

REPORTABLE (8)

QEDISANI SILAS MACHINE
V
(1) THE SHERIFF OF ZIMBABWE (2) ZB BANK
LIMITED (3) THE REGISTRAR OF DEEDS (4)
PAPERHOLE INVESTMENTS (PRIVATE) LIMITED

CONSTITUTIONAL COURT OF ZIMBABWE
GARWE JCC, MAKARAU JCC & HLATSHWAYO JCC
HARARE 18 OCTOBER 2021, 25 NOVEMBER 2022 & 26 JUNE 2023

T. Mpofu with E. Mubaiwa for the applicant

A. Ingwani for the first respondent

O. Mutero for the second respondent.

No appearance for the third respondent.

F. Girach for the fourth respondent.

MAKARAU JCC: This is an application for direct access to this Court. If the application is granted, it is the applicant's intention to approach this Court in terms of s 85(1) (a) of the Constitution of Zimbabwe, alleging and arguing that a judgment of the Supreme Court handed down on 31 December 2020 infringed his dual rights to equal protection and benefit of the law and to a fair hearing before an independent and impartial court.

Background

The applicant owed the second respondent the sum of US\$327 345.77 plus interest thereon at the rate of fifty percent per annum. On a date that is not material, the second

respondent obtained judgment in the High Court against the applicant for the payment of the debt together with the accrued interest.

The applicant failed to satisfy the judgment debt. In due course, the first respondent attached the applicant's farm and sold it by public auction. The sale realised the sum of US\$205 000.00. The applicant successfully objected to the sale. The first respondent set the sale aside, accepting that the sale had been conducted in an irregular manner. It had not been preceded by a *nulla bona* return against the applicant's movables and the property had been poorly described in the advertisement fled before the sale. In his ruling setting aside the sale, the first respondent indicated that he would offer the property for sale by private treaty for the following thirty days on certain specified conditions.

The first respondent proceeded to sell the property to the fourth respondent by private treaty for the sum of US\$825 000.00. Clearly not anticipating any further objections from the applicant, the first respondent advised the judgment creditor's legal practitioners of the sale by letter, which he also copied to the applicant. In the same breath, he advised the parties that he had declared the fourth respondent the purchaser of the property and had consequently confirmed the sale in accordance with the rules of court. The germane part of the letter reads:

"I refer to the sale in the above matter and advise that on 27 February 2018, the Sheriff declared and confirmed the highest bidder Paperhole Investments (Pvt) Limited to be the purchaser at the sum of US\$825 000.00 after the property was sold by private treaty."

The letter advising and confirming the sale at the same time was written on 27 February 2018, the same date on which the sale was concluded.

Upon receipt of his copy of the letter, the applicant approached the first respondent, intending once again to object to the sale. The first respondent raised the defence of *functus officio*. He advised the applicant that after confirming the sale, his mandate was discharged and the applicant had to approach the High Court for any possible relief.

In due course, the applicant filed an application for review in the High Court, seeking an order setting aside the confirmation of the sale. He alleged that such confirmation was irregular and not in accordance with the rules of the High Court.

The application was opposed by all the respondents save for the third.

In opposing the application before the High Court, the first respondent stated in his opposing affidavit that he had declared the fourth respondent as the purchaser and had confirmed the sale in the same breath because it was his reading of the rules of court that the applicant had no right to object to the second sale. It was his considered position that the rules did not permit him to entertain multiple objections in respect of the same property sold in execution.

Dismissing the first respondent's contentions, the High Court upheld, and correctly so in my view, the applicant's right to challenge the second sale. It found that the applicant's right to object to any sale of his property in execution was not limited by the certain number of objections he had taken. For as long as there was a sale in execution against his property, the applicant had the right to object to any such sale on the grounds given in the law. The High Court however went on to dismiss the application for review on the basis that the applicant had failed to disclose in the papers before the court the grounds of his objection to the second sale.

Aggrieved by the dismissal of the application for review, the applicant appealed to the Supreme Court. Before that court, he contended that once the High Court had upheld his right to object to the second sale, it ought to have given him an opportunity to lodge his objection with the first respondent in accordance with the rules. It was his argument that the nature and content of his objection, embodying the recognised grounds of objecting to the sale, was not an integral part of the application for review such that its absence would be fatal to that application. Fully developed, it was his argument that the law did not require him to lodge his objection to the sale with the court in the application for review, but to lodge it with the first respondent once the court had upheld and protected his right to object. Viewed differently, he argued that the High Court had wrongfully conflated the application seeking the declaration of his right to object to the second sale with the procedure that he had to adopt to enjoy that right.

In its judgment, the Supreme Court took a few steps backwards and, without making any reference to the notice of appeal or seeking further submissions from the parties, found that the applicant had not lodged with the first respondent an objection to the second sale as was required of him by Rule 359 (1) of the High Court Rules 1971, (now R 71 (38)). After setting out the relevant rule in detail, the Supreme Court found that the applicant had not complied with the provisions of the rule, which, in its view, is worded in peremptory terms. For emphasis, the court *a quo* went further to hold that there was no provision in the rule that imposes a duty on the first respondent to invite persons to submit objections to the confirmations of the sale of immovable property is execution of court judgments.

The above finding became the *ratio decidendi* of the Supreme Court judgement.

The application for leave

Respecting the finality of the judgment of the Supreme Court, the applicant brought this application for leave. It is his intention to bring an application alleging that the Supreme Court judgment breaches his right to equal protection and benefit of the law and the right to a fair hearing before an independent and impartial court. He submitted in this regard that the Supreme Court Judgment is erroneous both in fact and in law.

In his application, the applicant raised four main arguments.

Firstly, he argued that although the judgment of the Supreme Court was on a non-constitutional issue, it threatened the court's claim to judicial authority in that it infringed his right to judicial protection. Secondly, he alleged that the Supreme Court failed to act in accordance with the law governing the proceedings that were before it, which failure disabled it from making a decision on the non-constitutional matter that was before it. In the third instance, he argued that the failure by the court to act in accordance with the law governing the proceedings that were before it violated his rights to equal protection and benefit of the law and a fair hearing before an independent and impartial court. Finally he alleged that the judgment of the court a quo was irrational and arbitrary.

I shall return to these four arguments in some detail shortly.

The application was opposed again by the first, second and fourth respondents.

The first respondent, without necessarily accepting that the Supreme Court may have erred in its approach, argued that the Constitution protects the right to access a legal system that is fair but not necessarily infallible.

The second respondent contended that since there was no constitutional issue before the Supreme Court, its decision is final and cannot found a cause of action for the intended application under s 85 (1) of the Constitution.

The fourth respondent denied that the applicant had demonstrated that his rights had been breached as alleged or at all. On that basis, it argued that it was not in the interests of justice that the application for leave be granted.

In my view, the contention by the fourth respondent crystallises the only issue that falls for determination in this application. It is whether it is in the interests of justice that the applicant be granted leave to bring the intended application. This is so because during oral argument, the first respondent formally abandoned his opposition to the application and placed himself in the hands of the Court. This is the proper stance that he ought to have taken right from the beginning. As an officer of this Court, it is not appropriate that the first respondent pitches tent with any of the litigants and lends the weight of his office in that corner.

No issue can thus arise from the contentions by the first respondent.

In a similar vein, the contentions of the second respondent cannot give rise to any issues for determination. It is the settled position at law that a judgment of the Supreme Court on a non-constitutional issue, whilst not appealable, is open to review if it infringes a fundamental right or freedom. (See *Martin v Attorney-General* 1993 (1) ZLR 153 (SC), *Matamisa v Mutare City Council and Another* 1998 (2) ZLR 439 (SC); *Lytton Investments (Private) Limited v Standard Chartered Bank and Another* CCZ 11/18 and *Denhere v Denhere* CCZ 9/19).

Thus, the only issue that remains for determination is raised for and on behalf of the fourth respondent.

The law

An application for leave to approach this Court directly is filed and determined in accordance with R 21 of the Constitutional Court Rules, 2016. The Rule enjoins the Court in considering such an application to be satisfied that it is in the interests of justice that the matter be brought directly or at all, to this Court.

Rule 21(8), in particular, provides specific guidance to the Court in determining when it is in the interests justice that direct access be granted in the following terms:

- “In determining whether or not it is in the interests of justice for a matter to be brought directly to the Court, the Court or judge may, in addition to any other relevant consideration, take the following into account-
- (a) The prospects of success if direct access is granted;
 - (b) Whether the applicant has any other remedy available to him or her; and
 - (c) Whether there are any disputes of facts in the matter.”

The above strictures constitute very broad guidelines to the Court. These guidelines apply in general terms to all applications for direct access. In an application such as the one before the Court, where the allegation is made that a Supreme Court judgment has infringed one or more of the applicant’s fundamental rights and/or freedoms, the applicant specifically bears a double –barrelled onus in establishing that it is in the interests of justice that he or she be granted direct access. He or she must show, in the first instance, that the Supreme Court was disabled from rendering a decision on the matter that was before it. In the second instance, he or she must allege and demonstrate that the judgment infringes one or more of his or her fundamental rights and or freedoms. A consideration of these two aspects will guide the Court is establishing whether it is in the interests of justice that direct access be granted.

Regarding the first instance referred to above, I wish to note in passing that the four arguments raised by the applicant in his application and which I have referred to above correctly serve to illustrate the nature of the error that the Supreme Court must have fallen into to give rise to the cause of action. The four arguments borrow heavily from the language employed in the decided cases that I have cited above.

The authorities hold that the decision of the Supreme Court must be arbitrary or irrational so as to threaten the claim of the court to judicial authority. The arbitrariness or irrationality of the decision must arise from a demonstrable failure by the Supreme Court “*to act in accordance with the requirements of the law governing the proceedings or prescribing the rights and obligations subject to determination.*” (See *Lytton Investments (Private) Limited, supra*).

I now proceed to analyse whether the applicant has established that it is in the interests of justice that he be granted direct access to this court, having in mind the double-barrelled onus that he bears.

Analysis

I turn first to the Supreme Court decision.

The finding by the Supreme Court that the applicant had not lodged an objection with the first respondent to trigger the exercise of discretion by the first respondent in terms of the then R359 of the High Court Rules was clearly not in answer to any of the issues that arose from the appeal or could have risen therefrom. This is so because it was common cause amongst the parties that the applicant was not afforded the mandatory fifteen days within which to lodge

the objection to the second sale. It was this denial of the right, created and afforded him by the law, which triggered the litigation before the High Court.

In the circumstances of this application, the conclusion that the Supreme Court did not determine the real issue that was placed before it by the appeal is unavoidable.

The import of a failure by the Supreme Court to deal with the issues raised by the appeal has been discussed in a number of decisions of the Supreme Court itself. See *Nzara & Others v Kashumba N.O. and Others* SC 18/18; *A Adam & Company (Private) Limited & Others v Good Living Real Estate (Private) Limited & Others* SC 18/21; *Zimbabwe Revenue Authority v Packers International (Private) Limited* SC 28/16 and *Gwaradzimba N.O. v C.J. Petron & Company (Proprietary) Limited* SC12/16.

It is the settled position that any failure to determine the issue or issues arising from the dispute between the parties is a misdirection gross enough to vitiate the order made at the end of the hearing. The Supreme Court has held that it is improper for any court to either stray from the issues arising from the pleadings or to pick up an issue for the parties and determine the dispute on the basis of the issue so created by it. This is the standard that the Supreme Court, as the apex court in all common law matters, has since time immemorial, set and enforced upon the procedures and decisions of lower courts. It is therefore the standard against which its own procedures and decisions must in turn be measured.

But this is not the end of the inquiry. I must now turn to analyse whether the applicant has set out adequately and appropriately the fundamental rights and freedoms that he alleges were violated by the judgment of the Supreme Court.

I start with the allegation that the failure by the court *a quo* to determine the issues that were before it infringed the applicant's right to equal protection and benefit of the law as guaranteed by s 56 (1) of the Constitution of Zimbabwe.

After hearing the parties at the first hearing, this Court directed the parties to make further submissions on the content of the fundamental right that is guaranteed under s 56 (1) of the Constitution. This was so because, whilst in his papers filed of record the applicant had alleged that his rights as protected by this section had been violated, in oral argument, he appeared to be relying entirely on the right to due process as guaranteed by s 18 (1) of the repealed constitution.

We are indebted to counsel for the additional submissions and oral arguments.

The applicant's position is not complicated. If granted leave, he intends to assert his rights to the protection and benefit of the law. In this regard, he relies fully on the content of this right as it was provided for under s 18 (1) of the repealed constitution and as subsequently interpreted by this Court. This notwithstanding that he cites s 56(1) of the Constitution.

S 18 of the repealed constitution provided that:

“18 Provisions to secure protection of law

(1) Subject to the provisions of this Constitution, every person is entitled to the protection of the law.”

The content of the right as provided for by the section was interpreted to be nothing more than the right to demand and be protected by the due process of the law. It thus protected

every person against arbitrary decisions that do not follow the laid down precepts of the law be they substantive or adjectival. (See *Martin v Attorney-General* 1993 (1) ZLR 153 (SC); *Mawarire v R G Mugabe and Others* CCZ 1/13 and *Matiashe v Mahwe N.O and Another* CCZ 12/14).

With the adoption of the Constitution, the right to the protection of the law was re-enacted and provided for in s 56. It is common cause that s 56 (1) is differently worded from s 18 of the repealed constitution. The applicant readily accepts the difference in the wording of the two sections. He however argues that, notwithstanding this change, his right to the protection of the law, as espoused in the case authorities decided prior to 2013, still obtains and must find not only expression but also gratification under s 56 (1) of the Constitution.

S 56(1) of the Constitution provides as follows:

“56 Equality and non-discrimination.

(1) All persons are equal before the law and have the right to equal protection and benefit of the law.”

The right to the protection and benefit of the law as guaranteed by s 56 (1) has been construed narrowly. (See *Nkomo v Minister of Local Government, Rural and Urban Development and Others* 2016 (1) ZRL 113 (SC) and *Marx Mupungu v Minister of Justice, Legal & Parliamentary Affairs and Others* CCZ 7/21.)

Thus, instead of the right to the protection and benefit of the law being a right to due process *simpliciter*, the right guaranteed by s56 (1) has been modified or discoloured, as it were, by the insertion of the word “equal” in the provision immediately preceding the right.

An applicant seeking to rely on the right must not only allege and prove non-observance of due process but now bears the additional onus of alleging and ultimately showing that other persons similarly positioned are afforded the protection and benefit of the law that he or she craves.

In *Nkomo v Minister of Local Government, Rural and Urban Development and Others, supra*, it was held that s 56 (1) provides equality to all persons before the law and the right to receive the same protection and benefit afforded by the law to “**persons in a similar position**”. (The emphasis is mine). Similarly in *Marx Mupungu v Minister of Justice, Legal & Parliamentary Affairs and Others, (supra)* it was observed in part that:

“.. What this provision means is that all persons in a similar position must be afforded equality before the law and **the same protection and benefit of the law.**” (Again the emphasis is mine).

I do not read the above cases as having changed the core content of the right to the protection of the law as upheld by this Court prior to 2013. I read the above cases as qualifying that right or as Patel JCC put it in *Marx Mupungu v Minister of Justice, Legal & Parliamentary Affairs and Others, (supra)* as simply “narrowing” the scope of the enjoyment of the right. Put differently, I do not read the judgments of this Court as requiring more than a specific averment and a demonstration by the facts alleged in the founding papers that similarly placed litigants were afforded the right that the applicant wishes to assert. Viewed in this sense, the averment will, in the converse, mean that denying the applicant the right in such circumstances will amount to denying him or her equal treatment before the law. This will obviously constitute a violation of the right embodied in the section.

I am fortified in making this finding from the words of ZIYAMBI JCC in *Nkomo v Minister of Local Government, Rural and Urban Development and Others*, *supra*, at 119B where her Ladyship cites with approval the *dicta* in *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) to the effect that the South African equivalent of our s 56(1) means that all persons in a similar position must be afforded the same right to access the courts and to the same fair and just procedures with regards to such access.

In finding against the applicant in that matter, her Ladyship continued:

“Clearly the guarantee provided by s 56 (1) is that of equality under the law. The Applicant has made no allegation of unequal treatment or differentiation. He has not shown that he was denied protection of the law while others in his position have been afforded such protection. He has presented the Court with no evidence that he has been denied equal protection and benefit of the law....In short, the applicant has come nowhere near establishing that his right enshrined in s 56 (1) of the Constitution has been infringed. He is therefore not entitled to a remedy.”

I must in turn find against the applicant. In making this finding, I am aware that the requirement to specifically plead and ultimately prove that other persons similarly placed were protected by and benefited from the law might appear superfluous and pedantic, especially in circumstances such as in *casu*. However, the position of the law is that it is necessary that in all instances where the right is invoked, the equality before the law and the equal treatment under the law that the section envisages is specifically pleaded and ultimately proved even if, in some instances, the proof thereof will be common cause or easy to furnish.

I further make the observation that requiring the specific averment that other persons were afforded the protection and benefit of the law that the applicant seeks, in circumstances such as in the present application, does not amount to putting form over substance. It is not superfluous to plead that other litigants in the Supreme Court have their issues determined on appeal. Such pleading simply serves to give effect and import to the word “equal” that was inserted into the wording re-enacting the right.

For completeness, I note that the applicant did not even mount the possible, though not tenable argument that complying with the procedural requirements of pleading inequality of treatment in the circumstances of this matter was implied and therefore unnecessary. Instead, he maintained that the position of this Court holding that pleading unequal treatment or differentiation whenever this right is invoked is a requirement was erroneous and ought to be set aside by a full bench of the Court. Put differently, he submitted that this Court ought to reverse itself. In pressing his argument in this regard, the applicant made no attempt to distinguish the facts of this matter from the cases cited above that give a narrow interpretation of the right guaranteed by s56 (1). He did not seek to sidestep the *ratio decidendi* of those cases but simply attacked such as being erroneous. He thus did not lay any possible basis upon which this Court can contemplate revisiting the position that it has taken in interpreting the provisions of s 56 (1) of the Constitution.

He cannot be helped.

It is common cause that the applicant did not plead his case with the requisite particularity that would have brought him within the ambit of the alleged breach of the

fundamental right protected under s 56 (1) of the Constitution. Therein lies the fatal defect that determines this application against him on this allegation.

On the basis of the above, the intended application by the applicant will not succeed in establishing that the decision of the Supreme Court breached his right to the equal protection and benefit of the law. Enjoying no prospects of success in this regard, it cannot be in the interests of justice that the leave be granted on this score.

I now turn to the second allegation that the decision of the Supreme Court allegedly infringed the applicant's right to a fair hearing before an independent and impartial court. Apart from making the allegation, the applicant did not proceed to lay any foundation in his founding papers or in oral argument for a finding that the applicant was not afforded a fair hearing. The applicant exerted all his energies and arguments towards establishing the error made by the Supreme Court and the alleged infringement of his right to the equal protection and benefit of the law and paid scant attention to the alleged breach of his right to a fair trial.

I find no basis on the facts of the matter for holding that the applicant was not afforded a fair trial. I do not so hold.

Disposition

The application cannot succeed and must be dismissed. Regarding costs, there are no reasons justifying a departure from the ordinary position of this Court of not awarding costs against any of the parties.

In the result, the following order is made:

The application is dismissed with no order as to costs.

GARWE JCC : I agree

HLATSHAWAYO JCC : I agree.

Nyahuma Law Chambers, applicant's legal practitioners.

Dube-Banda Nzarayapenga, 1st respondent's legal practitioners.

Sawyer & Mkushi, 2nd respondent's legal practitioners.

Hogwe Nyengedza Attorneys, 4th respondent's legal practitioners.