

HOPCIK INVESTMENT (PRIVATE) LIMITED
versus
MINISTER OF ENVIRONMENT WATER AND
CLIMATE
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 26 January 2016 & 17 February 2016

Opposed Matter

P.C Paul, for the applicant
E. Mukucha, for the 1st respondent
R. Mhlanga, for the 2nd respondent

DUBE J: The applicant seeks an order compelling the respondents to supply potable water per week to its premises.

In 1955 *Ezra Taافت Benson*, *US Secretary of Agriculture* made the following observations about the water situation in his country. “I have little need to tell you that water has become one of our major national concerns”. These sentiments are equally applicable to the water situation in this country at the moment and in particular in Harare. Water has become the cry of the Harare. It is on everyone’s lips. Residents of the town have no access to clean drinking water. Taps have run dry in this town for a number of years now. Pipe burst are the order of the day. Diseases like cholera and typhoid have wreaked havoc in this town. Residents have had to resort to digging wells and boreholes to sustain themselves. The city fathers have resorted to folding their hands and watching the melee amid promises to rectify the situation.

Water is the most basic of all needs. Without water there is no life. Access to water has become a human right in this country and is guaranteed in our Constitution. The responsible authorities have a duty to ensure that they provide residents access to a reliable supply of potable water. The authorities lack the will to accomplish this objective. It is time for the authorities to take reasonable and satisfactory steps to rectify the situation and ensure

adequate supplies of water. The responsible authorities cannot be allowed to merely observe and adopt a nonchalant attitude. To ensure the realisation of this right, will require concerted efforts of all concerned. This frustration has led to a daring resident resorting to getting the relevant authorities to account for their actions and realise its rights through litigation.

The applicant is the owner of a property situated at 3 Tynward Close, Ballantyne Park, Harare. The first respondent is the Minister responsible for the administration of the Water Act [*Chapter 20:34*]. The first respondent has the responsibility to regulate the supply of water by the second respondent. The second respondent is the local authority established in terms of s 183 of the Urban Council Act [*Chapter 29:15*]. Its mandate is to provide and maintain a supply of water within or outside the council.

The applicant avers that there has been no supply of water to the area in which the applicant's property is located for approximately three years. The applicant submitted that other properties in Harare are receiving a regular supply of water. The applicant conceded that the second respondent has certain difficulties in making water available to all residents of the city but argued that it does not appear that the second respondent is doing all that is necessary to provide an equitable distribution of water to all the inhabitants of the city. The applicant submitted further that the second respondent is acting in an irresponsible manner in that it has failed to attend to water pipes breaking, which remain unrepaired for long periods of time depriving citizens of water. The applicant contended that the second respondent is not taking its responsibility seriously and has not done enough to ensure adequate supply of water to residents. The applicant prays for an order compelling the respondents to supply to it 15000 litres of potable water to the applicant's premises on a weekly basis.

The respondents defend the application. Their submissions may be summarised as follows. The City of Harare has faced numerous challenges especially financial constraints and this has made it extremely difficult to supply water to the applicant and other affected residents. They respondents have been working very hard to improve the dire situation. The two respondents have engaged investors, partners and have acquired loans and it is envisaged that they will be able to meet the water demands of residents. The city's water supply system requires refurbishment and upgrading. The Minister has signed numerous memorandums of understandings and agreements with different countries and construction companies with the objective of building dams, drilling of boreholes so as to improve water supply. These endeavours and efforts will soon start to reap rewards and improve the water supply situation.

The second respondent has failed to supply water to the premises of the applicant for a number of reasons. The urban area has seen monumental growth resulting in the demand for water outstripping supply. Regard must be had to the harsh economic climate and financial constraints the second respondent faces which has rendered the city unable to upgrade its infrastructure. Leakages have increased resulting from aged pipes. There is a frequent breakdown of plant and equipment in water production and distribution resulting in reduced water supply. The city is unable to guarantee the applicant a minimum of 15000 litres per week. The applicant is not the only resident in this predicament. The situation has been made worse by the poor rainy season experienced this year. The second respondent argued that when s 183 of the Urban Councils Act was enacted, the legislature was mindful of the fact that the second respondent may not be able to provide and supply water to residents because of the use of the word "may" in the section . Further that the second respondent has failed to provide water to the applicant on justifiable reasons.

The right to water was recognised by the United Nations General Assembly through Resolution 64/292 on 28 July 2010 as a human right. The resolution calls upon state parties to make available financial resources to help capacity building and technology transfer and places obligations on state governments to ensure that its citizens can enjoy, "sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses." See UN CESCR General Comment 15. A number of international treaties, which include the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child and the International Covenant on the Economic Social and Cultural Rights, recognise this right. It is an economic, and social right. This right is recognised as a self-standing human right. The right to water contains an entitlement to access to a minimum amount of safe drinking water to sustain life and health. The supply must be sufficient and continuous to cover personal and domestic uses and meet basic needs. According to the World Health Organisation, WHO between 50 and 100 litres of water per person per day are needed to ensure that basic needs are met.

All persons have an entitlement to access to water. In the South African case of *Mazibuko and Ors v City of Johannesburg and Ors* (CCT 39/09) (2009) ZACC the court in its introductory remarks notes as follows:

"Cultures in all parts of the world acknowledge the importance of water. Water is life without it, nothing organic grows. Human beings need water to drink to cook, to wash and to grow our food. Without it we will die. It is not surprising then that our constitution entrenches the right of access to water".

The quotation highlights and emphasizes the purposes of and the importance of water. In recognition of the importance of the right to water, the new Zimbabwean Constitution provides for the right to water. The Old Constitution that came into existence in 1979 at the advent of independence did not recognise the right to water. The right to access to safe drinking water and sanitation is newly introduced and is now a constitutional right enshrined under s 77 of the new Constitution of Zimbabwe. Section 77 provides as follows:

“77 Right to food and water

Every person has the right to-

(a) safe, clean and potable water; and

(b) sufficient food;

and the State must take reasonable legislative and other measures, within the limit of the resources available to it, to achieve the progressive realisation of this right.”

In line with the UN Resolution of 28 July 2010, s 77 guarantees the right to water. It places a responsibility on the State to take reasonable legislative and other measures to ensure the realisation of the right. The State is expected to do so, within the resources available to it. This analysis makes it clear that the applicant has a right to access to safe, clean and potable water in terms of the constitution.

The right to water access to safe drinking water and sanitation is a human right and is protected by law. Implementation of the right is made possible through the Urban Councils Act and the Water Act and hence the state is in compliance of the requirement to put in place legislative measures to achieve the right to access to safe, clean and potable water. These laws were already in existence when this right was introduced. The laws have become the medium through which the right can be recognisable and enforced. Section 6 of the Water Act [*Chapter 20:24*] places a responsibility on the first respondent to ensure the availability of water to all citizens for primary purposes and other uses. The primary obligation to ensure and protect the right to water rests on the state. The first respondent is expected to fulfil its obligations by taking meaningful steps to address the shortage of water within the resources available to it. It must ensure that local authorities have adequate powers and resources to perform their duties. It must adopt appropriate legislative and administrative and financial measures to fully realize the right to water. Government must also ensure that organisations such as the first respondent that has a responsibility to supply and distribute water in accordance with the law are afforded the resources to enable them to do so. It must ensure that the local authority has adequate resources to maintain quality water resources. The state is empowered to delegate the responsibility to supply water to an authority. The Minister has

the primary responsibility to ensure that the institution that it delegates to supply water is equipped to do so and does carry out its mandate.

In line with this section the legislature in s 183 of the Urban Councils Act, [*Chapter 29*], empowers councils to provide and maintain a supply of water to an area. Section 183 provides as follows:

“183 Powers of council in relation to water supply

- (1) A council may provide and maintain a supply of water within or outside the council area and for that purpose the council may –
 - (a) In accordance with the Water Act [*Chapter 20:22*] take such measures and construct such works, whether inside or outside the council area, as it considers necessary for the purpose of providing and maintaining a supply of water;
 - (b) Enter into agreements for the purchase and sale of water and for any other thing necessary in connection with the maintenance and supply of water”.

This section places a responsibility of local authorities to ensure adequate supply of water in terms of the power delegated to them. Councils are required to take measures to construct such works for providing and maintaining a supply of water.

The word “may” in s 183 was used in recognition that there are instances when a council may fail to provide and maintain adequate supplies of water. The legislature was alive to the possibility that the institution delegated the power to supply the water, may at some stage be unable to comply with the requirement for one reason or another. Depending on the reasons furnished for the failure, these may constitute good and acceptable reasons. I do not think that it was the intention of the legislature that government be held accountable for matters outside its scope. Where a complaint against a failure to supply water has been filed, the relevant authorities are required to account for their actions. The court is required to enquire into the reasons for the failure to comply. The State and local authority involved may only be absolved where good and sufficient reasons for failing to provide and maintain a safe, clean and potable supply of water have been given. Litigation concerning the realisation of constitutional rights makes government and other responsible authorities accountable for their actions.

The explanation for the respondent’s failure to supply water to the applicant’s premises simply comes to its lack of resources. The court was told that the respondents are limited by financial resources to address their shortcomings. The court was not told why the respondents aver that they do not have adequate resources when they have access to large sums of revenue every month. Could it be that they have failed to prioritise their needs? The

maintenance and repair of water supply pipes requires to take priority. Water is life and without it there is no life. The right to water is central to all other rights. There is a need to prioritise it.

The respondents have on numerous occasions announced the availability of partners and investors willing to invest in the sector to no avail. Nothing ever seems to materialise from the investors. At the time that the first respondent's opposing affidavits were deposed to in March 2014, the indications were that the Minister has signed numerous memorandum of understandings on agreements with different countries and partners with the objective of improving the supply system. Further that all these endeavours and efforts will soon start to reap rewards and improve the erratic water supply system. The respondents did not address the court on the outcome of these engagements. Instead the same story was repeated in this application. The respondent's affidavit discloses a casual attitude to the issue. They don't explain what they have done in the past 5 years to address the problem. In its heads of argument the second respondent indicated that it had sourced grants and loans for infrastructure rehabilitation. It anticipated that it will complete its rehabilitation works and be able to provide regular water supplies to residents by March 2015. When the matter was initially set down for argument in 28 July 2015, the matter was removed from the roll because the second respondent advised that water was being supplied to the applicant's premises. It was discovered that no water was being supplied to the applicant's premises resulting in the matter being re-set down again for argument. No explanation was forthcoming with regards the supposed supply of water. It does not appear that any effort is being made to ensure that the applicant gets adequate supplies of water. The measures adopted so far if any, have not borne any meaningful fruit. The respondents in their heads of argument argue that they are disorganised at the moment but are silent on the real solutions to the problem.

It does not appear to the court that the respondents have taken meaningful and reasonable steps to address the issue at hand. The respondents have been able to supply water to some residents whilst others are starved of it on end. What the second respondent ought to do is to ration water so that the scarce resource is distributed fairly. It is incomprehensible how the second respondent is able to maintain water supplies in selected areas whilst other residents fail to get any share of it completely. If it is about the high terrain of the area, there must be some technology they can employ to get the water up hill.

The responsible authorities may be in a difficult moment. It is expected that the respondents address the shortage of water within the resources available to them. They must be seen to be taking corrective and reasonable steps to address the issue for all residents. The respondents have selectively supplied water to residents. The scarce resource available should be shared in a fair and equitable manner. I do not view that the respondents are doing enough to ensure adequate supplies to the applicant. I am unable to find that the respondents have taken reasonable measures to ensure the realisation by the applicant of the right to safe, clean and potable water. Both respondents have not treated the issue of supply of water to the applicant seriously or prioritised it. The respondents have not been receptive and accessible to the applicant's cry for water. The failure to ensure supply safe, clean and potable water constitutes a breach of the applicant's rights in terms of s 77 of the Constitution. The applicant was entitled to invoke the legislation available in order give effect to its rights. It is entitled to the order sought.

The applicant has asked for 15 000 litres per week. The basis for supply of such quantities of water was not established. The applicant is a company, its operations and number of people requiring water is unknown. It was not shown why it requires such large quantities of water per week. The respondents have not meaningfully challenged the quantities requested for or made any other suggestions. I have in the exercise of my discretion decided to accede to the request.

In the result it is ordered as follows,

1. The first and second respondents jointly and severally shall ensure a supply of potable water to the applicant's premises being, 3 Tynwald Close, Ballantyne Park, Harare within 3 months of this order.
2. Should the respondents through no fault of their own be unable to supply the water for any given period they may make an application to this court for a variation of this order during that period. Such a request shall not be made to the court unless a request for such variation is first made to applicant and applicant has unreasonably refused to grant that request.
3. The respondents are to bear the costs of this application.

Wintertons, applicant's legal practitioners
Civil Division, 1st respondent's legal practitioners