AC 3/19
ACC 81/18
ACC 63/18

THE COSMO TRUST
BARBARA VITORIA
MARGARET SOPER
LINDA BROMLEY

AND

CITY OF HARARE
SHARADKUMAR PATEL
MEADOWS (PVT) LTD
THE ENVIRONMENTAL MANAGEMENT AGENCY
THE MINISTER OF ENVIRONMENT, TOURISM AND HOSPITALITY INDUSTRY

AND

THE COSMO TRUST

AND

THE MINISTER OF ENVIRONMENT, WATER AND CLIMATE
THE ENVIRONMENTAL MANAGEMENT AGENCY
SHARADKUMAR PATEL
MEADOWS (PVT) LTD

ADMINISTRATIVE COURT OF ZIMBABWE

Mandeya J

HARARE, 6 November 2018, 18 January 2019 & 8 March 2019

Assessors: Mr C Chinzou
Mr F S Choruma

JUDGMENT

Introduction

The above-cited appeals were argued and heard simultaneously. The main stakeholders in both appeals are on the one hand The Cosmo Trust and on the other Mr Sharadkumar Patel and his company known as The Meadows (Pvt) Ltd. The latter shall be referred to as the proponents. The Cosmo Trust will be referred to as the appellant. One legal practitioner represented the appellants in both appeals. The respondents were also represented by the same legal practitioners in both appeals.

The first appeal is the development permit appeal. The other is the environmental impact assessment certificate appeal.

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The background facts to these appeals are that the proponents applied for a permit to erect 121 cluster houses on their property. The permit was issued to them.

The appellants were opposed to that. Hence the present development permit appeal. Appellants also opposed the issuance of the environmental impact assessment certificate to the proponents. Hence the environmental impact assessment certificate appeal.

The proponents' property, known as The Meadows of Monavale, is sixteen comma two thousand eight hundred and eight five hectares (16, 2885 ha) in extent. It is common cause that on part of that property is a house where the second proponent and his wife reside. It is further common cause that on another portion of that same property is the piece of land on which the proponents intend to erect 121 cluster houses. In the application for the development permit, the second respondent stated:

"... I acknowledge that property is indeed within a wetland since a river flows through it ..."

Throughout these appeals, it was accepted that the piece of land in question is a wetland. The dispute in the development permit appeal is therefore whether the issuance of that development permit was proper or not.

In a case such as the present one, for a development permit to be issued there should have been an environmental impact assessment certificate issued by the Surveyor General of the Environmental Management Agency in respect of that piece of land. It is that link between the development permit and the environmental impact assessment certificate that resulted in these two appeals being argued together.

Development Permit Appeal

Section 26 (1) of the Regional, Town and Country Planning Act, Chapter 29:2 (the Act) provides:

a) An application for a permit ... shall be made to the local planning authority in such manner and shall contain such information as may be prescribed and shall be accompanied by the consent in writing of-

   a) the owner of the land; and
   b) where the application relates to development which involves an alteration –
      (i) in the character of the use of any land or building; (my underlining)

In the present case the development sought to be made on the piece of land in question is the erection of 121 cluster houses. It is common cause that that piece of land is virgin, undeveloped land.

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Erecting houses on that piece of land changes the character of the use of that piece of land. The piece of land changes from undeveloped land to residential land.

The first ground of appeal alleges that the application for the permit in this case was defective in many respects. In particular it did not contain particulars of the piece of land in question.

It is accepted by all parties in this case that the portion of the Meadows of Monavale which the second and third respondents intended to erect the cluster houses on excludes the portion on which the second respondent resides on. The objection is therefore valid. The cluster houses were never meant to be built "anywhere" on the expanse of 16, 2885 hectares constituting the Meadows of Monavale. They were meant to be built on a specific portion of that property.

At page 101 of the bundle of documents in this case is the following acknowledgement:

> "Birdlife and the Task Force are grateful to the Jensen Foundation who have offered money for the purchase of a section of Monavale Vlei."

At page 151 of the same bundle of documents is the following acknowledgement

> "Birdlife Zimbabwe acknowledges the financial support received from Jensen foundation for the purchase of 10 hectares of Monavale Vlei and funding of some of the activities in this plan."

In appellants' statement in support of appeal against development permit authorising erection of 121 cluster houses on The Meadows of Monavale is the following statement in paragraph 1.17.

> "Surveys were carried out resulting in the Patels obtaining authority from the Surveyor General's Office for The Meadows of Monavale to be subdivided into two plots: a 9.35 hectare plot on the Northside of the property to be known as 'Stand 201' to be sold to Birdlife Zimbabwe, and a 6 hectare plot on the Southside to be retained by the Patels (…). However, the Subdivision Permit later lapsed because the Patels withdrew from their provisional agreement to sell the larger North - of – stream part of that land to Birdlife Zimbabwe, which had secured conditional approval of a grant to purchase that part of the property. The subdivision was never implemented, and 'Stand 201' was never registered in the Deeds Office."

It is clear from the above-quoted unchallenged assertions that the 121 cluster houses were meant to be erected on the unregistered Stand 201 measuring 9.35 hectares which was ultimately unsuccessfully sheared off the Meadows of Monavale .

The omission to particularise the portion of the 16, 2885 hectare Meadows of Monavale was indeed a serious error which the first respondent could, and should not have condoned.

Another defect of the application for the development permit is that it did not attach the signed consent of the NMB Bank.

Section 26 (1) (b) of the Act states:

> An application for a permit … shall be accompanied by the consent in writing of –
>
> a) …
>
> b) …
>
> The holder of any real right registered over the property concerned (my underlining)

In this case NMB Bank held mortgage bonds over the Meadows of Monavale. None of the respondents justified why the application for the permit in this case was not accompanied by the consent in writing of NMB Bank. That defect in the application for the permit renders the application invalid.

The court is satisfied that the first ground of appeal has merit. It is accordingly upheld.

The second ground of appeal is that the first respondent issued the development permit on the basis of an erroneously issued environmental impact assessment certificate. The development permit refers to the Meadows of Monavale. On the other hand the environmental impact assessment certificate refers to Stand 201, Monavale. As has already been shown, the Meadows of Monavale is 16, 2885 hectares in extent.

The unregistered Stand 201 is 9.35 hectares in extent. It follows that the development permit relates to the larger, undivided Meadows of Monavale. On the other hand the environmental impact assessment certificate was issued in respect of a portion of the Meadows of Monavale. The lack of alignment between the development permit and the environmental impact assessment certificate means that the former could not be supported by the latter. The bigger could not be supported by the smaller. In short, the development permit on a 16, 2885 hectare piece of land could not be supported by an environmental impact assessment certificate on a 9,35 hectare piece of land.

It is evident that the development permit was for the erection of 121 cluster houses. But the environmental impact assessment certificate states:

> "This is to certify that Sharadkumar Patel … has been granted EIA acceptance to operate … Housing Development on Stand 201 Monavale …
>
> …
>
> Type of Development: Housing Development"

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Again there is no alignment between the development permit and environmental impact assessment certificate. One is specific. The other is vague. No wonder why the appellants complained in paragraph 2.1.3 of their notice of appeal:

> "the Development permit" and "the Environmental Impact Assessment Certificate" make it "impossible to ascertain the nature of the different developments proposed."

The court is satisfied that the second ground of appeal has merit. It is accordingly upheld.

The third ground of appeal is that the development permit application of 15 May 2018 should have been complete on its own. It was not. Instead it relied in part on what had been submitted for the 15 April application and in part on the November 2017 request for the re-issuing of the Development Permit granted on 3 December 2015.

Section 26(7) of the Act provides:

> "If the local planning authority has not determined in terms of subsection (6) an application in terms of subsection (1) within three months of the date of acknowledgement in terms of subsection (2) of the receipt of the application or any extension of that period granted by the applicant in writing, the application shall be deemed to have been refused by the local planning authority."

In accordance with this section what had been submitted for the previous applications "shall be deemed to have been refused." It had served its purpose. It would not be relied on again. In the present case it is common cause that three months had long expired since November 2017 as well as December 2015.

The argument put forward in the first respondent's heads of argument is not helpful to the first respondent. It is in paragraph 21 of the first respondent's heads of argument. There first respondent submitted:

> "It is of no consequence that that application may have been accompanied by documents from previous applications."

That means first respondent admits that the 15 May 2018 application for a development permit was indeed "accompanied by documents from previous applications." That admission is not accompanied by any attempt to explain away the deeming provision in section 26 (7) of the Act. The court is obliged to apply the law as it is. The court finds that the development permit application of 15 May 2018 was defective. It should not have been acted upon by the first respondent.

Lord Denning said the following in Benjamin Leonard MacFoy v United Africa Co. Ltd [1961] 3 Aller 1172

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad ... It is automatically null and void without more ado ... And every proceeding which is founded on

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it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse"

Applied to the circumstances of this case, it means that if the application for the development permit was a nullity the development permit founded on it was also a nullity.

The court finds that the third ground of appeal must be upheld. It is hereby upheld.

The fourth ground of appeal is that the first respondent did not adequately take into account the appellants' "audi alteram partem" or natural justice rights. This is supported by the assertion that appellants filed four objections. Instead first respondent referred to having received only two objections from the appellants.

Indeed the bundle of documents in this case contains a letter of objection from the fourth appellant at pages 267 to 269; a letter of objection from third appellant and her husband at pages 270 to 271; a letter of objection from second appellant at pages 272 to 274; and a letter of objection from the chairperson of the first appellant. There were therefore four detailed letters of objection.

Instead the Director of Works of the first respondent in his report dated 29 June 2018 merely stated at page 286 of the bundle of documents:

"... objectors have no documentation to substantiate their claims."

There are two falsehoods made by the first respondent. The first is the allegation that the appellants had no documentation to substantiate their claims. The letter from the chairperson of the first appellant had a map showing Ramsar sites of environmental importance in Southern Africa; two maps showing the distribution of the striped crake (a rare bird) and the streaky – breasted flufftail (a rare bird) as well as web links for Ramsar.

The other is that the first respondent did not specify which two of the four objections from the appellants it considered. One gets the impression that the first respondent brushed aside the objections from the appellants. It did not fully and properly consider those objections. This was a failing on the part of the first respondent. This confirms that the first respondent did not adequately take into account the appellants' "audi alteram partem" rights.

The other leg of the fourth ground of appeal is that the first respondent in considering whether to grant the development permit or not unlawfully shifted the onus from the proponents to the appellants. The burden of proof should have remained on the proponents. The appellants did not need to substantiate their objections. It is the proponents who intended to introduce developments on

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the virgin piece of land and needed authority to erect the cluster houses there. Appellants only needed to object, with reasons, as they did. To then dismiss their objections because "the objections were unsupported by evidence" was indeed shifting the burden of proof from the proponents to the appellants. That was wrong.

The fourth ground of appeals is upheld.

The fifth ground of appeal is that the first respondent failed to address the appellants' grave concern that the site for development is an internationally protected wetland.

It is common cause that on 3 May 2013 the Monavale Wetland which is five hundred and seven (507) hectares in extent was designated as Site 2107 on the Ramsar Convention on Wetlands of International Importance, especially as Waterfowl Habitat. The 16, 2885 hectare Meadows of Monavale is part of this wetland. As already explained earlier, the unregistered Stand 201 is the 9.35 hectare piece of land which the proponents intended to erect 121 cluster houses on.

It is common cause that the Avondale River flows through this unregistered Stand 201. There is no doubt that this piece of land is a wetland. At page 210 of the bundle of documents the following is stated:

> "Monavale Vlei is a grassland that holds an amazing array of plants and animals, 36 species of grass and more than 80 species of other plants…
>
> The Vlei's waters support flowering plants … Over 240 bird species breed in the pools and squelch zones."

At page 13 of the bundle of documents the following is stated:

> "Monavale wetland supports a tremendous diversity of plant and animal species … Monavale wetland is best known for its birds, with a long and well – established reputation as an important birding site, both in Zimbabwe and internationally. It supports an unusually large number of species for such a small area, including a number of rare and endangered species, such as the striped crake and streaky-breasted flufftail."

That is why Birdlife Zimbabwe intended to buy that piece of land from the second and third respondents. If that sale had been concluded Birdlife Zimbabwe would have preserved that wetland as a bird sanctuary and kept it in its natural state.

This case brings to the forefront the need for protecting the environment for the present and future generations.

Section 73 of the Constitution of Zimbabwe, 2013, provides:

1) "Every person has the right –

   a) to an environment that is not harmful to their health or well - being ; and

   b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that –

      (i) prevent pollution and ecological degradation;
      (ii) promote conservation; and
      (iii) secure ecologically sustainable development and use of natural resources while promoting economic and social development."

Section 77 of our Constitution then provides:

"Every person has the right to –

a) safe, clean and potable water; and
b) ...

Section 86 of our Constitution then provides for "Limitation of rights and freedoms" as follows:

1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.

2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including –

   a) ...
   b) ...
   c) ...
   d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
   e) ...
   f) whether there are any less restrictive means of achieving the purpose of the limitation."

What is important to highlight is that our Constitution gives every Zimbabwean the right to have the environment protected for the benefit of present and future generations. That is done through legislative and other measures that prevent ecological degradation, promote conservation and secure ecological sustainable development. Ecologically sustainable development ensures that all living creatures, including birds, are enabled to meet their needs from the environment we rely on.

Our Constitution guarantees that every person has the right to safe, clean and potable water. Wetlands such as the Monavale Vlei provide clean water that flows to Harare's main source of water: Lake Chivero.

Section 86 of the Constitution strikes a balance. It provides that the rights and freedoms citizens enjoy must be exercised reasonably and with due regard to the rights and freedoms of other

persons. While exercising one's rights and freedoms a citizen must not trample on the rights and freedoms of other citizens.

In the circumstances of this case the second and third respondents have a right to deal with their property, in particular the 9, 2885 hectare portion of the Meadows of Monavale. In doing so, however, they also have to comply with section 86 of the Constitution. Section 86 provides that their rights and freedoms must be exercised reasonably and with due regard for the rights and freedoms of other persons such as the appellants and other persons whose source of water is Lake Chivero.

The argument put forth by the respondents in this case fails to recognize that section 86 (1) entitles the second and third respondents to do as they wish with the piece of land in question AND with due regard for the rights and freedoms of appellants, and other citizens of Harare, Ruwa, Chitungwiza and Norton.

The complaints filed by the appellants clearly demonstrate that appellants had good reasons for preferring to have the core of the Monavale Wetland left untouched, left wild and left suitable for the diverse range of migrant birds. Experts submitted that some of the migrant birds which seasonally come to breed at the Monavale Wetlands are rare endangered species.

In the circumstances of this case it is significant that there are available options which would enable the second and third respondents to derive economic benefit from that portion of their land. One is converting it into a nature reserve. The other is offering it to buyers such as Birdlife Zimbabwe and registering it in the Deeds Office. These two options appear to the court to qualify as the "less restrictive means" referred to in section 86 (2) (f) of the Constitution.

The Environmental Management Act, Number 13 of 2002, (EMA) provides in section 4 as follows:

(1) Every person shall have a right to –

a) a clean environment that is not harmful to health; and
b) …
c) protect the environment for the benefit of present and future generations and to participate in the implementation of the promulgation of reasonable legislative policy and other measures that -

    (i) prevent pollution and environmental degradation; and

    (ii) secure ecologically sustainable management and use of natural resources while promoting justifiable economic and social development.

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It will be noted that the Constitution of Zimbabwe 2013 in section 73 (1) says that "every person has the right to an environment that is not harmful to their health or well-being." Section 4 (1) (a) of EMA reiterates the same: "Every person shall have a right to – (a) a clean environment that is not harmful to health."

In this case there were unnecessary attacks on the appellants. There were suggestions that they were being racialistic and did not welcome the establishment of the 121 cluster houses in their neighbourhood as the occupants would most likely be from non-white races.

What was at stake in this case was the environment. The environment has no regard for class or racial differences. The court finds the implied and express racial attacks completely irrelevant and uncalled for.

It is significant that section 4 (1) (c) (ii) provides that every person has a right to protect the environment for the benefit of present and future generations. The concern should not be short term, but long terms. Short term benefits are for the present generation. Long term benefits will be enjoyed by future generations.

The construction of the 121 cluster houses will no doubt involve the digging up of special foundations, clearing of land and the erection of the houses. The 50 metre wide corridor on either side of the Avondale River that will be left undisturbed is not a result of any known scientific study. It is simply to comply with building and town planning regulations. The question remains: where exactly do those migratory birds come to breed in the Meadows Monavale? What is on record does not answer that question.

Respondents clamour to emphasize that the erection of the 121 cluster houses will go some way to alleviate the housing shortage in the City of Harare. But as section 4 (1) (c) of EMA provides, are we protecting the core of the wetland at the Meadows of Monavale for the benefit of present and future generations? Harare City Council is currently struggling to supply many of its residents with adequate clean water. No scientific studies have yet ascertained exactly what attracts that diverse range of birds and mammals to the wetland in question. Some of them come from as far as Cameron, Zaire and Kenya to breed in Zimbabwe. Some come every year from Europe to stay in this wetland for some time.

Case law shows that the Precautionary Principle applies to cases such as the present one. In the Ugandan case of Amooti Godfrey Nyakaana v National Environment Management Authority and 6 others CA 5/11 Katureebe CJ said:

"The Precautionary Principle and The Polluter Pays Principle are essential features of sustainable development. The Precautionary Principle ... means

i) ... the State ... must anticipate, prevent and attack the causes of environmental degradation,

ii) Where there are serious threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

iii) The 'Onus of proof' is on the actor or developer ... to show that his action is environmentally benign."

In that judgment at page 150 of the Bundle of Case Law the learned Chief Justice had said:

> "A person cannot degrade a wetland and cause pollution to other citizens simply because he owns the land. This would defeat the whole purpose of the Constitution which requires that citizens may own land, but not cause pollution or degradation of the environment which may affect other people and the country as a whole."

Finally the same Chief Justice said at page 151 of the Bundle of Case Law:

> "The individual's interest must be viewed in the context of the larger interest of society as a whole and in the context of the Constitution and the laws made thereunder."

In the Zimbabwean case of Munyaradzi Mutsai & Ors v City of Harare & Ors HH 835/17 at page 129 the court said:

> "In the absence of any scientific certainty that the Holding Bay is not being constructed on a wetland, ... it is prudent to err on the side of caution by granting the provisional order."

In the South African case of Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga & 11 Ors ZACC 13 the court said:

> "The precautionary principle required these authorities to insist on adequate precautionary measures to safeguard against the contamination of underground water. This principle is applicable where due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development. Water is a precious commodity, it is a natural resource that must be protected for the benefit of present and future generations."

Later the same court in that case said:

> "The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out."

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At paragraph 113 of the same judgment the court said:

> "The essence of sustainable development is balanced integration of socio-economic development and environmental priorities and norms.

In the present case all the parties agree that the site where the second and third respondents propose to erect the 121 cluster houses is a wetland. There is no doubt that the scientific studies which have been conducted on that site, in particular on the bird habitat thereon, are not enough to assure anyone that the massive construction work envisaged will not cause massive degradation and irreparable destruction of the bird habitat as well as disruption of the natural processes of water retention, cleansing and gradual release.

The court is satisfied that the fears of the appellants were well-founded and justified. The fifth ground of appeal is accordingly upheld.

The remaining grounds of appeal are upheld for reasons which have been set out in discussing the fifth ground of appeal.

<u>The Environmental Impact Assessment Certificate Appeal.</u>

The environmental impact assessment certificate (EIA Certificate) in this case was issued to the third respondent. It states that the fourth respondent was the company which had been granted the EIA certificate. As already stated earlier, the third respondent is a natural person whereas the fourth respondent is the third respondent's company. Legal persons act through their natural representatives. In this regard, there was nothing wrong with issuing the EIA certificate to the third and fourth respondents as set out on the EIA certificate.

The problem came thereafter. The EIA certificate then states that the proponents have "been granted the EIA acceptance to operate: Housing Development on Stand 201 Monavale."

As discussed earlier, there is no property registered in the Deeds Office of Zimbabwe as Stand 201 Monavale. In short, the EIA was issued in relation to a non-existent property. The EIA becomes a nullity for the reason set out in the <u>MacFoy v United Africa Co. Ltd</u> case cited earlier.

More importantly, the appellants insisted that they were never consulted during the preparation of the EIA report which preceded the issuance of the EIA certificate

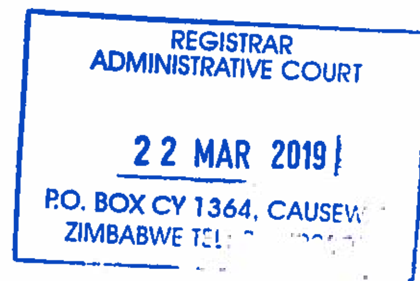
The second respondent did not file heads of argument in respect of Case Number ACC 63/18.

The last point to make is what is highlighted in the development permit appeal. It is that the EIA certificate was issued for a development project intended to be carried out by the proponents on a non-existent property. One wonders where exactly on the Meadows of Monavale the development was to be carried out. Town planning requires more precision that what presumably happened here. The third and fourth respondents intended to erect cluster houses on the unregistered 9,35 hectare portion of the Meadows of Monavale. Through inadvertence and lack of attention to detail they applied for the EIA to be conducted on that unregistered portion of the Meadows of Monavale. The certificate was issued to the owners of the whole property measuring 16, 2338 hectares. Appellants are correct in submitting that the EIA certificate is invalid for vagueness, lack of clarity.

The appeal is for the above reasons upheld.

As both appeals have been upheld the respondents, except EMA, are to bear the appellants costs of suit in respect of both appeals on the ordinary scale. This is because EMA did not oppose both appeals.

Both assessors concur with this judgment.



T Biti for Appellants

C Kwaramba for 1st Respondent

T Magwaliba for 2nd & 3rd Respondents

N Mabasa for 5th Respondent in Case No. ACC 81/18 & 1st Respondent in Case No. ACC 63/18

No Appearance for 2nd & 4th Respondents in Case No. ACC 63/18