IN THE HIGH COURT FOR ZAMBIA **2017/HP/1239**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

CALVIN MAKA SIKAZWE & 5 OTHERS	**PLAINTIFFS**
AND	
BOSPHORUS INVESTMENT LIMITED *(Formally known as UFUK Investments Limited)*	**1st DEFENDANT**
ZAMBIA ENVIRONMENTAL MANAGEMENT AGENCY	**2ND DEFENDANT**
LUSAKA CITY COUNCIL	**3RD DEFENDANT**
RICHARD BESA MULENGA	**4TH DEFENDANT**

BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN OPEN COURT, ON 16TH NOVEMBER, 2023.

For the Plaintiffs:	*Mr. E. B. Mwansa, SC. – Messrs. EBM Chambers.*
For the 1st Defendant:	*Mr. M. Phiri & Mr. A. M. Shilimi – Messrs. Mwansa, Phiri, Shilimi and Theu Legal Practitioners.*
For the 2nd Defendant:	*Mr. M. Kumwenda – In House Counsel*
For the 3rd Defendant:	*Mr. S. Lubasi – In House Counsel.*
For the 4th Defendant:	*Mr. R. B. Mulenga – In Person.*

JUDGMENT

CASES REFERRED TO:

1. *Read v Lyons and Company Limited (1945) K.B. 216;*
2. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172;*
3. *Zambia Railways Limited v Pauline S Mundia, Brian Sialumba (2008) Z.R. 287;*
4. *Bamford v Turnley (1862) 3 B&S 66;*
5. *Sedleigh-Denfield v O'Callaghan (1940) A.C. 880;*
6. *National Hotels Development Corporation (T/A Fairview Hotel) v Ibrahim Motala (2002) Z.R. 39;*
7. *J.Z. Car Hire Limited v Malvin Chala and Another (2002) Z.R. 113;*
8. *Attorney General v Mpundu – S.C.Z. Judgement No. 7 of 1984;*
9. *Kafue District Council v Chipulu – S.C.Z. Judgment No. 5 of 1997;*
10. *Rylands v Fletcher (1861-73) ALL ER REP 1;*
11. *Rickards v Lothium (1913) A.C. 263;*
12. *Smith v Inco Limited (2011) ONCA 628;*
13. *Transco v Stockport MBC (2004) 1 ALL ER 589;*
14. *M C Mehta v Union of India (1987) 1 SCC 395; and*
15. *Indian Council for Enviro-Legal Action & Others v Union of India & Others (1996) 2 LRC.*

LEGISLATION REFERRED TO:

1. *The Environmental Management Act, 2011;*
2. *The Law Reform (Miscellaneous Provisions) Act;*
3. *The Constitution of Zambia, Chapter 1, Volume 1 of the Laws of Zambia.*
4. *The Environmental and Pollution Control (Environmental Impact Assessment) Regulations, SI No. 28 of 1997; and*
5. *Trades Licensing Act, Chapter 393, Volume 22 of the Laws of Zambia.*

OTHER WORKS REFERRED TO:

1. *Phipson on Evidence, Seventeenth Edition, (Thomson Reuters (Legal) Limited 2010); and*
2. *Clerk and Lindsell on Torts, 19th Edition, (Sweet & Maxwell Limited, 2006).*

1 INTRODUCTION

1.1 The delay in the delivery of this Judgment is deeply regretted. It is due to the heavy workload, coupled with

the fact that the Court was indisposed during the month that it should have been delivered.

1.2 The Plaintiffs, Calvin Maka Sikazwe, Doris Kapembwa, Jack Kapembwa, Teresa Chanda, Caiaphas Habasonda and Chilufya Mbalashi, launched this action against the 1st Defendant, Bosphorous Investment Limited; 2nd Defendant, Zambia Environmental Management Agency ("ZEMA"); 3rd Defendant, Lusaka City Council ("LCC") and 4th Defendant, Richard Besa Mulenga. The case involves allegations against the manufacturing activities of the 1st Defendant, including noise and air pollution caused by its business activities.

1.3 The Plaintiffs, who claim that they have been affected by the high levels of noise and air pollution caused by the 1st Defendant, through its manufacturing machinery at is business premises owned by the 4th Defendant, lodged a complaint with the 2nd and 3rd Defendants, whom they allege, acted contrary to their statutory obligations and issued a trading licence to the 1st Defendant, to carry out an industrial business in a zone designated as a residential and agricultural area. Accordingly, this Judgment is in respect of the Plaintiffs' claim for reliefs sought against the Defendants.

2 BACKGROUND

2.1 The genesis of this matter is that the 1st Defendant, which is a private limited company, has been carrying on business of manufacturing and supplying pavers, blocks, tiles, furniture and aluminium steel, at Plot No. 2315/M, Leopard's Hill Road, New Kasama, Lusaka ("Subject Property"), which property belongs to the 4th Defendant. The Plaintiffs, who all live within the proximity of the Subject Property are aggrieved with what they perceive to be noise and air pollution, emitted from the 1st Defendant's manufacturing machinery. The Plaintiffs allege that the 1st Defendant is carrying on its said business in a zone that is designated as a residential and agricultural area by the 3rd Defendant. They claim that the 1st and 2nd Defendants did not conduct an Environmental Impact Assessment ("EIA"), failed to hold a public hearing, and changed land use without proper authorisation. The 2nd Defendant denies responsibility for EIA and public hearings, stating that they are only required for specific projects.

2.2 The Plaintiffs are also aggrieved that the 2nd Defendant has failed in its statutory duties by allowing the 1st Defendant to set up its business in a residential area, thereby abrogating the law which the 2nd Defendant is supposed to implement in its regulatory capacity.

2.3 The Plaintiffs are further aggrieved that the 3rd Defendant issued a business permit and/or trading licence to the 1st

Defendant, thus effectively permitting the 1st Defendant to operate and conduct its business in an area not designated for industrial purposes, which results in noise and air pollution that not only affects the Plaintiffs' health, but their livestock and crops as well. The 3rd Defendant admits that it issued a trading licence but alleges that the 1st Defendant changed land usage without authorisation.

2.4 The 4th Defendant asserts that the change of land use was approved and disputes allegations of noise and air pollution.

2.5 The Plaintiffs allege that no remedial action has been taken by the Defendants, which has led to their being subjected to noise and air pollution that has greatly affected their health, livelihood and crops. It is against this backdrop that the Plaintiffs launched this action.

3 PLEADINGS

3.1 The Plaintiffs launched this action by Writ of Summons, issued on 27th July, 2017, with claims for the following reliefs: -

1. *Damages for nuisance, pollution and inconvenience;*
2. *Damages for emotional and mental stress;*
3. *An order of mandatory injunction restraining the 1st Defendant from committing and* continuing *to commit*

and cause the nuisance, pollution and inconvenience complained of;

4. *An order that any license or permit issued to the 1st Defendant to conduct its business of manufacturing and supplying pavers, blocks, tiles, furniture and aluminium steel or any other environmentally offensive activity or product on the Subject Property be revoked and or cancelled;*

5. *Interest; and*

6. *Costs.*

3.2 In the Statement of Claim that accompanied the Writ of Summons, the 1st Plaintiff averred that she is the owner and occupier of Plot No. 5226/M, New Kasama, Leopards Hill Road, Lusaka and brings this action on her own behalf and on behalf of and with the authority and consent of all the other Plaintiffs who are also the owners and occupiers of residential and agricultural small holdings within the close vicinity of the 1st Defendant.

3.3 It was averred that the 1st Defendant is and was at all material times a private limited company, situated at the Subject Property and carrying on a business of manufacturing and supplying pavers, blocks, tiles, furniture and aluminium steel, while the 2nd Defendant is

an environmental management agency in Zambia and the 3rd Defendant is a Local Authority.

3.4 It was further averred that for a period of time since 2015, the 1st Defendant has operated and continues to operate its business of manufacturing and supplying pavers, blocks, tiles, furniture and aluminium steel at the Subject Property and has caused and still continues to cause high levels of noise pollution through its manufacturing machinery.

3.5 Furthermore, it was averred that the 1st Defendant is conducting and carrying out an industrial business in a zone that is designated as a residential and agricultural area by the planning authority, which is the 3rd Defendant. Despite this, the 3rd Defendant has issued the 1st Defendant with a Trading License and/or Business Permit.

3.6 The Plaintiffs asserted that the 1st Defendant caused and has continued to cause noise and air pollution and as a result of which the serenity of the environment has been lost and the Plaintiffs and their families can no longer sleep peacefully, both during the day and night. Further, it was asserted that the 1st Defendant has caused air pollution through emission of contaminants from the quarry dust and cement used to make blocks, which endangers the Plaintiffs and their families' health and interferes with

their normal enjoyment of life and endangers the environment including livestock, plant life and crops.

3.7 It was also asserted that the Defendants have been aware or ought to have been aware that the 1st Defendant was causing and has continued to cause air, noise and/or nuisance, pollution and an inconvenience to the Plaintiffs and their families who are its neighbours, by constantly subjecting them to emotional and mental stress, as well as posing a serious damages to their health and wellbeing, but that despite that, the Defendants have failed to take any steps to relocate the business to an appropriate place.

3.8 It was affirmed that the 1st and 2nd Defendants did not conduct an environmental impact assessment of the effects that 1st Defendant's business would have on the environment and its neighbouring occupiers/residents. It was further affirmed that no public hearing was constituted by the 1st and 2nd Defendants, so as to afford the Plaintiffs an opportunity to be heard on the impacts of the 1st Defendant's proposed business project on the environment and the general health and well-being of the Plaintiffs and their families. The Plaintiffs also affirmed that the 3rd Defendant did not execute the necessary action for the change of land use as required by law.

3.9 The Plaintiffs professed that as a direct consequence of the Defendants actions and/or omissions, the Plaintiffs together with their families have suffered loss and damage.

3.10 By the 1st Defendant's defence filed on 16th August, 2017, the 1st Defendant averred, *inter alia*, that it has operated and continues to operate its business of manufacturing and supplying pavers, blocks tiles, furniture and aluminium steel at the Subject Property but denies that it caused and continues to cause high levels of noise and air pollution through its manufacturing machinery or otherwise.

3.11 The 1st Defendant further averred that it has conducted its business within the confines of the law and has continued to comply with the environmental requirements as specified by the 2nd Defendant and with all the requirements of the planning authority, the 3rd Defendant herein. Furthermore, it was averred that the 1st Defendant's business and operations are licensed by both the 2nd and 3rd Defendants and that its operations are conducted strictly within the requirements of the two stated authorities. It stated that it has neither caused air pollution nor interfered with the normal enjoyment of life of its neighbours nor endangered the environment.

3.12 The 1st Defendant claimed that its operating hours are 08:00 hours to 17:00 hours during the week and 08:00

hours to 14:00 hours on Saturdays. It further claimed that the business is closed on Sundays and Public holidays.

3.13 It was asserted that there is a residential house on the premises, where four expatriate workers stay and their health and general wellbeing has never been negatively affected. Further, it was asserted that the 1st Defendant also keeps a few chickens, ducks, rabbits and quails for consumption, without any problems and also grows a few vegetables.

3.14 Finally, it was professed that the 1st Defendant has never violated any rights of the Plaintiffs in its lawful conduct of its business.

3.15 By the 2nd Defendant's Defence filed on 10th September, 2018, the 2nd Defendant averred, *inter alia*, that an Environmental Impact Assessment ("EIA") is conducted by a project proponent and submitted to the 2nd Defendant for consideration and that therefore, the 2nd Defendant is not charged with the responsibility of conducting an EIA on behalf of a project proponent.

3.16 The 2nd Defendant denied that the Plaintiffs herein were not given an opportunity to be heard on the impacts of the 1st Defendant's proposed business on the environment and stated that a public hearing is for projects specified under

the 2nd schedule of the Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations of 1997, which schedule does not include the 1st Defendant's project. The 2nd Defendant averred that it conducted regular inspections at the 1st Defendant's facility and accordingly, took appropriate action.

3.17 By the 3rd Defendant's Defence filed on 29th August, 2017, the 3rd Defendant averred, *inter alia*, that the Subject Property is designated as a residential and agricultural area and will aver at trial that he 1st Defendant changed land usage without the 3rd Defendant's authorisation.

3.18 The 3rd Defendant admitted that it issued the 1st Defendant with a Trading Licence and that the same was done with the assumption that the 1st Defendant was operating in an area designated for commercial use. It was averred that the 1st Defendant was issued with an enforcement notice ordering them to desist from using the land for commercial purposes.

3.19 By the 4th Defendant's Defence, filed on 18th November, 2020, the 4th Defendant denied that there were high levels of noise and air pollution emanating from the Subject Property. It was averred that as landlord of the 1st Defendant, he got a change of use as it relates to the 1st Defendant's business.

3.20 It was further averred that the 4th Defendant, as landlord, is not aware of any complaints of noise and air pollution and that in fact, he spoke to Doris Kapembwa, Jack Kapembwa and Theresa Chanda, who denied ever complaining about noise and air pollution as alleged. He stated that the allegations of noise and air pollution lack merit and should be dismissed.

3.21 The 4th Defendant asserted that the 1st Defendant does not carry out production at night as alleged, except when there is ZESCO load shedding. Further it was asserted that the 4th Defendant is the closest neighbour to the 1st Defendant's business premises and that despite being the nearest person, his crops and plant life are healthy and he has enjoyed a bumper harvest in the last seasons.

4 EVIDENCE AT TRIAL

4.1 At trial, **PW1** was **Chilufya Mbalashi**, the 6th Plaintiff herein, who is a legal practitioner and small scale farmer residing at Lot 5226/M Leopards Hill Road and she testified, *inter alia*, that she grows vegetables and has an orchard of fruits at her premises.

5.2 PW1 referred the Court to the site plan produced at page 1 of the Plaintiffs' Bundle of Documents, depicting where she and the other Plaintiffs live and testified that she lived at Lot 5226/M; Calvin Maka, the 1st Plaintiff, resides at Lot

2316/M; Doris Kapembwa and Jack Kapembwa, the 2nd and 3rd Plaintiffs, respectively, reside at Lot 3224/M; Teresa Chanda, the 4th Plaintiff, resides at Lot/5227/M; and Caiaphas Habasonda, the 5th Plaintiff, resides at Lot/5228/M.

5.3 PW1 testified that the 1st Defendant operates a factory and is involved in the manufacturing of blocks, pavers, pave stones, furniture, aluminium products and building materials, which activities are done on the frontage of Leopard's Hill Road.

5.4 It was her testimony that the Plaintiffs' complaint is against the industrial activities, which the 1st Defendant conducts on the Subject Property, which has resulted in the creation of nuisance of both air and noise pollution in the area where the Plaintiffs reside. The noise pollution arises from the machinery used in the 1st Defendant's activities, as well as air pollution emanating from the materials used in the production of blocks, pave stones, etc. In terms of furniture, it is the welding and fabrication in the production of those products that cause the noise.

5.5 PW1 stated that the pollution began in 2014, when she saw a portion of the Subject Property being cleared. There was no notice erected on the Subject Property, so the Plaintiffs did not know what was going on at the Subject Property. Later, there were activities of mounting

machinery and subsequently, they discovered that they were living in the middle of a factory.

5.6 Before the construction of the factory, the activities conducted in that area were agricultural and residential. The area was very quiet, peaceful and enjoyable to live in and the Plaintiffs were able to do their various farming activities peacefully, without any hindrances to the growth of livestock and crops.

5.7 PW1 referred the Court to pages 25 to 31 of the Plaintiffs' Bundle of Documents and stated that page 25 depicted the frontage of Leopard's Hill Road and that there was a bill board showing the name of the 1st Defendant and the products it produces. That there is also an office building which is marked sales office.

5.8 PW1 stated that Page 26 shows the same billboard erected by the 1st Defendant showing the types of products it deals in, being wood, steel and stone. Further, page 27 shows the earlier picture of the factory and the machines, which make blocks and pavers. She stated that page 28 shows blocks and pavers, office building, containers and dairy animals.

5.9 PW1 stated that the owner of the dairy animals is Calvin Sikazwe, the 1st Plaintiff and that there is a wire fence which separates his farm and that of the 1st Defendant's

factory. Page 29 is the frontage or entrance to the factory, which has blocks, while Page 30 shows one of the machines belonging to the 1st Defendant.

5.10 PW1 stated that the adverse effects of the activities of the 1st Defendant is that the Plaintiffs have been affected by the noise of the machines of the 1st Defendant, which has impacted them in a negative way. The noise has had a toll on the Plaintiffs and affected their normal way of life. The noise has resulted in their being stressed and the dust emanating from the operations affects the area as it is always dusty to the extent that the windows of their houses cannot be opened.

5.11 PW1 stated that the factory is situated on the eastern side of their properties and that the wind usually blows from east to west, thus the dust accumulates on the walls, the roofs and the vehicles. In terms of chores like laundry, the Plaintiffs have resorted to hanging clothes in their garages. According to PW1, the Plaintiffs' health has been impacted because of the contaminants in the air and there have been reports of asthma attacks. PW1 stated that the Plaintiffs' main concerns are the noise and air pollution.

5.12 It was PW1's testimony that the Plaintiffs approached the 2nd and 3rd Defendants, concerning the noise and air pollution. They wrote a letter of complaint to ZEMA, the 2nd Defendant, herein dated 30th September, 2015 and

copied it to the Permanent Secretary, Ministry of Lands. A copy of the said letter was produced at pages 3 to 8 of the Plaintiffs' Bundle of Documents. However, the Plaintiffs did not receive a response from ZEMA.

5.13 The Plaintiffs later approached the 3rd Defendant, Lusaka City Council and complained of the 1st Defendant's activities in an area designated for residential and agricultural purposes. The Plaintiffs wrote a letter to the 3rd Defendant in 2016 but there was no response.

5.14 PW1 stated that pages 30 to 31 of the 2nd Defendant's Bundle of Documents contains a Protection Order dated 10th October, 2018, issued by ZEMA to the 1st Defendant. However, the 1st Defendant did not comply with the order. PW1 referred the Court to page 6 to 9 of the 2nd Defendant's Bundle of Documents containing an Inspection Report from ZEMA, dated 30th March, 2018, addressed to the 1st Defendant, which included recommendations and actions that the 1st Defendant was required to take. However, nothing has improved as the 1st Defendant did not comply.

5.15 PW1 referred to the 3rd Defendant's Defence and stated that the 3rd Defendant issued a trading license to the 1st Defendant without verifying that the factory was not in a commercial area. PW1 further stated that the 3rd Defendant issued an Enforcement Notice to the 1st Defendant for it to stop operating but the 1st Defendant

has continued operating. PW1 also stated that the 1st Defendant did not follow the law when it began its operations and did not get consent from the Plaintiffs herein. She indicated that ZEMA approved the project by letter and that there was no environmental assessment done.

5.16 In cross examination by the 1st Defendant's Counsel, PW1 testified that it has been unbearable to live at her premises but conceded that she had no proof of dust and no proof of the levels of noise pollution. She further conceded that she had no medical report to show mental stress and that she had not visited the factory nor seen the taps on the premises.

5.17 PW1 testified that the animals belonging to Mr. Sikazwe, one of the Plaintiffs herein, have been affected by the pollution but conceded that she had no documents to show that the animals were dying. PW1 further conceded that she had no document before Court to show that the vegetables and other plants were being affected.

5.18 PW1 referred to four (4) Inspection Reports relating to the 1st Defendant's premises, issued by the 2nd Defendant, between 27th November, 2017 to 25th April, 2018 and stated that she was not aware of any legal action that the 2nd Defendant had taken against the 1st Defendant.

5.19 PW1 testified that the 1st Defendant operated for 24 hours, 7 days a week, when they started their operation but that since 2018, they have been operating from 06:00 hours to 18:00 hours, but conceded that she had no document stating that they were operating for 24 hours, 7 days a week.

5.20 In cross examination conducted by the 2nd Defendant's Counsel, PW1 testified that the 2nd Defendant did not act in accordance with the law in regard to approving the 1st Defendant's project. She stated that in one of the Inspection Reports from ZEMA, dated 12th December, 2017, it was indicated that the noise from the 1st Defendant's project was beyond the accepted levels. PW1 stated that the Inspection Reports from ZEMA came too late but were an attempt to protect the environment.

5.21 In cross examination conducted by the 3rd Defendant's Counsel, PW1 referred to page 1 of the Plaintiffs' Supplementary Bundle of Documents, containing a Notice by the Lusaka City Council, relating to the 1st Defendant's application for change of land use from Agriculture to Commercial, in relation to the Subject Property. She stated that the Notice on site is dated 9th October, 2017, to 10th November, 2017, but conceded that the Plaintiffs did not object within the specified period.

5.22 In cross examination conducted by the 4th Defendant, PW1 stated that she shared a boundary with the property that 4th Defendant lives on.

5.23 In Re-examination, PW1 referred to the 2nd Defendant's Inspection Reports and stated that all the reports indicated that the 1st Defendant had no control systems for air and noise pollution in their factories. The reports further concluded that there was noise and air pollution emanating from the 1st Defendant's activities and that in their final report of 2018, it was recommended that a Protection Order be issued against the 1st Defendant.

5.24 PW1 referred to page 26 of the Plaintiffs' Bundle of Documents, which is a letter from the 2nd Defendant, directing the 1st Defendant to stop conducting activities in the warehouse as these were not approved by the 2nd Defendant. She further stated that the approval from the 2nd Defendant to the 1st Defendant was made on 20th March, 2013, without submission of an Environmental Project Brief by the 1st Defendant.

5.25 The Plaintiffs did not call any other witnesses and this marked the close of the Plaintiffs' case.

5.26 The 1st Defendant's witness, **DW1** was **Erna Kurtay**, who testified, *inter alia*, that he was the Director of the 1st Defendant company. He stated that he had gone to the 2nd

Defendant and asked for an inspection to determine whether the 1st Defendant's operations were suitable or not. DW1 stated that he had also gone to the 3rd Defendant to obtain the necessary permissions.

5.27 According to DW1, when the 1st Defendant received reports from the 2nd Defendant, it took into account the terms stated in the reports. He stated that since operations began in 2013, to date, the 1st Defendant has never received a report objecting to its operations from the 2nd Defendant.

5.28 DW1 stated that there was one objection by the 2nd Defendant that was not related to the block making part of the 1st Defendant but the furniture, which after inspection, the 2nd Defendant determined that the 1st Defendant was not a manufacturer of furniture but was merely assembling furniture. DW1 stated that after the inspection, the 2nd Defendant had no objection to the 1st Defendant continuing its operations.

5.29 DW1 stated that the working hours of the 1st Defendant are from 08:00 AM to 17:00 hours, from Monday to Saturday. He further stated that in the manufacturing side of the business, the 1st Defendant manufactures blocks and pavers and has an assembly point for furniture. He also stated that the 1st Defendant took the

necessary precautions and safety, in accordance with the Laws of Zambia.

5.30 In cross examination conducted by the Plaintiffs' Counsel, DW1 stated, *inter alia*, that he signed a renewable seven-year lease agreement with the 4th Defendant, relating to the Subject Property that the 1st Defendant company was operating from.

5.31 DW1 testified that in 2021, the 1st Defendant's block making machine was not working. He stated that in 2013 when the 1st Defendant began its operations, DW1 did not ask the 1st Defendant's landlord, the 4th Defendant, if he had changed the use of premises from residential to commercial, as it was not his duty.

5.32 DW1 stated that the 1st Defendant renews its licenses with the 3rd Defendant yearly and that he had prepared an Environmental Project Brief for the 2nd and 3rd Defendants, but conceded that it was not before Court.

5.33 DW1 testified that the 1st Defendant operated within the correct hours but that during load shedding period, he had requested for permission to exceed 18:00 hours. He stated that before the letter from the 2nd Defendant was received, the 1st Defendant did not reduce fugitive dust but that it did so soon thereafter.

5.34 DW1 gave evidence that when there was wind on the premises, the dust and sound would move faster and cover a longer distance with the wind. He stated that he did not know if the noise from the machine reached his neighbours and that the perimeter fence of the 1st Defendant's operation was raised in 2015.

5.35 DW1 further stated that the 4th Defendant informed him that he had applied for a change of use in 2017 and that he showed him the approval, but that the said approval did not indicate making blocks and pavers. DW1 stated that the block making machine makes noise and produces dust. When referred to pages 30 to 31 of the 2nd Defendant's Bundle of Documents, containing a Protection Order dated 27th September, 2018, issued by the 2nd Defendant, DW1 stated that after this Order was issued, the 1st Defendant made improvements to mitigate the noise and dust.

5.36 DW1 testified that he had no proof that the neighbours were affected by the 1st Defendant's operations. He stated that he did not think that the noise and dust produced was affecting the neighbours, however, the 1st Defendant took measures to mitigate the same, as directed by the 2nd Defendant. DW1 further stated that he had never been negatively impacted and that the 1st Defendant's employees are protected from unhealthy conditions. DW1

agreed that if the 1st Defendant causes harm; it would have to pay all the people that have been harmed by the 1st Defendant's activities.

5.37 There was no cross examination from the 2nd Defendant's Counsel.

5.38 In cross examination conducted by the 3rd Defendant's Counsel, DW1 stated that they had received the ZEMA documents from the 2nd Defendant and the Lusaka City Council documents from the 3rd Defendant.

5.39 In re-examination, DW1 stated that when the 1st Defendant received the Inspection Reports from the 2nd Defendant, it took action but that the action was gradual and not immediate.

5.40 **DW2** was **Mabuku Malumo**, employed as a Legal Assistant at the licensing section of Lusaka City Council, the 3rd Defendant herein. DW2 testified, *inter alia*, that the 1st Defendant was given a manufacturing license because they met all the requirements, which are the clearance letter from ZEMA, PACRA and production of the Tax Payers' Identification Number and a manufacturing application form duly filled in.

5.41 In cross examination, by the Plaintiffs' Counsel, DW2 testified that the manufacturing license was issued to the Defendant in 2018. DW2 stated that the 3rd Defendant did

not inspect the 1st Defendant's premises but relied on the report from ZEMA, the 2nd Defendant herein. DW2 further stated that the 3rd Defendant was required to inspect the premises but did not do so. He also stated that the licensing requirement do not demand the applicant to disclose whether the premises are commercial or residential.

5.42 DW2 was referred to the Plaintiffs' Supplementary Bundle of Documents containing a Notice issued by the Town Clerk. He stated that the 3rd Defendant did not take any action when it discovered that the 1st Defendant was operating in a residential area and that if the 3rd Defendant had inspected the premises; it would have known of the 1st Defendant operating in a residential area.

5.43 DW2 attested that he did not know whether the 1st Defendant stopped operating when it was issued with an enforcement notice. He stated that there was no health report or building inspection report issued by the 3rd Defendant relating to the 1st Defendant's operations. He further stated that the 1st Defendant was issued a license to operate in 2020 and 2021 by the 3rd Defendant.

5.44 In cross examination by the 1st Defendant, DW2 testified, *inter alia*, that he did not have the Enforcement Notice before Court and that it would not be wrong for the 1st Defendant to use the license issued by the 3rd Defendant.

5.45 In cross examination conducted by the 2nd Defendant, DW2 stated that the basis on which the 3rd Defendant approved the 1st Defendant's application was the letter of no objection from ZEMA, the 2nd Defendant herein, dated March, 2013. He stated that the operations of the 1st Defendant required input from the 3rd Defendant and that the 3rd Defendant had authority to issue directives to the 1st Defendant.

5.46 There was no cross examination conducted by the 4th Defendant.

5.47 In re-examination, DW2 stated that there are certain places where the 3rd Defendant would normally inspect. He gave an example of liquor licenses which are normally issued after inspections are done. He also stated that a number of trading licenses are issued by the 3rd Defendant.

5.48 **DW3** was **Richard Besa Mulenga**, the 4th Defendant herein, who resides at the Subject Property. He testified, *inter alia*, that he was given the Subject Property for his livelihood, on which the 1st Defendant was operating on, by his late father. He stated that in 2013, he engaged an agent to assist him to apply for the change of use of land.

5.49 DW3 attested that following the death of his father, the late Smarts Mulenga, he was in need of income and thus he

engaged the 1st Defendant to start operations on the Subject Property. Sometime, in the 2017, DW3 was approached by PW1 who told him that his tenants were causing dust and noise pollution.

5.50 According to DW3, the approval for change of use of the Subject Property was issued on 17th October, 2018. In 2020, DW3 was joined to these proceedings as 4th Defendant.

5.51 In cross examination conducted by the Plaintiff, DW3 testified, *inter alia*, that he did not have a Certificate of Title to the Subject Property, which is still in the names of his late father, Smart Mulenga and his eldest sister, Hope Mulenga. When referred to pages 16 to 24 of the 1st Defendant's Bundle of Documents, containing a 7-year lease agreement between DW3, as landlord and the 1st Defendant, DW3 conceded that he did not register the said lease at Ministry of Lands. He stated that the Certificate of Title in his name is still being processed, but conceded that he did not have any document to show that his late father gave him the Subject Property.

5.52 DW3 attested that as far as he was concerned the block making machine does not make noise and does not produce dust. He stated that the area where the Subject Property is located is designated for residential and agricultural use. He conceded that the approval for

change of use is in the names of his late father, Smarts Mulenga, despite being issued after his death. DW3 further stated that his father was dead during the period that the 3rd Defendant issued him with change of use and that he did not give false information but that the process of change of use took long, in which period his father died. DW3 also conceded that there was nothing mentioned about block making and pavers in the change of use.

5.53 DW3 affirmed that he did not want to withdraw the Notice from the 3rd Defendant. He stated that he did not believe the Plaintiffs' concerns as he does not experience noise and dust, however, when the Plaintiffs complained of the noise from the machinery, he wrote a letter to the 1st Defendant.

5.54 In cross examination conducted by the 1st Defendant's Counsel, DW3 testified, *inter alia*, that it was his obligation to obtain change of land use for the Subject Property. He stated that he did not obtain change of use of land until 2019. He also stated that the noise and dust is minimal and that he is the closest to the factory.

5.55 In cross examination conducted by the 2nd Defendant's Counsel, DW3 testified that the application for change of use of land was made to the Town Clerk at Lusaka City Council. When referred to a letter dated July, 2021 indicating solutions that came from ZEMA, the 2nd

Defendant herein, following their interview of the 1st Defendant's neighbours, DW3 stated that the 1st Defendant put up the measures indicated in the said letter. DW3 further stated that from his neighbours, there were some that said they were affected by the noise and some that were not. He also stated that he had not received any letter from the Plaintiffs indicating that if the 1st Defendant implemented the proposed changes, they would have no problem.

5.56 In re-examination, DW3 attested that the Plaintiffs have not availed any medical reports for health problems. He also attested that being the closest to the 1st Defendant's factory on the Subject Property, he would have experienced health problems.

5.57 **DW4** was **Maxwell Mwewa Nkoya**, the Director Planning Information and Research in the employ of ZEMA, the 2nd Defendant herein. DW4 testified, *inter alia*, that he was employed by the 2nd Defendant in 2004 as an Environmental Inspector and rose through the ranks of Senior Inspector, Principal Inspector and Manager Inspectorate. In 2015 to 2016, he served as Acting Director General of ZEMA.

5.58 DW4 testified that he remembers receiving complaints of noise and air pollution and met the representative of the community in which the 1st Defendant operated in. When

referred to page 26 of the 1st Defendant's Bundle of Documents, containing a No Objection letter issued by the 2nd Defendant in 2013, DW4 gave an account of what amount to a No Objection letter and stated that it is not a permit nor a decision letter but merely informs the applicant that they may proceed with their project in harmony with the laws of Zambia. DW4 confirmed that based on the information contained in the letter of 20th March, 2013, the procedure was followed by the 1st Defendant of a No Objection.

5.59 DW4 went on to give an account on the process of an Environmental Impact Assessment ("EIA"), as laid out in Regulation Number 28 of 1997 and stated that with regards the premises on which the 1st Defendant was operating, ZEMA did not issue a decision letter because the project was found not to be specifically listed in the first or second schedule of the EIA Regulations and as such, no decision letter was issued. DW4 stated that while ZEMA did not require an EIA for the 1st Defendant's project, the No Objection did not absolve the 1st Defendant from complying with other laws and to conduct their business in line with the requirements of the law.

5.60 DW4 testified that following the complaints by the Plaintiffs through their representative, Mrs. Mbalashi (PW1), the 2nd Defendant instituted inspections of the

source of the complaint. He referred to a letter authored by the 2nd Defendant in August, 2015, containing a directive to the 1st Defendant to stop the environmental pollution in the form of noise and dust.

5.61 DW4 attested that the 2nd Defendant received a letter from the community, in which the 1st Defendant operates, demanding for the 1st Defendant to be relocated. He stated that he had a meeting with the representative of the community, PW1 and provided guidance. However, the response to the letter was not reduced into writing but was merely verbal. Following this meeting, the 2nd Defendant did not receive any complaints until around 2017, when the 2nd Defendant received Court summons.

5.62 DW4 affirmed that block making was not listed in the first or second schedule and that management at the time determined that the 1st Defendant's project did not require an EIA. He stated that the 2nd Defendant did not conduct a public hearing since the project was determined not to require an EIA. He further stated that the 2nd Defendant heard the complaint based on its mandate, conducted inspections and issued directives within the environmental jurisdiction.

5.63 In cross examination conducted by the Plaintiff's Counsel, DW4 testified, *inter alia*, that the 1st Defendant was directed to operate within 06:00 hours to 18:00 hours and

to minimize noise by enclosing the block making machine and to reduce fugitive dust. DW4 stated that if the Subject Property was in an industrial area, the 2nd Defendant would not have given the restriction on time.

5.64 When referred to an Inspection Report, shown at pages 1 to 5 of the 2nd Defendant's Bundle of Document, which was a follow up to the complaint regarding noise and air pollution and particularly to item 7.0, DW4 testified that the 2nd Defendant should have issued the Protection Order as recommended in the report for the purpose of enforcing the provisions of the Environmental Management Act, No.12 of 2011, to protect both the environment and human health from adverse effects associated with the noise and dust pollution. DW4 stated that in the Inspection Report there was no direct mention of grass and trees, but conceded that the environment includes grass and trees and that any competent inspector would look at that.

5.65 DW4 attested that the Inspection by the 2nd Defendant was done over a period of 6 months and that a Protection Order was issued on 27th September, 2018 and served on the 1st Defendant. According to DW4, the Protection Order intended to protect human health and the environment, was issued as the 1st Defendant did not comply with the

directives given earlier. DW4 stated that the noise and dust pollution became too much.

5.66 DW4 stated that the 1st Defendant did not present a Project Brief to the 2nd Defendant and that the letter sent to the 2nd Defendant by the 1st Defendant, to which the 2nd Defendant responded with a 'No Objection' was not before Court.

5.67 In cross examination conducted by the 1st Defendant, DW4 testified that the 2nd Defendant does not have noise limit regulations but has air pollutant limits among others. He stated that the Inspection Reports issued by the 2nd Defendant do not give quantitative levels of dust but refers to qualitative fugitive dust. Regarding noise, it was found that in some intervals, the noise exceeded the International Finance Cooperation ("IFC") Standard.

5.68 In re-examination, DW4 reiterated his testimony on the 2nd Defendant fulfilling its mandate and that it issued a letter dated 24th August, 2015, which refers to findings of non-compliance to operating hours and fugitive dust.

5.69 **DW5** was **Alick Mwansa Makasa**, a Senior Inspector employed by the 2nd Defendant. He testified, *inter alia*, that he took part in the inspection of the 1st Defendant's premises, being the person in charge of that area at the

time. He stated that the inspection was occasioned by the complaints of the 1st Defendant's neighbours.

5.70 DW5 went on to describe how the Inspection was conducted and stated that the two tables on page 24 of the 2nd Defendant's Bundle of Documents were the noise measurements taken from the block making machine for a duration of 20 minutes and the result was 70 decibels. The 2nd measurement was done at Ms. Hope Mulenga's house, which was the nearest to the block making machine and it measured at 52 decibels. He stated that the second table shows the International Standards or guidelines for noise measurement referred to as IFC.

5.71 DW5 stated that the limit in day time is 55 decibels while for night time it was 45 decibels. He further stated that for receptors that are in an industrial and commercial area, the limit was 70 decibels during both day and night time. DW5 also stated that for Ms. Hope Mulenga's house, the noise levels were within limit.

5.72 DW5 attested that at first, the 2nd Defendant did not stop the 1st Defendant's activities as they were within limit and in terms of dust, the 1st Defendant had sprinkled the surroundings with water and therefore, there was no dust. DW5 further attested that there were different noise readings recorded in the neighbourhood ranging from 73.6

decibels near the block making area to 45 decibels recorded at Mr. Habasonda's premises.

5.73 DW5 affirmed that he recalled that PW1 refused the 2nd Defendant to take measurements at her premises in the absence of her engineers and that the 2nd Defendant did not receive an invitation from PW1 after the incident.

5.74 DW5 further affirmed that at the houses of Ms. Hope Mulenga and Mr. Sikazwe, the noise levels were above the set limits and guidelines. He stated that at Mrs. Chanda's and Mr. Habasonda's residences, the noise levels were within the limits. Based on the readings, the 2nd Defendant did not shut down the 1st Defendant's operations. DW5 further stated that there was noise coming from the block making machine but based on the readings and interviews with the neighbouring community, the noise was not affecting them that much.

5.75 DW5 testified that he participated in the inspection, which was done on 30th March, 2018, following the complaint of dust and noise emanating from the 1st Defendant company. In the previous report, the 2nd Defendant had given the 1st Defendant recommendations to control noise and dust.

5.76 Following several recommendations that the 2nd Defendant gave the 1st Defendant with little or no action being taken

by the 1st Defendant, the 2nd Defendant issued a Protection Order with a condition for the 1st Defendant to cease operations. DW5 stated that since the Protection Order was issued, there have been no complaints as the 1st Defendant complied with the Protection Order.

5.77 In cross examination conducted by the 1st Defendant's Counsel, DW5 testified that when he and the other inspectors went for the second Inspection, they took measurements for noise but did not take measurements during the third and fourth Inspections. He stated that in the Zambian Laws there are no laws regarding the limit of noise. Further, he stated that the 2nd Defendant has never recommended that the 1st Defendant be shut down, as it was operating legally in so far as the 2nd Defendant is concerned.

5.78 In cross examination conducted by the 4th Defendant, DW5 testified that it could have been an oversight that no reading was conducted on the 4th Defendant's house, which is the nearest to the 1st Defendant.

5.79 In cross examination by the Plaintiff's Counsel, DW5 testified, *inter alia*, that the first Inspection Report was issued on 27th November, 2017, after this action had started on 27th July, 2017. He conceded that all the Inspection Reports were issued in the rain season.

5.80 DW5 attested that ideally, the 2nd Defendant should have gone back to the 1st Defendant's premises to check if the 1st Defendant had complied with the Protection Order. Regarding the measurement of noise, DW5 reiterated that the 2nd Defendant relied on the international standards and that the 2nd Defendant did not have interaction with the Plaintiffs on whether the equipment they had was working or not, despite being there more than three times.

5.81 DW5 stated that the enforcement of environmental issues is a process and that the 2nd Defendant does not act there and then, but gives guidelines to the client and thereafter, 2nd Defendant continues following up on the guidelines.

5.82 DW5 stated that the 2nd Defendant did not have a machine to measure dust levels before 2020. He further stated that the noise affected the neighbours but not the dust. He also stated that Ms. Hope Mulenga's house was the nearest to the source, but she never complained about the noise. When referred to page 26 of the 2nd Defendant's Bundle of Documents, DW5 stated that the word "continuously abate" does not mean that there was continuous noise and dust coming from there. He further stated that there was noise when the machine was on but not dust.

5.83 In re-examination, DW5 stated that showing the equipment that the 2nd Defendant is using is not mandatory and that the use of the IFC guidelines was to

help address the complaint raised by the 1st Defendant's neighbouring community. He stated that when they went on site, they could not visibly see dust within the premises because the 1st Defendant had been suppressing it through sprinkling of water. He also stated that the Protection Order was issued as a precautionary measure and to compel the 1st Defendant to put up measures to prevent dust and noise.

5.84 This marked the close of the 2nd Defendant's case.

5 SUBMISSIONS

5.1 The parties were given a time frame within which to file written submissions, but only the Plaintiffs and 2nd Defendant filed herein their submissions.

5.2 By the Plaintiffs' submissions filed on 14th December, 2022, the Plaintiffs' Counsel submitted, *inter alia*, that the evidence of the 3rd Defendant shows that the 1st Defendant was and is conducting its business without any approval or permit of change of use of land from the 3rd Defendant, the planning authority. Counsel contends that it is not true that the 4th Defendant obtained an approval or permit for change of use in October, 2018, for manufacturing and supplying blocks, pavers and tiles from the 3rd Defendant as the 4th Defendant did not produce the said approval or permit before the Court.

5.3 It was argued that due to lack of an approval or permit for change of land use, the manufacturing and supplying of pavers, blocks and tiles being done by the 1st Defendant and permitted by the 4th Defendant is wrongful and illegal and as such, the 1st Defendant should be ordered to stop manufacturing pavers, blocks and tiles at the Subject Property. It was further argued that if there was any trading licence issued by any planning authority, in this case Lusaka City Council, should be revoked and/or cancelled due to lack of approval of change of land use as pleaded by the Lusaka City Council in paragraphs 5, 6 and 8 of its Defence.

5.4 On the issue of the lack of a valid trading license, Counsel submitted that the 1st Defendant only produced one license for 9th September, 2016 to 30th December, 2017, being Manufacturers Business, but that it did not produce licenses for 2018 to 2022. Further, it was submitted that the 3rd Defendant's witness, DW2, testified that the 3rd Defendant issued an enforcement order for the 1st Defendant to desist from using the land for commercial purposes.

5.5 Additionally, it was submitted that the four inspection reports produced by the 2nd Defendant indicated that the 1st Defendant had no trading license during the period of inspections. It was argued that as the 1st Defendant is still

operating on an area without a change of use, the premises on which it is operating is still agricultural and/or residential. Counsel contends that the operations of the 1st Defendant on the Subject Property are wrongful and illegal and therefore, the 1st Defendant should cease to occupy and carry on its current operations.

5.6 Regarding the issue of the lease agreement between the 1st and 4th Defendant, it was contended that the 1st Defendant did not adhere to clause 2 (g) of the Lease Agreement between the 1st Defendant and 4th Defendant of not permitting or suffering to be done in or upon the premises or any part thereof any act or thing which may be or may become a nuisance, annoyance or damage or inconvenience to the landlord or other tenants or neighbouring owners or occupiers. Counsel submits that the failure to comply with clause 2 (g) of the Lease Agreement caused nuisance, annoyance and inconvenience to the Plaintiffs hence the Plaintiffs complaining to the landlord (4th Defendant), ZEMA and Lusaka City Council, for the 1st Defendant to re-locate to an industrial area.

5.7 Counsel alleged that there was lack of seriousness by the 2nd and 3rd Defendants and submitted, *inter alia*, that from the evidence of the witnesses, the 2nd Defendant ignored and/or neglected its statutory duty by failing to hold a

public meeting and failing to request for a project brief from the 1st Defendant, before giving the 1st Defendant a "No Objection letter" to its project. It was further submitted that the 2nd Defendant acted late in issuing a Protection Order in September, 2018, when the Plaintiffs' complaint was filed in September, 2015.

5.8 Furthermore, it was submitted that the 2nd Defendant had deprived the Plaintiffs their statutory right to a clean, safe and healthy environment, as stipulated under ***Section 4*** of ***The Environment Management Act***[1], by failing to do its duty thereby allowing the 1st Defendant to do what it has done to the Plaintiffs. It was also submitted that the 1st Defendant has already caused a nuisance to the Plaintiffs.

5.9 On allegations of lack of seriousness by the 3rd Defendant, Counsel submitted, *inter alia*, that its incompetence lies in the fact that it issued a manufacturing license for the year 2017, to the 1st Defendant, when there no permit or approval of change of land use. It was further submitted that the 3rd Defendant allowed the 1st Defendant to trade from 2013 to 2016 and 2018 to date, without a trading license, in an agricultural and residential area. Additionally, it was submitted that the 3rd Defendant issued a trading or manufacturing license without

inspecting the 1st Defendant's premises to see in which zone it was operating.

5.10 In fortifying the allegations of nuisance, Counsel cited the case of ***Read v Lyones and Company Limited***[1] for the following: -

> ***"That nuisance is unlawful interference with a person's use or enjoyment of land or some right over in connection with it."***

5.11 Counsel set out to describe the alleged acts of nuisance as stated at trial and in their pleadings, that the Plaintiffs suffered at the hands of the Defendants and submitted that the Defendants have committed a nuisance which has resulted into emotional, mental stress and inconvenience to the Plaintiffs.

5.12 Counsel argued that the balance of rights between the rights of the Plaintiffs and that of the 1st and 4th Defendants on the other side, can only be maintained where there are lawful rights and that in this case, the 1st and 4th Defendants have no lawful rights to run a block, paver and tile manufacturing plant in an agricultural and residential area.

5.13 Counsel submitted that the 2nd Defendant's inspection reports done in November, December 2017 and March and April, 2018, show that the 1st Defendant's factory produces noise, which has affected the Plaintiffs, although the

measurement was done by using IFC standard, which is not an official standard to use in Zambia. Counsel contends that the effect of the noise on the Plaintiffs can be seen by the 2nd Defendant issuing a Protection Order against the 1st Defendant in order to protect humans and vegetation.

5.14 Counsel submitted that this Court awards interest to the Plaintiffs on the sum found due on damages for nuisance, pollution, inconvenience, emotional and mental stress. Counsel cited ***Section 4*** of ***The Law Reform (Miscellaneous Provisions) Act***[2], in support of the foregoing submission.

5.15 Finally, Counsel contended that the Plaintiffs have successful and justifiable claims against the Defendants and prayed for costs to be awarded to the Plaintiffs, which he submits that they are entitled to.

5.16 By the 2nd Defendant's final submissions filed on 17th January, 2023, the 2nd Defendant's Counsel set out to describe its statutory mandate and cited ***Section 9*** and ***Section 109*** of ***The Environmental Management Act***[1] in support of its submission that the Plaintiffs have failed to demonstrate the failure by the 2nd Defendant to undertake its mandate under ***The Environmental Management Act***[1]. Counsel invited the Court to the case of ***Wilson***

Masauso Zulu v Avondale Housing Project Limited[2] in support of the foregoing submission.

5.17 It was further submitted that the Plaintiffs have misconstrued the mandate of the 2nd Defendant and by so doing, the Plaintiffs have erroneously made a claim against the 2nd Defendant in this lawsuit. Based on the foregoing, Counsel prayed that the Plaintiffs' claims against the 2nd Defendant be dismissed with costs to the 2nd Defendant.

6 CONSIDERATION AND DECISION OF THE COURT

6.1 I have carefully considered the pleadings herein and evidence adduced before this Court. I have also considered the submissions and authorities cited by Counsel for the Plaintiffs and 2nd Defendant, for which I am grateful.

6.2 The Plaintiffs herein seek an Order for damages for nuisance, emotional and mental stress; an order of mandatory injunction against the 1st Defendant; and an order that the license or permit issued to the 1st Defendant, to conduct its business at the Subject Property, be revoked and cancelled.

6.3 It is settled law that a person who commences a civil action must prove his case against the Defendant in order to succeed in his claim. To that effect, the learned authors of ***Phipson on Evidence***[1], in ***paragraph 6-06***, at ***page***

151, state the following regarding the burden of proof in civil cases: -

> ***"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. If, when the evidence is adduced by all parties, the party who has the burden has not discharged it, the decision must be against him."***

6.4 Additionally, the standard to which a Plaintiff should prove his case was discussed by the Supreme Court in the case of ***Zambia Railways Limited v Pauline S Mundia, Brian Sialumba***[3] as follows: -

> ***"The standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability as opposed to beyond all reasonable doubt in a criminal case. The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable..."***

6.5 It is not in dispute that the 1st Defendant herein conducts the business of manufacturing pavers, blocks, tiles, assembling of furniture and selling of aluminium products at the Subject Property. It is also not in dispute that the Plaintiffs herein live in close proximity to the Subject Property. Further, it is not in dispute that when the 1st Defendant commenced its activities in 2015, it was

conducting and operating its business of manufacturing pavers, blocks, tiles, furniture and aluminium at Subject Property, an area designated for residential and agricultural purposes. What is in dispute and needs to be determined by this Court are the following: -

1. Whether 1st Defendant's business activities at the Subject Property are and have continued to cause noise and air pollution thereby causing a nuisance to the Plaintiffs; and

2. Whether the licence or permit issued to the 1st Defendant to operate at the Subject Property should be revoked.

6.6 I will address the legal issues in the manner that I have identified them above. Before doing so, I will first lay out the legal framework that governs the environment in Zambia.

6.7 ***The Constitution of Zambia***[3] establishes principles to guide the development and management of the environment and natural resources, in ***Article 255***. ***Article 255 (c)*** of ***The Constitution of Zambia***[3] provides that: -

> ***"The management and development of Zambia's environment and natural resources shall be governed by the following principles:***

(c) where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation; ..."

6.8 ***Section 2*** of ***The Environmental Management Act***[1] provides definitions of the following: -

""pollution" means the presence in the environment of one or more contaminants of pollutants in such quantities and such conditions as may cause discomfort to, or endanger the health, safety and welfare of human beings, or which may cause injury or damage to plant or animal life of property, or which may interfere unreasonably with the normal enjoyment of life, the use of property or conduct of business;

"polluter" means a person who contributes to, or creates a condition of, pollution;

"polluter pays principle" means the principle that the person or institution responsible for pollution or any other damage to the environment shall bear the cost of restoration and clean-up of the affected area to its natural or acceptable state;

"precautionary principle" means the principle that, lack of scientific certainty should not be used as a reason to postpone measures to prevent environmental degradation, or possible environmental degradation, where there is a threat of serious or irreversible environmental damage, because of the threat; ..."

6.9 ***Section 3*** of ***The Environmental Management Act***[1] provides that: -

> ***"Subject to Constitution, where there is any inconsistency between the provisions of Act and the provisions of any other written law relating to environmental protection and management, which is not a specific subjected to law on a particular environmental element, the provisions of this Act shall prevail to the extent of the inconsistency."***

6.10 Further, ***The Environmental Management Act***[1] provides for a right to a clean environment in ***Section 4 (1)*** as follows: -

> ***"Subject to the Constitution, every person living in Zambia has the right to a clean, safe and healthy environment."***

6.11 ***The Environmental Management Act***[1] also has a provision under ***Section 5***, on the duty to protect the environment, as follows: -

> ***"Every person has a duty to safeguard and enhance the environment and to inform the Agency of any activity or phenomenon that affects or may affect the environment."***

6.12 In Zambia, the essence of EIAs is rooted in the broader goals of ***The Environmental Management Act***[1], which aims to facilitate integrated environmental management, safeguard the natural environment, and encourage

sustainable natural resource management, as per the preamble to this Act. According to the preamble of this Act, EIAs serve as tools for preventing and managing pollution and environmental degradation. They enable public participation, provide access to environmental information, and set baselines for monitoring auditing. EIAs practically enforce precautionary and prevention principles of environmental law, ensuring public safety and the right to a safe, clean, and healthy environment from development projects.

6.13 According to ***Section 4*** of ***The Environmental Management Act***[1], practically, EIAs enforce and implement the precautionary and prevention principles of environmental law. These principles, when effectively upheld, ensure public safety from adverse impacts of development projects and uphold the right to a safe, clean, and healthy environment.

6.14 ***Section 6 (b)*** of ***The Environmental Management Act***[1] provides as follows: -

> ***"The following principles shall be applied in achieving the purpose of this Act:***
>
> ***(b) adverse effects shall be prevented and minimized through long-term integrated planning and the co-ordination, integration and co-operation of efforts,***

which consider the entire environment as a whole entity; ..."

6.15 ***The Environmental Management Act***[1] creates the Zambia Environmental Management Agency ("ZEMA"), the 2nd Defendant herein. According to ***Section 9 (1)*** of ***The Environmental Management Act***[1], the 2nd Defendant is tasked with undertaking *"all necessary actions to ensure the sustainable management of natural resources, protection of the environment, and prevention and control of pollution"*.

6.16 EIAs in Zambia are provided for in ***Section 29*** of ***The Environmental Management Act***[1] as follows: -

> ***"(1) A person shall not undertake any project that may have an effect on the environment without the written approval of the Agency, and except in accordance with any conditions imposed in that approval.***
>
> ***(2) A person, appropriate authority or other public body shall not grant a permit or licence for the execution of a project referred to in subsection (1) unless an approval for the project is granted by the Agency, or the grant of the permit or licence is made conditional upon such approval being granted.***
>
> ***(3) Subject to this Act, the Agency may delegate to an appropriate authority any of its functions under***

this section and may impose conditions with respect to the exercise of the delegated functions.

Provided that nothing in this subsection shall be construed so as to absolve the Agency from its responsibility for any act done by such a body or person in the exercise of the delegated authority.

(4) The Agency shall not grant an approval in respect of a project if the Agency considers that the implementation of the project would bring about adverse effects or that the mitigation measures may be inadequate to satisfactorily mitigate the adverse effects of the proposed project.

(5) A person aggrieved with the granting or refusal of an approval under this section may, within fourteen days of that decision, lodge an appeal in accordance with Part X."

6.17 ***Section 30*** of ***The Environmental Management Act***[1], empowers the Minister to make regulations for the effective administration of Strategic Environmental Assessments ("SEA") and EIAs. These regulations are meant to categorise projects which are considered to have an effect on the environment, and those which are required mandatorily to conduct an EIA. This section of the law aims to reduce subjectivity in approvals by establishing guiding indicators which EIAs must enforce.

6.18 The EIA Regulations are contained in ***The Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations***[4]. Therein, a project is described in ***Regulation 2*** as follows: -

> ***""project" means any plan, operation, undertaking, development, change in the use of land, or extensions and other alterations to any of the above and which cannot be implemented without an authorisation licence, permit or permission from an authorising agency or without approval from a line ministry before entry into a project implementation programme; ..."***

6.19 Having set out the law governing the environment in Zambia, I will now consider the first issue of whether 1st Defendant's business activities at the Subject Property are and have continued to cause noise and air pollution thereby causing a nuisance to the Plaintiffs herein. The typical recourse for individuals who believe that their personal rights have been unduly disrupted by human activities they view as environmentally detrimental, examples being noise, smoke, dust, vibration, odours, and discharges causing water pollution, is to seek a legal remedy through either a private or public nuisance action, contingent on the specific situation. In the case of ***Bamford v Turnley***[4], Lord Pollock noted that the concept of 'nuisance' lacks a universally applicable, objective legal definition. However, a suggestive understanding can be

gleaned from the learned authors of ***Clerk and Lindsell on Torts***[2], who describe 'nuisance' in the following manner: -

> ***"Nuisance is an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, or (b) his ownership or occupation of land or some easement, profit or other right used or enjoyed in connection with land, when it is a private nuisance."***

6.20 The learned authors go on to state as follows: -

> ***"A private nuisance may be and usually is caused by a person doing, on his own land, something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his act are not confined to his own land but extend to his neighbour by:***
>
> ***1) causing an encroachment on his neighbour's land, when it closely resembles trespass;***
>
> ***2) causing physical damage to his neighbour's land or building or works or vegetation upon it; or***
>
> ***3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land."***

6.21 Additionally, in the case of ***Sedleigh-Denfield v O'Callaghan***[5], Lord Wright held as follows on how to determine the degree of interference with comfort or convenience that constitutes a nuisance: -

"Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself but by reference to all the circumstances of the particular case, including for example, the time of the commission of the act complained of; the place of its commission; the manner of committing it, that is whether it is done wantonly or in the reasonable exercise of rights; and the effect of its commission, that is, whether those effects are transitory or permanent, occasional or continuous; so that the question of nuisance or no nuisance is one of fact."

6.22 Having set out the definition of nuisance, the scope of consideration and the degree of interference one has to consider to determine that the tort of nuisance has been committed, I shall now proceed to consider whether the Plaintiffs herein have proved their allegations of nuisance against the 1st Defendant entitling them to damages. The burden of proof lies on the Plaintiffs to demonstrate that the environment harm they experienced was a result of the Defendants' actions or negligence. This applies whether the harm takes the form of direct physical harm to their property or disruption of their peaceful use and enjoyment of the property, resulting in personal discomfort.

6.23 At trial, in support of the allegations of nuisance, PW1 alleged that the 1st Defendant herein runs a factory at the Subject Property, which is located in an area designated for residential and agricultural use. She testified that the

1st Defendant is involved in the manufacturing of blocks, pave stones, aluminium products and aggregate building materials. PW1 stated that as a result of the activities on the Subject Property, she and the other Plaintiffs, who share a boundary or live in close proximity with the Subject Property, have been negatively affected by the noise and dust emanating from the operation of the 1st Defendant.

6.24 PW1 further stated that due to dust from the activities carried on the Subject Property by the 1st Defendant, the Plaintiffs have been unable to open the windows to their houses; the paint on their houses has accumulated dust; their motor vehicles accumulate dust; and that they are unable to hang their laundry outside. She emphasized that the main issue is the noise and dust pollution emanating from the 1st Defendant's operations.

6.25 In proving that the noise and dust pollution emanated from the 1st Defendant's operations, the Plaintiffs produced their letters of complaint to the 2nd and 3rd Defendants herein, wherein they indicate that they have been subjected to noise and dust pollution for 24 hours on a daily basis due to the industrial activities being conducted by the 1st Defendant on the Subject Property.

6.26 On my perusal of the Plaintiffs' Supplementary Bundle of Documents, I note that the Plaintiffs have produced a site

plan depicting the location of the Plaintiffs' plots in relation to the Subject Property, on which the 1st Defendant conducts its activities. This site plan clearly indicates that the Plaintiffs herein share a boundary and are within close proximity to the Subject Property. The site plan indicates that the 1st, 4th, 5th and 6th Plaintiffs share a boundary with the Subject Property, whilst the 2nd and 3rd Plaintiffs are the farthest away from the Subject Property, but share a boundary with the 5th and 6th Plaintiffs herein.

6.27 I note further, that the Plaintiffs have produced images depicting the block making machinery and heaps of blocks. Additionally, the Plaintiffs have produced copies of images depicting the 1st Defendant's signage that shows that the 1st Defendant produces kitchen units, wardrobes and coffees tables in its furniture section. Furthermore, the signage indicates that in its steel section, the 1st Defendant produces doors, windows, gates, cabinets, burglar bars and aluminium railings and that under its stone work section, the 1st Defendant produces blocks, paving blocks and curb stones.

6.28 Moreover, in response to the Plaintiffs' complaints of noise and dust pollution, the 2nd Defendant herein, produced four inspection reports relating to the 1st Defendant's activities on the Subject Property. Regarding the allegation of noise pollution, the report dated 12th

December, 2018, indicates that the noise levels at the 1st Plaintiff's premises were at 58.5 decibels, which was higher than the 55 decibels maximum limit recommended during the day time. However, the report indicates that the noise levels at the 4th and 5th Plaintiffs' premises, were below the maximum limit recommended during the day.

6.29 I find as a fact that all the said inspection reports indicate that there was noise and dust emanating from the block making activities of the 1st Defendant but that it did not warrant disturbance of the neighbourhood. Further, the reports recommended for the 1st Defendant to abate the noise and air pollution as much as possible, which is an indication that there was a need to keep the noise levels and dust emissions in constant check.

6.30 I also find that the 2nd Defendant issued a Protection Order, dated 27th September, 2018, against the 1st Defendant, which instructed the 1st Defendant to cease its operations until it had complied with the directive to stop generating dust and noise, and to enclose its block making machine to mitigate noise and dust. This, in my view and as stated by PW5 in his testimony, is an indication that the 1st Defendant did not do much to abate the noise and dust pollution emanating from its operations following the various inspections and recommendations by the 2nd Defendant.

6.31 In the case of ***National Hotels Development Corporation (T/A Fairview Hotel) v Ebrahim Motala***[6], it was held as follows regarding noise nuisance: -

> ***"We are not too sure whether noise nuisance can be reduced to decibels so that only a specific level or quantity of noise measured in decibels should be actionable. This type of civil wrong has long been recognized to raise questions of fact, such as whether noise disturbance which deprives a neighbour of rest or sleep can or cannot inconvenience any other person of ordinary firmness and sensibility."***

6.32 Based on my findings of fact above, the authorities cited and taking into consideration all the circumstances of the case, I find that the Plaintiffs herein have sufficiently demonstrated that the business activities of the 1st Defendant have caused noise and dust emissions on a continuous basis in an area that is designated for residential and agricultural activities.

6.33 On the strength of the case of ***National Hotels Development Corporation (T/A Fairview Hotel) v Ebrahim Motala***[6] cited above, I am further of the view that the fact that the 2nd Defendant's report indicates that the noise emanating from the 1st Defendant's activities did not disturb the neighbourhood is not supported by the Plaintiffs' continuous complaints of noise and dust and the Protection Order issued by the 2nd Defendant itself. I,

therefore, find that it has been sufficiently proved on a balance of probabilities that the activities of the 1st Defendant produced noise and dust, which amounted to an unlawful interference with the Plaintiffs' use or enjoyment of land and therefore, an actionable nuisance, entitling the Plaintiffs herein to damages. The said damages shall be assessed and determined by the Deputy Registrar and the sum so determined shall carry interest at average short term bank deposit rate from the date of the Writ to the date of this Judgment and thereafter, interest will accrue at current Bank of Zambia lending rate up to the date of payment.

6.34 I note that the Plaintiffs herein have made a claim for damages for inconvenience, emotional and mental stress. In the case of ***J.Z. Car Hire Limited v Malvin Chala and Another***[7], the Supreme Court held as follows: -

> ***"It for the party claiming any damages to prove the damages."***

6.35 Additionally, in the case of the ***Attorney General v Mpundu***[8], the Defendant was awarded damages for mental distress and inconvenience in an action for breach of contract. This case was a one of unlawful suspension and the Plaintiff was later reinstated. Similarly, in the case of ***Kafue District Council v Chipulu***[9], the Supreme Court held as follows: -

"The evidence in the instant case clearly established that the respondent was extremely inconvenienced and mentally tortured by the Appellant Council's inconsiderate treatment when they offered him employment and allowed him to travel to Kafue with his family but subsequently refused to employ him. We are satisfied on the evidence on record that this is a proper case for an award for inconvenience and mental torture."

6.36 On the strength of the foregoing authorities and my analysis of the evidence on record in support of the claim for damages for inconvenience, emotional and mental torture, I find that at trial PW1 referred to the fact that the Plaintiffs have not been able to open the windows to their houses due to the dust, their vehicles are constantly covered in dust and that they have had to bear with the noise and dust emanating from the activities of the 1st Defendant. While the evidence from the Plaintiffs' side has established that they were inconvenienced by the fact that they were unable to open the windows to their houses due to the dust, their vehicles were constantly covered in dust, which dust also ruined their washed clothes that were hung on the line, the Plaintiffs however, did not produce any evidence in support of the claims for emotional and mental torture. I am therefore only satisfied that the Plaintiffs herein suffered the said inconvenience, but I am not satisfied that they suffered emotional and mental

stress as a consequence of the nuisance. Consequently, the Plaintiffs have only proved their claim for inconvenience. In the case of ***Rylands v Fletcher***[10], it was established as follows: -

> ***"We think that the true rule of law is, that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the Plaintiff's default; or perhaps, that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he***

does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

6.37 It is clear from the above cited case that the prerequisites of a strict liability claim are that the Defendant made a "non-natural" of "special" use of his land; that the Defendant brought onto his land something that was likely to do mischief if it escaped; the substance in question escaped; and the Plaintiff's property was damaged because of the escape. The term "non-natural" has evolved over time to mean more than bringing something not naturally on the land but instead connote out of the ordinary use of land. See the case of ***Rickards v Lothium***[11], which was cited with approval in the case of ***Smith v Inco Limited***[12], where Lord Moulton, speaking on the principle in the ***Rylands v Fletcher***[10], stated that the thing brought onto the Defendant's land should be something "not naturally there". In the case of ***Transco v Stockport MBC***[13], the English Court also adopted a similar view and held on the test of what amounts to non-natural use of land. The Supreme Court of India has in addition introduced the concept of absolute liability in addition to strict liability

where the Defendant is engaged in industrial activities resulting in pollution. In the case of ***M C Mehta v Union of India***[14], cited with approval in the case of ***Indian Council for Enviro-Legal Action & Others v Union of India & Others***[15], the Court stated that the test upon which such liability is to be imposed is based on the nature of the activity. Accordingly, where an activity is inherently dangerous or hazardous, then absolute liability for the resulting damage attaches on the person engaged in the activity.

6.38 In my view, the 1st Defendant's use of the 4th Defendant's land can be deemed to be non-natural. I say so, because the 1st Defendant is carrying out industrial activities on land designated for agricultural and residential use. Even though the 1st Defendant has a licence issued by the 3rd Defendant to carry out such activities, it is not, in my view, an automatic defence to strict liability under the ***Rylands v Fletcher***[10] rule. There has been no change of use of land from agricultural/residential to industrial and the land is still situated in a neighbourhood that is still largely agricultural and residential. I therefore find that the Plaintiffs are entitled to damages for inconvenience. The said damages shall be assessed and determined by the Deputy Registrar and the sum so determined shall carry interest at average short term bank deposit rate from the date of the Writ to the date of this Judgment and

thereafter, interest will accrue at current Bank of Zambia lending rate up to the date of payment.

6.39 Having considered the issue of inconvenience, I now turn to the claim of emotional and mental stress. I find that the Plaintiffs have failed to prove on a balance of probability that they have been emotionally and mentally stressed by the noise and dust emanating from the 1st Defendant's operations, as no such proof was placed before this Court to support their assertion. The only evidence relevant, here and of material particular, was that the dust emanating from the 1st Defendant's operations affected the Plaintiffs' motor vehicles, windows and clothing hanged outside their respective properties. No medical evidence was laid before the Court to show mental and emotional stress, which are medical conditions by their nature. Accordingly, while the claim for inconvenience succeeds, the other claim for emotional and mental stress are dismissed.

6.40 I now turn to consider the second legal issue of whether the licence or permit issued to the 1st Defendant to operate at Subject Property should be revoked. In support of the claim for an order that any licence issued to the 1st Defendant to conduct its business be revoked, the Plaintiffs by their pleadings alleged that the Lusaka City Council, the 3rd Defendant herein, issued a manufacturing

license to the 1st Defendant to conduct its commercial activities in an area zoned for residential and agricultural activities. It was further alleged that the 3rd Defendant did not execute the necessary action for change of land use of the Subject Property as required by law.

6.41 In response to these allegations, the 3rd Defendant admitted that it had issued a manufacturing license to the 1st Defendant but that it was not aware that the 1st Defendant's activities were to be conducted in an area zoned for residential and agricultural activities and that upon becoming aware of this, the 3rd Defendant issued an Enforcement Notice against the 1st Defendant directing it to desist from conducting its activities on the Subject Property. Further, the 3rd Defendant stated that the 1st Defendant was not authorised to change the land use from residential to commercial use.

6.42 The 1st Defendant on the other hand insists that it was operating within the legal requirements when it commenced its activities on the Subject Property. Further, DW3, the son to the Deceased, who is the beneficial owner of the Subject Property, stated that the process of applying for change of use commenced in 2013 in his father's name, before he passed away and that the approval for change of use was given on 17th October, 2018, by the 3rd Defendant.

6.43 On my analysis of the evidence on record, I find that it is not in dispute that the 3rd Defendant issued a Manufacturing License to the 1st Defendant and that by its own admission, the 3rd Defendant has stated that when it issued the Manufacturing License to the 1st Defendant, it was not aware that the 1st Defendant's activities were to be conducted in an area zoned for residential and agricultural activities.

6.44 ***Sections 13***, ***14*** and ***15*** of ***The Trades Licensing Act***[5] provides as follows on application for licence, the powers of licensing authorities in considering applications and the general principles affecting issuance of a licence are as follows and I quote, respectfully: -

> ***"13(1) Subject to this section, an application for a licence shall be made in the prescribed form to the Licensing Authority for the area in which the applicant intends to carry on the activity to be licensed.***
>
> ***14. A Licensing Authority, or any person authorised in writing in that behalf by a Licensing Authority, shall, for the purpose of considering an application under section thirteen, have power-***
>
> ***(a) to take evidence on oath or affirmation and, for that purpose, to administer oaths or affirmations;***

(b) to summon, by notice in the prescribed form, any person to give evidence in respect of such application or to produce any book, plan or document relating thereto;

(c) to make such investigation as may be necessary in order to ascertain any of the matters which a Licensing Authority is required to consider under section fifteen:

15(1) Subject to the provisions of sections sixteen and seventeen, a Licensing Authority may in its discretion refuse to issue a licence if it is satisfied-

(a) that the applicant is under the age of eighteen years;

(b) that the issue of such licence is likely to cause nuisance or annoyance to persons residing, or occupying premises, in the neighbourhood of the premises in respect of which the licence is sought; or

(c) that the premises on which the applicant intends to conduct his business would not conform to the requirements of any law for the time being in force; or

(d) that the issue of such licence would conflict with any approved or proposed town planning scheme or zoning area; or

(e) that the issue of such licence would operate against the public interest."
(Court's emphasis)

6.45 From the foregoing authority, the 3rd Defendant herein is mandated to receive applications for a license and in considering the license, has the power to investigate and determine whether the issuance of the license is likely to cause nuisance or annoyance to persons residing, or occupying premises, in the neighbourhood of the premises in respect of which the licence is sought and to consider whether the issuance of such licence would conflict with any approved or proposed town planning scheme.

6.46 Based on the foregoing authority, I find that in failing to determine that the 1st Defendant's application for a Manufacturing License was with respect to conducting commercial activities in an area zoned for agricultural and residential purposes, the 3rd Defendant was in breach of its statutory obligations.

6.47 Further, I note that in trying to mitigate its failure, the 3rd Defendant alleges that it issued an Enforcement Order to the 1st Defendant. However, the 1st Defendant denies receiving such a notice and no copy of such Enforcement Notice was produced before Court. Therefore, I find that the 3rd Defendant has failed to prove that such an Order was issued. Accordingly, I find that as the 3rd Defendant

has admitted that they were not aware that the Manufacturing Licence was issued to the 1st Defendant, who was to conduct commercial activities in an area zoned for residential or agricultural use, the said Manufacturing License issued to the 1st Defendant should and is hereby revoked. Consequently, the 1st Defendant is hereby ordered to cease its operations on the Subject Property, forthwith.

6.48 I now turn to consider the issue of whether a change of use of land was issued in favour of the 1st Defendant's activities. The 3rd Defendant alleges that it did not authorise the change of use of land to the 1st Defendant or to the estate of the Deceased registered owner of the Subject Property. On the other hand, DW3, the son to the Deceased, who is the 1st Defendant's alleged landlord, stated that he obtained the approval for change of use on 17th October, 2018.

6.49 On my analysis of the evidence on record, I find that though the Plaintiffs have exhibited a notice of intention of change of use of land, which was published in the daily mail newspaper, dated 10th October, 2017, I find that the said notice does not amount to an approval of change of use of land. Further, neither the Plaintiffs, the 1st Defendant, nor the 4th Defendant herein, have produced a copy of the actual alleged approval of change of use.

6.50 Based on the foregoing, I am of the view that the Defendants have failed to prove the existence of the said approval. Furthermore, the 3rd Defendant asserts that it did not authorise any issuance of an approval for change of use. Resultantly, the issuance of the alleged approval, if any, should and is hereby revoked.

6.51 I now turn to consider the Plaintiffs' allegations against the 2nd Defendant. The Plaintiffs allege that the 2nd Defendant failed in its duty by allowing the 1st Defendant to set up its business in a residential area; failed to conduct an EIA of the effects of the 1st Defendant's activities; and failed to offer the Plaintiffs an opportunity to be heard on the impacts of the 1st Defendant's proposed business project.

6.52 Although the 2nd Defendant averred that it was not its responsibility to conduct the EIA and that it was not charged with the responsibility of conducting an EIA on behalf of a project proponent, the regulations do state that in instances where the planned project does not fall under ***Schedule 2***, it does not discharge the 2nd Defendant's Council's duty in terms of ***Section 2 (1) (c)***, which is couched as follows: -

> ***"A developer shall not implement a project for which a project brief or an environmental impact statement is required under these Regulations, unless the project brief or the environmental impact statement has been***

concluded in accordance with these regulations and the Council has issued a decision letter...

(c) any project which is not specified in the First Schedule, but for which the Council determines a project brief should be prepared."

6.53 Although the 1st Defendant's business of manufacturing and supplying pavers, blocks, tiles, furniture and aluminium steel, does not fall into any of the Schedule two projects requiring EIAs, it is my view that because of the gravity of the project undertaken by the 1st Defendant, and its potential impact on the people who live and reside in the area, the Council of the 2nd Defendant ought to have ordered for the EIA to be conducted and facilitated before approving the licence application. The precautionary principle requires the 2nd Defendant to mandate an EIA when there are concerns about potential environmental impacts, even if the project has already been approved. It is notable that the powers to do so are based on discretionary powers of the 2nd Defendant in ***Regulation 7 (2)*** of ***The Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations***[4].

6.54 In *casu*, the Plaintiffs had not sought a permanent conservatory order to compel the 2nd Defendant to adopt the precautionary principle in environmental management to prevent noise and air pollution by the manufacturing

business of the 1st Defendant, thus the Court has not had the opportunity to determine the issue in that regard. It is trite elementary law that the Court should not consider or grant a relief for which no prayer or pleading was made, thus, depriving the respondent of an opportunity to oppose or resist such relief.

6.55 However, in further response to the allegations, the 2nd Defendant contends that the 1st Defendant's project of manufacturing pavers, blocks, tiles and aluminium steel are not provided as activities requiring an EIA to be conducted. Further, the 2nd Defendant contends that it is empowered to request a developer to prepare an Environmental Project Brief in respect of a project, which is not listed in the First Schedule of the EIA Regulations, but could have severe impact on the environment. Nevertheless, as the 2nd Defendant did not consider the 1st Defendant's activities to be of such impact, it did not request the 1st Defendant to undertake an EIA.

6.56 ***Section 29*** of ***The Environmental Management Act***[1] provides as follows: -

> ***"(1) A person shall not undertake any project that may have an effect on the environment without the written approval of the Agency, and except in accordance with any conditions imposed in that approval."***

6.57 Additionally, ***Regulation 3*** of ***The Environmental and Pollution Control (Environmental Impact Assessment) Regulations***[4] provides as follows: -

> ***"(1) A developer shall not implement a project for which a project brief or an environmental impact statement require under these Regulations, unless the project brief or the environmental impact statement has been concluded in accordance with these regulations and the Council has issued a decision letter.***
>
> ***(2) The requirement for a project brief applies to-***
>
> ***(a) a developer of any project set out in the First Schedule whether or not the developer is part of a previously approved project;***
>
> ***(b) any alterations or extensions of any existing project which is set out in the First Schedule; or***
>
> ***(c) <u>any project which is not specified in the First Schedule, but for which the Council determines a project brief should be prepared</u>."*** *(Court's emphasis)*

6.58 Based on the foregoing, it is clear that the 1st Defendant was only required to undertake an EIA if its project fell under any schedules of the EIA Regulations. On my analysis of the Schedules of the EIA Regulations, I find that the 1st Defendant's project did not fall under any of

the schedules and that therefore, the 1st Defendant was not required to conduct an EIA. My finding is further supported by the testimony of DW4, who stated that after the 2nd Defendant conducted an inspection of the 1st Defendant's project, it determined that the environmental impacts of the project were insignificant and thereafter issued a No Objection letter. Therefore, the Plaintiffs' contention that the 1st Defendant's project required an EIA to be conducted cannot be sustained and is dismissed.

6.59 I now turn to consider the Plaintiffs allegations that the 2nd Defendant failed to hold a public hearing before issuing a No Objection letter to the 1st Defendant. A public hearing affords the public to participate by voicing their support, concerns and questions regarding the project, application or decision. The authors of ***Public Participation in Environmental Impact Assessment: Why, Who and How***[4] opine that there is no globally agreed definition of public participation. While ***The Constitution of Zambia***[3], ***The Environmental Management Act***[1] and ***The Environmental and Pollution Control (Environmental Impact Assessment) Regulations***[4] provide an appreciation of the value of public participation, they do not provide a definition of what constitutes public participation in Zambia. ***Article 255 (l)*** of ***The Constitution of Zambia***[3] provides that: -

"The management and development of Zambia's environment and natural resources shall be governed by the following principles:

effective participation of people in the development of relevant policies, plans and programmes; ..."

6.60 EIAs are structured to enable public involvement in environmental decision-making and information access, alongside setting benchmarks for environmental monitoring and audit. To that extent, ***Section 91*** of ***The Environmental Management Act***[1] provides as follows: -

"(1) The public have the right to be informed of the intention of the public authorities to make decisions affecting the environment and of available opportunities to participate in such decisions.

(2) The public shall have the right to participate in decision concerning the formulation of environmental policies, strategies, plans and programmes and to participate in the preparation of laws and regulations relating to the environment.

(3) The Agency and the appropriate authorities shall establish mechanisms to collect and respond to public comments, concerns and questions relating to the environment including public debates and hearing."

6.61 Further, ***Regulations 8*** and ***10*** of ***The Environmental and Pollution Control (Environmental Impact Assessment) Regulations***[4] also provides for public participations couched as follows:

> ***"Regulation 8.***
>
> ***(1) An environmental impact statement shall be prepared and paid for by the developer in accordance with the terms of reference prepared by the developer in consultation with the Council.***
>
> ***(2) To ensure that public views are taken into account during the preparation of the terms of reference, the developer shall organise a public consultation process, involving Government agencies, local authorities, non-governmental and community-based organisations and interest and affected parties, to help determine the scope of the work to be done in the conduct of the environmental impact assessment and in the preparation of the impact statement.***
>
> ***(3) The developer shall prepare draft terms of reference taking into account the issues contained in the Third Schedule and the results of the consultations undertaken under sub-regulation (2) and submit these to the Council for approval.***
>
> ***(4) On receipt of the drafts terms of reference, the Council shall determine, within a period of five days from receipt of the draft, whether the terms of***

reference are acceptable and if the terms of reference are unacceptable, the developer shall, with the assistance of the Council, prepare he final terms of reference.

(5) A developer shall not begin work on preparing the environmental impact statement until the Council has approved the terms of reference.

(6) The terms of reference shall include a direction that those responsible for preparing the environmental impact statement provide information on all matters specified in regulation 11 together with such other matters as are considered necessary by the Council.

Regulation 10.

(1) The developer shall, prior to the submission of the environmental impact statement to the Council, take all measures necessary to seek the views of the people in the communities which will be affected by the project.

(2) In seeking the views of the community in accordance with sub-regulation (1), the developer shall-

(a) publicise the intended project, its effects and benefits, in the mass media, in a language understood by the community, for a period of not less than fifteen days and subsequently at regular intervals throughout the process; and

(b) after the expiration of the period of fifteen days, referred to in paragraph (a), hold meetings with the affected community in order to present information on the project and obtain the views of those consulted."

6.62 Additionally, ***Regulation 17 (2)*** of ***The Environmental and Pollution Control (Environmental Impact Assessment) Regulations***[4] provides as follows, on instances when the Environmental Council of the 2nd Defendant, can conduct a public hearing: -

"The Council shall hold a public hearing on the environmental impact statement if-

(a) as a result of the comments made under regulations 15 and 16, the Council is of the opinion that a public hearing shall enable it to make a fair and just decision; or

(b) the Council considers it necessary for the protection of the environment."

6.63 A perusal of ***Regulations 15*** and ***16*** of ***The Environmental and Pollution Control (Environmental Impact Assessment) Regulations***[4], referred to in the foregoing provisions, relate to projects that require an EIA. Therefore, as the 1st Defendant's project did not require an EIA and as it was determined that the environmental impact would be insignificant, the 2nd Defendant was not required to hold a public hearing. Therefore, the Plaintiffs

contention that the 2nd Defendant failed to give them an opportunity to be heard on the impacts of the 1st Defendant's proposed business project cannot be sustained, as the 2nd Defendant was not required to do so in the circumstances.

6.64 Further, I find that the 2nd Defendant did not fail in its legal mandate by not objecting to the 1st Defendant's project as the 2nd Defendant guided the 1st Defendant to comply with the directives of other regulatory agencies. Additionally, the 2nd Defendant provided regular inspections of the 1st Defendant's project and offered recommendations, which culminated into a Protection Order. Therefore, the 2nd Defendant acted within its legal mandate. Accordingly, the Plaintiffs' claim in this regard is dismissed.

7 CONCLUSION

7.1 In conclusion, the activities of the 1st Defendant produced noise and dust, which amounted to an unlawful interference with the Plaintiffs' use or enjoyment of land and therefore, an actionable nuisance, entitling the Plaintiffs herein to damages as against the 1st, 3rd and 4th Defendants. The damages shall be assessed and determined by the Deputy Registrar and the sum so determined shall carry interest at average short term bank deposit rate from the date of the Writ to the date of this

Judgment and thereafter, interest will accrue at current Bank of Zambia lending rate up to the date of payment.

7.2 Further, the Plaintiffs have proved on a balance of probability that they were inconvenienced by the noise and dust emanating from the 1st Defendant's operations. Accordingly, I find that the Plaintiffs herein are entitled to recover damages for inconvenience as against the 1st, 3rd and 4th Defendants. The damages shall be assessed and determined by the Deputy Registrar and the sum so determined shall carry interest at average short term bank deposit rate from the date of the Writ to the date of this Judgment and thereafter, interest will accrue at current Bank of Zambia lending rate up to the date of payment.

7.3 The Plaintiffs have failed to prove on a balance of probability that they were emotionally and mentally stressed by the noise and dust emanating from the 1st Defendant's operations for reasons given above. Accordingly, I find that the Plaintiffs herein are not entitled to damages for emotional and mental stress.

7.4 Furthermore, the 1st and 4th Defendants have failed to prove the existence of the alleged change of land use approval and as the 3rd Defendant asserts that it did not authorise any issuance of an approval for change of use, the issuance of the alleged approval, if any, is hereby revoked.

7.5 Additionally, as the 3rd Defendant has admitted that they were not aware that the Manufacturing Licence was issued to the 1st Defendant, who was to conduct commercial activities in an area zoned for residential or agricultural use, the Manufacturing License issued to the 1st Defendant should and is hereby revoked. Consequently, the 1st Defendant is hereby ordered to cease its operations on the Subject Property, forthwith.

7.6 The Plaintiffs' contention that the 1st Defendant's project required an EIA to be conducted lacks merit and is accordingly dismissed.

7.7 Finally, the 2nd Defendant did not fail in its legal mandate by not objecting to the 1st Defendant's project as the 2nd Defendant guided the 1st Defendant to comply with the directives of other regulatory agencies and conducted regular inspections on the premises. Therefore, the 2nd Defendant acted within its legal mandate. Accordingly, the Plaintiffs' claim is dismissed.

7.8 Since the Plaintiffs have partially succeeded in their claims, I order that costs are for the Plaintiffs as against the 1st, 3rd and 4th Defendants, to be taxed in default of agreement.

7.9 Leave to appeal is granted.

SIGNED, SEALED AND DELIVERED AT LUSAKA, THIS 16TH DAY OF NOVEMBER, 2023.

P. K. YANGAILO
HIGH COURT JUDGE