LAWRENCE BENJAMIN NORTON
and
AFRICA MAJONI SILINGANISO JUBANE
and
ALBERTO DE LEO
and
JOHN DAVID GLYNN
and
TRYMORE NDOLO
and
EPHIAS MAMBUME
and
JOANNA CRAIG
and
TRAVOLTA TENDAYI CHATYOKA
and
GAIL CHRISTINE VAN JAARSVELT
and
BISHOP DUBE
versus
ADAGE SUCCESS (PRIVATE) LIMITED
and
SCANNER INVESTMENTS (PRIVATE) LIMITED
and
PARKS AND WILDLIFE MANAGEMENT AUTHORITY
and
ENVIRONMENTAL MANAGEMENT AGENCY
and
PROCUREMENT REGULATORY AUTHORITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 13 June 2022 and 27 March 2023

Urgent chamber application

Adv F Mahere, for the applicants
Ms *N Tiyago,* for the first respondent
Mr *A K Maguchu with Ms D Muchada,* for the 2nd respondent
Mr *H Nkomo with Mr L Mujogo,* for the 3rd respondent
No appearance for the fourth and fifth respondents

CHINAMORA J:

When I received the urgent chamber application, I set down the matter and the parties appeared before me on 13 June 2022. The matter was postponed by consent to 29 June 2022 subject to some directions. I ordered the first and second respondents to file their opposing affidavits no later than 16 June 2022. The applicants were to file their answering affidavit by 20 June 2022, and file their heads of argument no later than 23 June 2022. I then directed the first, second and third respondents to file their heads of argument by 28 June 2022. I made no order regarding costs.

The first, second and third respondents raised some objections *in limine*, and I opted to hear and determine them before hearing the merits of the application. The outcome of the preliminary points would inform how the matter proceeds.

Background facts

The brief background to this urgent chamber application can be captured as follows. The first applicant is an artist and self-employed businessman in Victoria Falls. The second and fifth applicants are like-minded individuals who are aggrieved by the perceived destruction of the pristine state of the natural wonder of the Victoria Falls. The first and second respondents are companies incorporated under the laws of Zimbabwe. The third respondent is government institution created by statute to provide for the establishment of national parks, botanical reserves, botanical gardens, sanctuaries, safari areas and recreational parks, and to make provision for the preservation, conservation, propagation or control of wildlife, fish and plants. Similarly, the fourth respondent is a government institution created by statute to provide for the sustainable management of natural resources and protection of the environment, the prevention of pollution and environmental degradation. Lastly, the fifth respondent a government institution created in terms of the statute to deal with the procurement of state assets. I will move to examine the submissions of the respective parties.

The applicants' case

The first applicant avers that around 14 April 2022, it got information that the first and second respondents had obtained permits from the third respondent, without public enquiry or comment, to operate two sites in the area surrounding the waterfalls which is designated as a 'highly

sensitive zone.' It is first applicant's case that the first respondent apparently purported to have authority to operate on Cataract Island on the Victoria Falls. Further, the first applicant alleges that the second respondent seems to have obtained approval to operate a commercial enterprise within the immediate vicinity of the rainforest created by the spray of the falls. Both sites are located inside the highly sensitive zone of the acclaimed World Heritage Site, and no previous commercial enterprises have been allowed to operate there. In addition, the first applicant alleges that the operation and use of the Cataract Island and Rainforest sites were not procedurally and properly availed through public tender. It was further argued that the public was not engaged in connection with the Environmental Assessment Report which must be compiled by the fourth respondent.

It is unclear to the first applicant how first and second respondents could possibly have obtained the permits, which could result in jeopardizing the World Heritage status of the Victoria Falls. He therefore submits that the loss to all Zimbabweans is unquantifiable. It is for this reason that the first applicant and the second to tenth applicants have sought to review first and second respondents' rights as regards the permits under HC 3576/22. Thus, the first applicant seeks a final order that pending the hearing and determination of HC 3567/22, and that the third respondent's decision to permit these two respondents to operate at the Cataract Island and Rainforest sites be suspended. The interim order which the applicants seek is as follows:

1. the purported concession/permit granted to the first respondent in respect of the Cataract Island and Rainforest sites be suspended;
2. the first and second respondents be ordered and directed to remove any structures or developments made at the Sites and/or restore same to their original condition; and
3. the first and second respondent cease advertising the sites.
4. No costs are sought unless the application is opposed.

As the final relief sought on the return day, the applicants asked that:

1. Pending the hearing and determination of HC 3576.22, the third respondent's decision to permit the first and second respondents to operate at the Cataract Island and Rainforest sites is hereby suspended.

The second to ten applicants filed supporting affidavits, essentially expressing common cause with the first applicant and prayed for an order in terms of the draft.

The respondents' case

The first, second and third respondents opposed the application. They took preliminary points at the outset on urgency, *locus standi* of the applicants, defectiveness of the application, material disputes of facts, incompetent relief and propriety of the supporting affidavits. The fourth and fifth respondents did not file any opposition, which means they opted to be bound by the decision of the court.

On the merits, the 1st respondent avers that it was not issued with a permit by the third respondent as claimed by the applicants. Its case is that sometime in 2017, it entered into a lease agreement with the third respondent for the refurbishment of derelict self-catering chalets that belong to third respondent. However, this agreement was subsequently terminated in 2018. The second respondent also denies ever being issued with the permit for a restaurant business in the Rainforest area as stated by the applicants. It is second respondent case that the permission to operate the restaurant was properly issued qua contract, with all due process having been carried out. Furthermore, the land clearing for the restaurant is pursuant to an existing lease agreement between the second respondent and the third respondents. The third respondent argues that the applicants are ill-advised. The process of giving a joint venture agreement does not require going through public tender. It is third respondent's case that the process of entering into a joint venture agreement or lease agreement is regulated by the Zimbabwe Investment Development Agency and not the Public Procurement and Regulatory of Zimbabwe. Furthermore, third respondent argues an exemption letter was granted to the third respondent and exempted to the provisions of the Act. Therefore, the process of engaging in joint-venture and lease agreements is done through the procedures laid down in the Zimbabwe Investment Development Agency Act and not the Public Procurement Act. Apart from the above, the respondents deny all the other averments. Let me address the preliminary points.

Points *in limine*

With respect to the points *in limine*, my proposed starting point is to examine whether or not the matter is urgent.

Urgency

It was argued by the first, second and third respondent that the matter is not urgent since the applicants had averred that they had knowledge of the concessions granted to the first and second respondent as early as 14 April 2022. Additionally, it was contended that the certificate of urgency does not speak to an essential requirement, namely, when the need to as arose. What constitutes urgency is settled in this jurisdiction. Two issues stand out for consideration, which are the harm that would ensue if interim relief was not granted and the time when the need to act arose. See *Gwarada* v *Johnson and Ors* 2009 (2) ZLR 159. The applicants must show that he is likely to suffer irreparable harm that any future intervention may not adequately protect their interests. There must be irreparable harm not mere harm that can be resolved even in the future without much prejudice.

The applicants are acting to protect a Zimbabwean heritage and World Heritage Site, which is the Victoria Falls. It was submitted that the first and second respondents were somehow purportedly granted permits by the third respondent without public enquiry to operate sites in a 'highly sensitive zone' surrounding the actual waterfall itself and on Cataract Island on the Victoria Falls. It is applicants' submission that the highly sensitive zone falls within the acclaimed World Heritage Site. In my view and as correctly argued by the applicants, the said ought to be protected and if prove the aesthetic damage to the World Heritage Site is an unquantifiable.

The applicants must also treat the matter as urgent by promptly seeking redress. See *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 189. *In casu*, if regard is heard to the relief sought to the relief sought, it is clear that the present urgent chamber application as indicated above is an application *pendente lite*. Therefore, the time factor ought to be calculated from the date of filing of the application under HC 3576/22 which is 31 May 2022 to the date of filing of the present application 3 June 2022. It took, the applicant 3 days to file the present application after it was apparent that the first and third respondents were continuing with their developments and commercial activities notwithstanding the fact that there was a pending application under HC 3576/22. The above issues were well articulated in the certificate of urgency. It was averred that if the applicants were to wait for the outcome in HC 3576/22 damage done would be potentially irreparable. It was also noted that the first and second respondents were proceeding with their developments and commercial activities and the third respondent appears not to have taken heed of

the applicants' concerns communicated through a letter. In my view, the legal practitioner demonstrated that he had applied his mind to the matter at hand. In the result I am satisfied that the matter is urgent.

I will in turn proceed to deal with the rest of the preliminary points raised by the first to third respondent.

The applicants' *locus standi*

It is contended that the second and third respondent lacks locus standi in this matter. The second and third respondent queries applicants' *locus standi*. The second respondent argued that the applicants have brought this application on two hats namely seeking to protect their own interest and that they are also acting in the public interest. The second respondent argues that this approach is not permissible. For this proposition the second respondent relies on the case of *Mudzuri and Anor* v *Minister of Justice Legal and Parliamentary Affairs and Ors* CCZ 12/2015. The third respondent echoes the above and goes on further to state that a financial interest does not confer the requisite legal standi for the applicants to institute the present application. On the other hand, the applicants averred that the application was filed in public interest for all Zimbabweans and the preservation of our natural heritage and Constitutional right for all Zimbabweans to have continued access to such heritage. However, the applicants in their answering affidavit made an about turn and denied that the application was being made under s 85(1) of the Constitution. As a result, this also addresses the preliminary point to the effect that the present application is a constitutional application disguised as an interdict. What is clear from a reading of the papers before the court it is clear that the present application is being made to protect the national heritage. It is an inescapable fact that the applicants have substantial interest in the preservation of the national heritage. In my view, I consider such proactiveness as sufficient to establish sufficient legal interest to clothe applicants with standing to apply for an interdict. In the result, I dismiss the preliminary point.

Is the application fatally defective?

Between them, the second and third respondent argue that the application is fatally defective. The second respondent contends that the applicants did not attach the permits or concessions granted to first and second respondent by the third respondent. As a result, the application ought to be struck off with costs. This preliminary point was not properly taken for the

simple reason that it involves going into the merits of the matter and is best dealt with when addressing the merits of the matter. The third respondent on one hand argues that the application is fatally defective by reason that the notice of application is dated 1 June 2022 whereas the founding affidavit is dated 2 June 2022. Furthermore, it is argued that the founding affidavit was commissioned on 2 June 2022 whilst the supporting affidavits were commissioned in May 2022. I have not found an authority which deals decisively with the alleged infractions. I light of the fact that the respondents have not suffered any prejudice; I am inclined to dismiss the said preliminary point and have the matter dealt with on the merits.

Are there material disputes of fact?

It is the third respondent's contention that there are material disputes of fact in this matter that renders the application procedure and improper procedure. In essence, the third respondent disputes that the allege permits will destroy the beauty of Victoria Falls. The third respondent argues that there is need to call evidence to confirm or deny the said allegation. The preliminary point was improperly taken for the simple reason that the present urgent chamber application is for an interdict pending litigation. It is not in dispute that the applicants instituted an application for review under HC 3576/22. It is not in dispute that the first and second respondent is at the respective sites. In light of the above, to allege disputes of facts would be stretching the principle too far. I move to dismiss the preliminary point.

Incompetent relief sought

The second respondent argued that the relief sought by the applicants is incompetent for two reasons. Firstly, it contended that the relief sought by the applicants under para 2.1 does not refer to suspension of the rights granted to the second respondent, but specifically the first respondent. Secondly, the second respondent argues that the restoration of already cleared land is relief incapable of being complied or enforced. Consequently, the second respondent argues that the application ought to be struck off the roll. Rule 60(9) of the High Court Rules, 2021 is instructive in this regard as the provisions of the said rule empowers this court to amend and or vary a draft order to make sure that the order being granted is capable of enforcement. See *Chiswa* v *Maxess Investments (Pvt) Ltd + Ors* HH 116-20. Consequently, I dismiss the preliminary point.

Disposition

In the result I make the following order:

1. The preliminary points raised by the first to third respondents be and are hereby dismissed.
2. The parties are directed to appear before this Court on 31 March 2023 and address the court on the merits of the matter.

Whatman and Stewart, applicants' legal practitioners
Scanlen & Holderness, first respondent's legal practitioners
Maguchu & Muchada, second respondent's legal practitioners
Mhishi, Nkomo Legal Practice, third respondent's legal practitioners