

Judgment No. S.C. 119/99  
Civil Appeal No. 82/99

(1) O.A.T. KWASHIRA (2) ZAKA RURAL DISTRICT COUNCIL  
vs LUKE TODD CHISI

SUPREME COURT OF ZIMBABWE  
GUBBAY CJ, McNALLY JA & MUCHECHETERE JA  
HARARE, OCTOBER 7, 1999

*G E Mandizha*, for the appellants

*F S Mafunga*, for the respondent

MUCHECHETERE JA: This is an appeal against the judgment of the High Court, Harare, on 16 March 1999 in which the second appellant was ordered “not to interfere with the rights of the respondent in the operation of his borehole on Stand No. 358 Jerera Low Density Suburb, Zaka without leave of the High Court”. At the end of the hearing we dismissed the appeal with costs. We, however, amended the first item of the order of the court *a quo* to read:

“That the second respondent is ordered not to interfere with the rights of the applicant in the operation of his borehole situated on Stand No. 358, Jerera Low Density Suburb, Zaka, in the absence of any by-law lawfully made in terms of s 88 of the Rural District Councils Act [*Chapter 29:13*] as read with item 68 of the Second Schedule of the Act”.

We indicated that our reasons for the decision would follow. These are they:

The facts in the matter are that the respondent owns the above-numbered stand. In or about August 1996 he caused a borehole or well to be sunk on the stand. Sometime in October 1996 the appellants advised him that he was sinking a borehole without permission and that he was therefore acting unlawfully.

The respondent thereafter sought to have the sinking of the borehole legalised. In this connection he approached the appellants for such permission but this was refused by way of a resolution of the second appellant at one of its regular meetings. After the meeting the second appellant advised the respondent to fill in his borehole and that if he did not comply the second appellant would itself fill it and charge the respondent for doing so. The respondent then sought a provisional order in the magistrate's court interdicting the second appellant from destroying or filling in his borehole. On the return day of the provisional order the magistrate's court refused to confirm it on the grounds that what the respondent was seeking was a review of the proceedings of the second appellant and that the magistrate's court had no jurisdiction to review the proceedings of the second appellant. The respondent appealed against that decision to the court *a quo*.

At the commencement of the hearing it was pointed out to counsel for both parties that the law applicable in this case is s 88 of the Rural District Councils Act [*Chapter 29:13*] as read with item 68 of the Second Schedule of the Act. These provisions are to the effect that an owner, lessee or occupier of a piece of land may for any purpose abstract and use underground water from any point of the piece of land unless he is prohibited by a regulations made by the Rural District Council under item 68 of the Second Schedule of the said Act. Both counsel, who had not read or

referred to the above provisions, conceded that the second appellant had not made any regulations in terms of item 68 of the Second Schedule of the said Act. In the circumstances the respondent could not be restricted in the manner the appellants sought.

There was therefore no merit in the appeal.

GUBBAY CJ: I agree.

McNALLY JA: I agree.

*Chuma, Gurajena & Partners*, appellants' legal practitioners

*Muzenda & Partners*, respondent's legal practitioners