AUGAR INVESTMENTS OU
versus
MINISTER OF WATER AND CLIMATE
and
ENVIROMENTAL MANAGEMENT AUTHORITY

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 4 March 2015 & 25 March 2015

Opposed Application

F Girach, for the applicant
J Mumbengegwi, for the respondent

CHIGUMBA J: This is an application to have General Notices 313/2012 and 380/2013 declared a nullity as being *ultra vires* the powers granted to the first respondent in terms of the **Environmental Management Act [*Chapter 20:27*]**, (hereinafter referred to as EMA). The purpose of EMA is to define environmental rights and to set out the principles of environmental management, as well as to provide an enforcement mechanism against recalcitrant offenders. This is a relatively new piece of legislation in this country, and its ability to nurture and protect the environment may be dependent upon the interpretation given to its provisions. Section 4 of EMA declares that 'every person in Zimbabwe shall have a right to a clean environment that is not harmful to health, access to environmental information, protect the environment for the benefit of present and future generations and to participate in the implementation of reasonable legislative policy and other measures that prevent pollution and environmental degradation, and secure ecologically sustainable management and use of natural resources while promoting justifiable economic and social development'. The issue that falls for determination is whether the first respondent is empowered to declare that a piece of land is a 'wetland', or whether, his powers are confined to declaring an existing wetland to be 'an ecologically sensitive area'.

At the hearing of the matter, the court pointed out that the first respondent was barred in terms of **Rule 238(2b) of the Rules of the High Court 1971** for failing to file its heads of argument on time. Counsel for the applicant Mr *Girach* advised the court that he had instructions from his client to consent to condonation of the late filing of the heads of argument, and to the upliftment of the bar. In return, the first respondent acceded to the application, by the applicant, for an amendment of the papers for the proper citation of the respondents, in terms of ***Rule 87 of the Rules of the High Court 1971.*** The court's view was that neither party would be prejudiced by these concessions, so they were allowed. The first respondent was then correctly cited as Minister of Environment, Water and Climate, and the second respondent was correctly cited as the Environmental Management Agency.

General Notice 313/2012 provided that:

> "Notice is hereby given, in terms of section 113(1) of the Environmental Management Act…that the Minister has **declared the land described in the schedule as wetlands,** (hereinafter in this notice referred to as 'Harare scheduled wetlands".

Section 113 of EMA reads as follows:

> "**113 Protection of wetlands**
> (1) The Minister may declare any wetland to be an ecologically sensitive area and may impose limitations on development in or around such area.
> (2) No person shall, except in accordance with the express written authorisation of the Agency, given in consultation with the Board and the Minister responsible for water resources
> (*a*) reclaim or drain any wetland;
> (*b*) disturb any wetland by drilling or tunneling in a manner that has or is likely to have an adverse impact on any wetland or adversely affect any animal or plant life therein;
> (*c*) introduce any exotic animal or plant species into the wetland.
> (3) Any person who contravenes subsection (2) shall incur a fine not exceeding level eight or imprisonment not exceeding two years or to both such fine and such imprisonment."

'Wetland' is defined in section 2 of EMA to mean:

"wetland" means any area of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, and includes riparian land adjascent to the wetland.

It was submitted on behalf of the applicant that, 'wetlands' being expressly defined by EMA, the question of whether or not a piece of land was a wetland was a question of fact, of

whether the piece of land fit into the description prescribed in the EMA. It was submitted further that no amount of declaration by the Minister, that a piece of land was a 'wetland' would turn that piece of land into a 'wetland' unless the piece of land fit squarely within the description provided in the EMA. It was submitted further, that s 113(1) had to read in conjunction with s 136 of EMA which provides that:

> "**136 Observation of rules of natural justice**
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> In the exercise of any function in terms of this Act, the Minister, the Secretary, the Agency, the Director- General and any other person or authority shall ensure that the rules commonly known as the rules of natural justice are duly observed and, in particular, shall take all reasonable steps to ensure that every person whose interests are likely to be affected by the exercise of the function is given an adequate opportunity to make representations in the matter.

It is common cause that the Minister did not observe the rules of natural justice when he issued General Notice 313/2012. No reasonable steps were taken to ensure that every person whose interests were likely to be affected, was given adequate opportunity to make representations in the matter. It was submitted that general Notice 380/2013 seeks to rely upon General notice 313/2012 for its validity, and that, for this reason, both general notices are null and void *ab anitio*. The court was referred to the celebrated case of *Jensen* v *Acavalos*[1] where the court said that:

> "In *Hattingh v Pienaar 1977 (2) SA 182 (O) 182 at 183, KLOPPER JP* held that a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule. With this view I most respectfully agree; for if the notice of appeal is incurably bad, then, to borrow the words of *LORD DENNING in McFoy v United Africa Co Ltd [1961] 3 All ER 1169 (PC) at 1172 I*, "every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

If the court makes a finding that General notice 313/2012 was null and void for contravening s 113, as read with s 136 of the EMA, then it should follow that General Notice 380/2013 be null and void, being founded on General Notice 313/2012. General Notice 380/2013, would collapse, because it is based on something incurably bad. It was submitted on behalf of the respondents that General Notice 313/2012 amounted to a notice of invitation to the

[1] 1993 (1) ZLR 216 (SC) @ 220

public to object and that the letter of complaint written by the applicant amounted to an opportunity to make representations. I respectfully disagree with that view. In terms of General notice 313/2012, notice was given, in terms of s 113(1) of the EMA that the Minister had declared the land 'described' in the schedule as wetlands. That cannot, in any language, be interpreted as an invitation to make representations. Section 136 of the EMA enjoins the Minister to observe the rules of natural justice for every action that he takes, or decision that he makes. It is my view that, the rules of natural justice were flagrantly flouted, by the gazetting of general Notice 313/2012.

The court is fortified in this view, by the persuasive submission made on behalf of the applicant, that the promulgation of General Notice 313/12 was in breach of s 3 of the ***Administrative Justice Act*** *[Chapter 10:28],* which provides that:

> "**3 Duty of administrative authority**
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> (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—
> (*a*) act lawfully, reasonably and in a fair manner; and
> (*b*) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
> (*c*) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.
> (2) In order for an 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 to in subsection (1)—
> (*a*) adequate notice of the nature and purpose 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.

It is settled in our law that the Minister is an "administrative authority' for purposes of the Administrative Justice Act, (See *Marufu* v *Minister of Transport)*[2] and that, he is enjoined to

[2]2009 (2) ZLR 458 @ 464D

act as fairly as possible, by giving adequate notice of his intention, by allowing a reasonable time period within which affected parties can make representations, and by providing reasons for his decision within a reasonable period of adverse representations being made. The Minister did not do so before, or after he caused General notice 313/2012 to be promulgated.

Section 130 of EMA provides for appeals against any decision of any authority in terms of the EMA as follows:

> **"130 Appeal against decision of authority**
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> (1) Subject to this section, any person who is aggrieved by any decision of any authority in terms of this Act, may within twenty-eight days after being notified of the decision or action of the authority concerned, appeal in writing to the Minister, submitting with his appeal such fee as may be prescribed:
> (2) For the purpose of determining an appeal noted in terms of subsection (1), the Minister (if he is not the authority concerned in the appeal) may require the authority to furnish him with the reasons for the decision or action that is the subject of the appeal and a copy of any evidence upon which the reasons are based.
> (3) The Minister, after due and expeditious inquiry, may make such order on any appeal noted in terms of subsection (1) as he considers just.
> (4) An appeal shall lie to the Administrative Court against any order of the Minister in terms of subsection (3).
> (5) An appeal in terms of subsection (4), shall be made in the form and manner and within the period prescribed in the rules of court.
> (6) On appeal in terms of subsection (4), the Administrative Court may confirm, vary or set aside the decision or action appealed against and may make such order, whether as to costs or otherwise, as the court thinks just."

It is hoped that the citizens of Zimbabwe will vigorously pursue and enforce their rights as provided in terms of the Environmental Management Act, lest we be judged and found wanting, by future generations, for failing to play our part in preserving and protecting the environment. However, it is my considered view that even if the High Court were to issue the *decalaratur* that is sought by the applicant, no consequential relief will flow from such a course of action. It is only pursuant to the noting of an appeal against the action of the Minister, in terms of s 130 of EMA, to the Administrative Court, that the decision of the Minister may be confirmed, varied, or set aside. The land that was declared to be 'wetland' remains so declared until the Administrative Court makes a finding in regards to the propriety of the action of the Minister in making the declaration. Section 136(6) empowers the Administrative Court to

confirm, vary or set aside the decision or action appealed against. This court, in terms of s 14 of the *High Court Act [Chapter 7:06]* is empowered to:

> "**14 High Court may determine future or contingent rights**
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> 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."

This court therefore declares that it was not open to the second respondent to make decisions based on the apparent validity of General Notices 313/12 and 380/2013, which were null and void for contravening the provisions of s 113, as read with s 136 of EMA. The Minister was required to give all parties likely to be affected by his decision, a reasonable opportunity within which to make representations, and observe each person's right to be heard in deference to the time honoured rule of *audi alterem partem*. It is this court's view, that the general notices were indeed *ultra vires* the EMA, which in s 113 only provided for a declaration that a wetland was an ecologically sensitive area. Section 113(1) presupposes the existence of a wetland. The definition of wetland is clear. It is a question of fact, not law, whether a piece of land is a wetland. Not all wetlands are ecologically sensitive, and declaring a wetland to be ecologically sensitive must surely be based on scientific study and determination of such ecological sensitivity. A wetland will not become ecologically sensitive just because it has been declared to be so. The court was constrained, despite its findings, and unable to accede to the second part of the order sought by the applicant. This is so because no evidence was placed before the court, which it could rely on that the applicant's denial of permission to develop its land, was based on the provisions or implementation of the General Notices in question. For these reasons, the relief sought by the applicants is granted, as follows: IT IS HEREBY ORDERED THAT:

1. General Notices 313/2012 and 380/2013 be and are hereby declared a nullity and are of no force or effect.
2. The first and second respondents pay the costs of this application, jointly and severally, the one paying and the other to be absolved.

Messrs Coghlan Welsh & Guest, applicant's legal practitioners
Civil Division of the Attorney general's office, respondent's legal practitioners