IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

SCZ JUDGMENT NO. 1 OF 2008
APPEAL NO. 50 OF 2006

BETWEEN:

ROBERT CHIMAMBO	**1ST APPELLANT**
RHIDA MUNG'OMBA	**2ND APPELLANT**
WILDLIFE CONSERVATION SOCIETY OF ZAMBIA	**3RD APPELLANT**
AND	
COMMISSIONEROF LANDS	**1ST RESPONDENT**
SAFARI INTERNATIONAL (Z) LIMITED	**2ND RESPONDENT**
ENVIRONMENTAL COUNCIL OF ZAMBIA	**3RD RESPONDENT**
FINGUS LIMITED	**4TH RESPONDENT**

CORAM: CHIRWA, MUMBA AND SILOMBA, J. J. S.
On the 23rd November, 2006 and 10th January, 2008

For the appellants: Mr. H. Ndhlovu of H. H. Ndhlovu and Company.
For the 1st Respondent: Mr. D. Y. Sichinga, Principal State Advocate.
For the 3rd Respondent: Not Present
For the 2nd and 4th Respondents: Mr. Mutemwa of Mutemwa Chambers.

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JUDGMENT

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SILOMBA, J. S., delivered the judgment of the Court.

This appeal is against the judgment of the High Court delivered at Lusaka on the 1st of March, 2006. At the centre of the dispute, in the court below, was Local Forest No. 27 located in the east of Lusaka. The action was commenced by the appellants by way of judicial review challenging

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certain actions of the 1st respondent relating to the allocation of land in the said Local Forest No. 27.

The reliefs the appellants sought in the court below were -

1. **An order of certiorari to remove into the High Court and quash the 1st respondent's decision to allocate the land in issue to the 2nd respondent disregarding the fact that the said land is protected;**
2. **An order of prohibition to restrain the 2nd respondent from making any constructions and cutting any trees in the said forest with immediate effect;**
3. **An order that the actions of the 1st and 2nd respondents without the due process of the law are null and void *ab initio*;**
4. **Any other relief the court may deem fit in the interest of conserving the protected forest in question and in the interest of all the stake-holders in the Chalimbana river catchment area; and**
5. **Costs.**

The grounds upon which the reliefs were sought were that:

a) **The decision by the 1st respondent to allocate Local Forest No. 27 to the 2nd respondent was illegal null and void; and**

b) **The forest in issue is still protected as such could not be allocated to the 2nd respondent without the due process of the law.**

The affidavit evidence of the appellants (applicants in the court below), which was sworn in support of the *ex-parte* summons for leave to apply for an order for judicial review, showed that Local Forest No. 27, Lusaka East, was de-gazetted in 1983. After pressure on the authorities,

mounted by the stake-holders who noticed that the Chalimbana river catchment area was being destroyed resulting in the environment being degraded to their disadvantage, the Government re-gazetted Local Forest No, 27 in 1996.

It would appear that during the period Local Forest No. 27 remained de-gazetted a lot of activities took place. Of particular relevance to this appeal, was the acquisition of Lot No. 6496 / M, in extent 270. 9472 hectares, by the 4th respondent through a State lease granted and signed by the Commissioner of Lands on the 21st September, 1993. The 4th respondent later obtained certificate of title No. L 4187 from the Chief Registrar of Lands and Deeds.

Another piece of land, known as Lot No. 6497 / M, in extent 538.1555 hectares, was leased to the 2nd respondent through a State lease dated the 24th September, 2004 following an application for the land in the same month. Subsequently, the 2nd respondent got certificate of title No. 32066 from the Chief Registrar of Lands and Deeds.

It is averred in (paragraph 38) the affidavit in opposition to an application for judicial review that despite Local Forest No. 27 being re-gazetted in 1996, Lot No.6496 / M, which was granted to the 4th respondent

on 1st November, 1992 cannot be impeached because the President has not compulsorily acquired it under Section 19 of the Forest Act, Chapter 199 of the Laws. It was, accordingly, counter-claimed in the affidavit in opposition that Statutory Instrument No. 161 of 1996 be rectified by excluding Lot No 6496 / M.

Further, it is averred in paragraph 39 of the same affidavit in opposition that even though Lot No. 6497 / M was granted to the 2nd respondent after the Local Forest was re-gazetted in 1996, the 1st respondent was in order to have done so; that the recommendations of the various stakeholders, including Government Departments and agencies, made the action of the 1st respondent to fall in line with Section 23 of the Forest Act.

When the matter came up for determination *inter partes*, counsel representing the parties informed the trial court that they had agreed to make written submissions since the matter to be determined was a question of law. The court granted the application pursuant to Order 14A of the Rules of the Supreme Court, 1999 Edition of the White Book.

The affidavit evidence in support of and in opposition to the application for judicial review and the written submissions of counsel were carefully examined by the trial court. In the light of the affidavit evidence

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and the submissions, the question the trial court set out to determine was whether the 1st respondent had power, under the provisions of the Forest Act, to grant title to Lots Nos. 6496 / M and 6497 / M.

As a starting point, the learned trial Judge examined Section 23 of the Forest Act and took the view that the 1st respondent could, under the Lands Act, make a grant of land in a local forest reserve to anybody for any purpose, which is not inconsistent with the objectives of the Forest Act.

The learned trial Judge related Section 23 to the *proviso* to Section 24 of the Forest Act under which the President may, by statutory instrument, permit in a local forest the doing of any of the acts prohibited under Section 16 of the same Act. He noted that there was no statutory instrument issued by the President to allow the doing of any of those acts prohibited by Section 16 after Local Forest No. 27 was re-gazetted in 1996.

In the absence of such statutory authority, the learned trial Judge found that the 1st respondent had no power to grant Lot No. 4697 / M to the 2nd respondent. To that extent, the learned trial Judge concluded that there was illegality, irrationality and procedural impropriety when the 1st respondent granted Lot No. 6497 / M to the 2nd respondent without a

statutory instrument being issued by the President under the *proviso* to Section 24 of the Act.

With regard to Lot No. 6496 / M, granted to the 4th respondent, the learned trial Judge held the view that the piece of land fell in a different category. The learned trial Judge took the view that when local Forest No. 27 was de-gazetted by Statutory Instrument No. 20 of 1983, the land comprised in the Local Forest reverted to State land. He, accordingly, ruled that the 1st respondent did not fall into error when he granted and issued a title deed to Lot No. 6496 / M in favour of the 4th respondent on the 1st November, 1992.

In conclusion and for the avoidance of any doubt, the learned trial Judge quashed the 1st respondent's decision to allocate Lot No. 6497 / M to the 2nd respondent since there was no legal authority for him to do so. He, however, declared as lawful, the granting of Lot No. 6496 / M to the 4th respondent because at the time of the grant the land was vacant State land not subject to the provisions of the Forest Act.

The appellants have advanced only one ground of appeal, which is, **that the court below erred in law and fact when it declared as lawful the granting and issuing of certificate of title in respect of Lot No. 6496 / M**

to the 4th respondent as the same was done when the land was State land not subject to the provisions of the Local Forest Act, Chapter 199 of the Laws, as doing so had the effect of going into the merits and demerits of having a forest reserve gazetted in the land which has not been developed.

Besides the only ground of appeal by the appellants, the 2nd respondent has filed a cross appeal, arguing that **the learned Judge in the court below misdirected himself in law and fact in holding that there was illegality, irrationality and procedural impropriety on the part of the 1st respondent when granting title to Lot No. 6497 / M to the 2nd respondent.**

Counsel for the appellants filed heads of argument in support of the ground of appeal. He relied on the heads of argument and reinforced them through oral submissions. From the heads of argument, the gist of counsel's submission was that when Local Forest No. 27, Lusaka East, was de-gazetted in 1983 and later re-gazetted in 1996 the latter statutory instrument did not provide for any alterations in the boundaries of the Local Forest nor savings or exceptions relating to the activities that took place during the period the Local Forest remained de-gazetted. That being the case, counsel

contended that the area of Local Forest No. 27 in 1996 remained the same as that prior to 1983.

He further contended that if it were the intention of the President to save some activities done between 1983 and 1996 the latter statutory instrument would have provided for such exceptions and altered the boundaries pursuant to Section 17 of the Forest Act. Consequentially, it was contended that since Local Forest No. 27, Lusaka East (Cessation) Order was revoked by the latter statutory instrument of 1996 everything that was done between 1983 and 1996 fell through.

Counsel submitted that the question of Lot No. 6496 / M did not arise and was not the issue before the trial court. As far as counsel was concerned, the declaration made by the trial court was erroneously made as the issue before the trial court was whether or not the 1st respondent exceeded his powers in allocating land in Local Forest No. 27.

Counsel also submitted that the remedy of a declaration could not be dealt with under judicial review proceedings and that if it were the wish of the 4th respondent to seek such a remedy it should have issued a writ of summons. With a writ, parties would be enabled to call evidence on the merits and demerits of issuing Statutory Instrument No.161 of 1996, as well

as, challenge the validity of the statutory instrument, which does not, in its current form, recognise the existence of Lot No. 6496 / M.

In his oral submissions, counsel merely emphasised what is covered in the heads of arguments.

There were no submissions, both oral and written heads of argument, from Mr. Sichinga, Chief State Advocate and counsel for the 1st respondent. He, however, relied on the arguments and submissions of counsel for the 2nd and 4th respondents in response. There were no submissions from the 3rd respondent either.

In response to the submissions of counsel for the appellants, Mr. Mutemwa, counsel for the 2nd and 4th respondents relied on the filed heads of arguments, which he augmented with oral arguments. From the heads of argument, the thrust of his argument was that the learned trial Judge was on firm ground when he declared as lawful the grant and issuance of title in respect of Lot No. 6496 / M to the 4th respondent

Counsel supported the finding of the learned trial Judge because the land was not compulsorily acquired or purchased under Section 19 of the Forest Act when Statutory Instrument No. 161 of 1996 was issued. As far as

he was aware, Lot No. 6496 / M was not a forest reserve as it was acquired during the period when the land was no longer a forest reserve.

Counsel further submitted that it was erroneous for the appellants to argue that Lot No. 6496 / M was not an issue in the proceedings before the trial court when the status of the Lot was raised in the affidavits of all the parties to the action.

On the complaint that the learned trial Judge should not have granted the remedy of a declaration in favour of the 4th respondent's counter claim, counsel submitted that this was in order in terms of Order 53/1 – 14/49 of the White Book, 1995 Edition. Counsel submitted that if the court has power under the aforesaid Order to grant a declaratory order in judicial review proceedings the court can, by analogy, do the same on a counter-claim raised in the same proceedings.

In his oral submissions, counsel submitted that Lot No. 6496 / M was allocated on title to the 4th respondent when Local Forest No. 27 was de-gazetted; that the passing of Statutory Instrument No. 161 of 1996, re-gazetting the aforesaid local forest, did not make the title to Lot No 6496 / M null and void.

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In reply, counsel for the appellants contended that as soon as the de-gazetting of Local Forest No. 27 was revoked any title issued between 1983 and 1996 was rendered null and void; that to allow the declaratory order of the trial court to stand would bring a lot of confusion as Lot No. 6496 / M was still part of Local Forest No. 27.

We have scrutinised the record of the proceedings before the learned trial Judge that culminated in the judgment of the 1st March, 2006, which is the subject of this appeal. We have also analysed the arguments, both written and oral, that counsel for the parties presented before us with the aim of persuading us one way or the other.

At the outset and as part of our house-keeping, we would like to correct the wrong impression that the judgment of the lower court, including the submissions of counsel, appears to convey. The judgment and the submissions appear to suggest that the 1st respondent (Commissioner of Lands) can grant land and also issue a certificate of title to such land. The latter act attributed to the 1st respondent is legally and procedurally not correct.

The correct position is that the 1st respondent can make a grant of land for and on behalf of the President. Once a lease agreement is executed with

the lessee (or an applicant for the land), the 1st respondent lodges the lease with the Chief Registrar of Lands and Deeds who later issues title to the lessee in respect of the land.

Coming to the substantive appeal, the appellants have contended that the question of Lot No. 6496 / M did not arise and was not the issue in the proceedings before the learned trial Judge. On the other hand the respondents have counter-argued that it is erroneous for the appellants to maintain such a stance when it was them who raised the issue in their affidavit in reply at paragraph 8, insisting that the title to Lot No. 6496 / M had become null and void when Local Forest No. 27 was re-gazetted.

We have visited the affidavit in reply and we take note that indeed the validity of title to Lot No. 6496 / M was challenged by the appellants. This was after the 2nd and 4th respondents emphatically outlined, in their affidavit in opposition, that the acquisition of the Lot was regularly done. Consequentially, the learned trial Judge had no choice but to rule on the matter.

We take note that there was no mention of Lot No. 6496 / M in the appellants' own statement on application for leave to apply for judicial review. In the application, the appellants challenged the decision of the 1st

respondent to allocate Local Forest no. 27, Lusaka East, in total disregard of the law. Accordingly, they sought, among others, an order of *certiorari* to remove into the High Court and quash the 1st respondent's decision to allocate the said Local Forest to the 2nd respondent in disregard of the fact that the said land was protected.

In our view, this was bad pleading. From the evidence on record, the 1st respondent never allocated Local Forest No. 27 but portions within the said Local Forest, now known as Lots Nos. 6496 / M and Lot No. 6497 / M. Because of bad pleading, we are not surprised that both the appellants and the 2nd and 4th respondents had to clarify matters, through affidavits, as to what specific pieces of land, within the Local Forest, they were talking about.

A very forceful argument has been advanced by counsel for the appellants that when Local Forest No. 27 was re-gazetted in 1996 the relevant statutory instrument did not make any savings or exceptions; that if the President had intended to save certain activities carried out between 1983, when the Local Forest was de-gazetted and 1996, when it was re-gazetted, he would have stated his intention very clearly by providing for

exceptions or alterations of boundaries pursuant to Section 17 of the Forest Act.

The appellants contend that since the statutory instrument of 1996 made no savings, exceptions or alterations of boundaries anything done between 1983 and 1996 fell through. As far as the appellants are concerned, the 1st respondent exceeded his powers in allocating Lot No. 6496 / M to the 4th respondent.

The response of the 2nd and 4th respondents is that the learned trial Judge was on firm ground when he declared as lawful the grant of Lot No 6496 / M to the 4th respondent. Their argument is that the land encompassed by Lot No. 6496 / M was not a Forest Reserve at the time it was allocated to the 4th respondent. The two respondents have asserted their rights to the Lot, considering that the President did not purchase or compulsorily acquire it when he issued Statutory Instrument No. 161 of 1996, re-gazetting Local Forest No. 27.

The argument of the appellants, though forceful, does not take into account the status of the land at the time the 1st respondent dealt with it. As far as we are concerned, that was the critical issue that the learned trial Judge

had to resolve. It was not his concern to rule on the fate of Lot No. 6496 / M, now that the Lot has been absorbed by the Local Forest.

Besides, the argument of the appellants does not acknowledge the fact that the 1st respondent can, on behalf of the President, make a grant or disposition of land that is free or unencumbered to any person who qualifies under the law.

From the affidavit evidence and the submissions made before the trial court and indeed before us, it was never in dispute that between 1983 and 1996 the entire land comprised in the former Local Forest No. 27 was, legally speaking, State land. Because it was State land and free from the provisions of the Forest Act, the 1st respondent was entitled, as a matter of law, to parcel out free portions of the land to deserving applicants.

The foregoing being the case, we are satisfied that the learned trial Judge was on firm ground when he declared as lawful the action of the 1st respondent to allocate Lot No 6496 / M to the 4th respondent in 1992 because the land was available. In the event, the two reliefs of *certiorari* and prohibition cannot be sustained. The main appeal is dismissed.

Before we leave the subject matter of Lot No. 6496 / M, we would like to address the argument of the appellants that it was wrong for the

learned trial Judge to invoke the remedy of a **declaration** in judicial review proceedings. The appellants have taken issue with the stand taken by the learned trial Judge when he said: **I declare, as lawful, the grant and issuance of Certificate of Title in respect of Lot No. 6496 / M to the 4th respondent ……"** The 2nd and 4th respondents have counter-argued in support of the remedy of a **declaration** and have cited Order 53 / 1 – 14 / 49 of the White Book, 1995 Edition, in aid.

The history of the matter, if we may digress a little, is that originally the 4th respondent was not a party to the proceedings when the appellants instituted this action. The 4th respondent applied to be added as one of the respondents because, as we have said earlier on, the appellants questioned the decision of the 1st respondent to allocate Local Forest No. 27, within which Lot No. 6396 / M fell, as being in total disregard of the law.

When the application was granted, the 4th respondent asserted, in the joint affidavit in opposition with the 2nd respondent, that it had an interest in Lot No. 6496 / M to protect. It, therefore, wanted the court to pronounce itself on the validity of the 1st respondent's action to allocate the Lot to it. In our considered view this claim became, for all intents and purposes, a counter-claim.

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We have visited Order 53, rule 1, sub-rule (2), of the White Book, 1999 Edition and therein the High Court has power to make a declaration claimed in an application for judicial review. This being the case, we agree with Mr. Mutemwa, counsel for the 2nd and 4th respondents, that since a counter-claim constitutes a new cause of action, the High Court has power to grant an order of a **declaration** in a counter-claim, as it did, affirming the decision of the 1st respondent to allocate Lot No. 6496 / M to the 4th respondent.

On the cross-appeal, counsel for the 2nd respondent entirely relied on the 2nd respondent's heads of argument in support of the ground of appeal, which is re-produced in this judgment. We note also that the appellants have filed their heads of argument in support of the finding by the learned trial Judge that there was illegality, irrationality and procedural impropriety on the part of the 1st respondent when he allocated Lot No. 6497 / M to the 2nd respondent.

In the view we take of the cross appeal, we do not find it necessary to go into the arguments of counsel as outlined in their heads of argument. The principle we have established, in dealing with the allocation of Lot No. 6496 / M in the main appeal, is that the power of the 1st respondent to allocate

land during the period Local Forest No. 27 was de-gazetted cannot be impeached because the land was vacant State land and available for allocation to deserving persons.

In relation to Lot No. 6497 / M, the evidence is clear. There is no dispute that the land was allocated after Local Forest No. 27 was re-gazetted. As found by the learned trial Judge, we agree that the allocation of the said Lot was indeed illegal, irrational and procedurally improper because at the time of allocation the Lot was protected under the Forest Act.

We know for sure that the 1st respondent's power to administer land is limited to the Lands Act and indeed any other Acts under his portfolio. There is no provision in the Lands Act, as far as we know, which allows him to override the provisions of the Forest Act, an act of Parliament that is at par with the Lands Act. This being the case, the cross-appeal has no merit and it is dismissed.

In the course of reading through the appellants' heads of argument on the cross-appeal, we came across an argument that should not have arisen at all. The appellants are saying that the cross-appeal is misconceived because the order or finding appealed against was not made against the 2nd respondent but against the 1st respondent.

As far as the appellants are concerned, it is the 1st respondent who should have cross-appealed if he was aggrieved by the finding and not the 2nd respondent. Our short answer is that the 2nd respondent, as a party to the proceedings, was entitled to cross-appeal because its interest in Lot No. 6497 / M was affected by the decision of the trial court.

The appellants having lost the main appeal but succeeded in the cross appeal and the 2nd and 4th respondents having won the main appeal and lost the cross-appeal, this court doth order that there will be no order for costs and each party shall bear its own costs.

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D. K. CHIRWA
ACTING DEPUTY CHIEF JUSTICE

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F.N.M. MUMBA
SUPREME COURT JUDGE

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S. S. SILOMBA
SUPREME COURT JUDGE