Water Authority or the Agricultural and Rural Development authority has agreed to supply water from any water works acquired on constructed or to be acquired and constructed by the Minister, the National Water Authority or the Agricultural and Rural, may in terms of section seventy-five claim a permanent or temporary servitude.

Section 75 sets out in elaborate detail the method of claiming such servitudes. One of the key things in this procedure is the service of a notice in writing on every interested party setting out details of the proposed servitude. It reads:

"75. Method of claiming servitudes

(1) subject to this part, a servitude shall be claimed by serving on every interested party in writing-

- (a) *requesting the servitude, which shall specify*
- (i) *the locality and nature of any water works which it is proposed to construct; or*
 - (ii) *the line of passage along which water is to be conducted or locality in which water is to be stored or both such line and such locality; and*
 - (iii) *the duration of the proposed servitude, and*
 - (iv) *the quantity of gravel, rock, sand, soil, stone or wood, if any required from the land concerns for the purpose of constructing water works or works incidental thereto; and*
 - (v) *that it is intended to register the proposed sentence against the title deeds of the land concerned; and*
 - (vi) *that any agreement to such claim is required to be in writing;*
- (b) *inviting him, if he wishes to seek compensation in respect of any loss or deprivation of rights likely to result from the grant of the proposed servitude, to submit to the claimant, within period of sixty days from the date of the service of the notice or such longer period as a precedent of the Administrative court may for good and sufficient reason allow, a statement in writing specifying in detail the nature of the loss or deprivation of rights likely to become to the interested party as a result of the right.*
- (2) *....."*

The common thread that runs through section 74 and 75 of the Water Act is that both the claim for the servitude and the representations capturing the attitude of the owner of the land must be in writing. The mischief is clearly to limit or even eliminate the scope of any future disputes between the holder of the servitude and the owner of the land. The 1st respondent should, if he acted in terms of this section, been alive of this requirement. He should therefore have insisted on the 2nd and 3rd respondents serving the notice on the applicants in writing.

Alternatively, he should have in the same spirit invited the applicants to submit in writing any representations on matters provided in section 75 (1) above. Had he done so this application would have been rendered unnecessary. In a word therefore, if the Minister granted the application for the servitude in terms of section 75 of the Water Act, the provision of that section should have been followed to the letter.

Whether the application for servitude was made in terms of section 73 of Water Act and if so whether the input of the applicants was required

If the 1st respondent acted in terms of section 73 of Water Act, which is what this application is primarily about, the question is whether he (i.e., 1st respondent) was absolved from

seeking the applicants' input before granting the application. Section 73 of the Water Act provides as follows:

"73 Acquisition of servitudes otherwise than in terms of part VIII

Nothing in this part shall be construed as preventing any person from acquiring in accordance with any other law a servitude required in connection with any water works.
"

It is to be accepted that the 1st respondent as the government functionary responsible for superintending over not only lands, agriculture and rural resettlement but also water has a wide remit in so far as the twin responsibilities of the enjoyment of resettled land and the use of water in resettled lands are concerned. It is also to be accepted that a servitude may be conferred by statute (as with the case with servitudes contemplated under Part VIII of the Water Act) or it may be obtained under the common law. As a matter of fact, the provisions of section 73 of the Water Act are specifically in recognition of the fact that servitudes in relation to water may be obtained other than under the Water Act.

The passage under the heading "rural servitudes" by the learned authors Francois du Bois in Wille's Principles of South African law 9th edition at page 599 is quite instructive. It reads:

"Rural servitudes of water include the right lead water over or from another's land (aquaeductus); the right to draw water from another's' private fountain, stream, well or cistern (aquaehaustus), the right to store water in a dam, the right to exclusive use of water from a fountain.... Furthermore, variety of servitudes of water can be created in terms of the National Water Act (equivalent to our Water Act, [Chapter 10:18])."

That the actions of the 1st respondent in considering the application for a servitude by the 2nd respondent constituted an administrative action is beyond doubt. He exercised that power in his capacity as the Minister responsible *inter alia* for matters relating to the use of Water and lands. He is an "administrative authority" who took an administrative action as contemplated in section 2 (2) of the Administrative Justice Act, [Chapter 10:28]. He therefore required to act in a fair manner. The benchmark for fairness is provided in section 3 (2) of the Act which states as follows:

(2) *"In order for administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred in subsection (1) –*

- (a) adequate notice of the nature and purposes of the proposed action; and
- (b) a reasonable opportunity to make adequate representations; and
- (c) adequate notice of any right of review or appeal, where applicable. ”

Paragraph (b) is no more than a restatement of one of the principles of natural justice—namely the right of a party affected by an administrative decision to be heard – i.e., the *audi alteram partem* rule. The *audi alteram partem* rule falls under the broad rubric of the legitimate expectation doctrine. In *Metsola v Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S) at pp155-156 the following was said:

“... this catch-phrase [legitimate expectation] is no more than a manifestation of the duty to act fairly. It is clearly connected with the “right to be heard”. It does not constitute an additional ground for the application of the *audi alteram partem* principle. In essence it means no more than that the decision-maker must act fairly and apply the principles of natural justice before reaching any decision that will adversely affect the legitimate expectations of the aggrieved party. See *Council of Civil Service Unions (CCSU) & Ors v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 954g; *Lloyd v McMahon* [1987] 1 All ER 1118 (HL) at 1170e-g; *Boesak v Minister of Home Affairs & Anor* 1987”

Similarly, in *Taylor v Minister of Higher education & Anor* 1996 (2) ZLR 772 (S) the following was said:

“The maxim *audi alteram partem* expresses a flexible tenet of natural justice that has resounded through the ages. One is reminded that even God sought and heard Adam’s defence before banishing him from the Garden of Eden. Yet the proper limits of the principle are not precisely defined. In traditional formulation it prescribes that when a statute empowers a public official or body to give a decision which prejudicially affects a person in his liberty or property or existing rights, he or she has a right to be heard in the ordinary course before the decision is taken. See *Metsola v Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S) at 333B-F; compare on the facts, *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546 (A) at 551F-G, per Schreiner JA.

In *Administrator, Natal & Anor v Sibiya & Anor* 1992 (4) SA 532 (A) it was said by Hoexter JA at 539A-B that:

The word ‘property’ would ordinarily tend to connote something which is the subject of ownership. In my view, however, the concept of ‘property’ to which the *audi* rule relates is wide enough to comprehend economic loss consequent...”

Nowhere in his opposing affidavit did the 1st respondent refer to having consulted the applicants before considering and granting the application for the servitude. He could not delegate that responsibility of the 2nd and 3rd respondents as the latter were interested parties.

During oral submissions in court, counsel for the 1st respondent, Ms Zikiti readily conceded that there was no written invitation extended by the 1st respondent to the applicants for their input regarding the proposed servitude. Critically, she conceded that at the time the 2nd respondent approached the 1st respondent with a written application for the servitude, the latter did not revert to the applicants for them to make any representations they might have been desirous to make in relation to the servitude. She also conceded that it would have been prudent on the part of the 1st respondent to do so although it would have prolonged the process.

Ultimately therefore whichever way one looks at it whether 1st respondent granted the application in terms of the Water Act, or by virtue of his broad power as the Minister responsible for superintending matters relating to Lands, Agriculture, Fisheries Water and Rural Development, there is one common thing that he could not in the context of this matter dispense with namely to seek the input of the applicants before he arrived at the decision, he did in granting the application.

The error that 2nd and 3rd respondents fell into was equating the invitation allegedly extended to the applicants to attend consultative meetings to written requests for their consent. The two are separate and distinct. More importantly, however, in light of the attitude demonstrated by the applicants in mounting a legal challenge against the erection of the pipelines, it was incumbent upon the respondents to follow the strict procedures laid out in section 75 of the Water Act.

However, the main error was the 1st respondent's failure to invite written representations from the applicants. By relying solely on the representations by the 2nd and 3rd representation in a matter that potentially prejudicially affected the rights of the applicants in the enjoyment of their respective pieces of land, the 1st respondent flouted one of the age-old tenets of natural justice namely the right to be heard.

I pointed out in the *ex- tempore* decision I delivered as I reiterate now that the error which the 1st respondent was the failure to formally approach the applicants in writing to make

representations on whether or not to grant the servitude. This, he was required to do in fulfilment of the *audi alteram partem* rule.

The alleged intransigence on the part of the applicants and their alleged failure to participate in prior consultations between them and the 2nd and 3rd respondents did not absolve the 1st respondent of the need to afford the applicants an opportunity to make representations on the subject. It was on that basis that I arrived at to set aside the 1st respondent's decision and remit the matter to the 1st respondent in terms of section 45 (2) of the Administrative Justice Act and for him to invite written representations from the applicants and the 2nd and 3rd respondents before arriving at his decision.

Ross Chavi Law Office, applicants' legal practitioner
Civil Divison of the Attorney Generals Office, 1st respondents' legal practitioner
Mangwana & Partners, 2nd and 3rd respondent's legal practitioners