RUSSEL TATENDA MWENYE
and
RUTENDO VERA
versus
ASSET MANAGEMENT UNIT
and
THE SHERIFF –HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 15 & 27 June 2023

Urgent Chamber application

Z Kajokoto with *W Madzimbamuto*, for the applicants
D C Kufaruwenga, for the 1st respondent
No appearance for the second respondent

CHIKOWERO J:

1. This matter, filed on 30 May 2023 as an urgent chamber application, is in fact not urgent. This is so because the need to act arose in 2020, which is three years ago.
2. On perusing the papers in chambers, before the first respondent filed opposing papers, I formed the *prima facie* view that the matter was not urgent. I removed the matter from the roll of urgent matters and made an endorsement on the record to that effect.
3. Thereafter, the applicants addressed correspondence to the Registrar of the High Court requesting to address the court on the issue of urgency.
4. The matter was then set down whereupon I heard oral argument on the issue of urgency. The first respondent had by then filed and served opposing papers. I reserved judgment because I thought this is a matter where reasons for judgment should be in writing.

THE BACKGROUND

5. On 19 March 2020 in the matter *Prosecutor- General* v *Russel Tatenda Mwenye, Rutendo Vera and Registrar of Deeds* HACC 15/20 the Prosecutor-General filed a court application in the High Court seeking a civil forfeiture order of Russel Tatenda Mwenye and Rutendo Vera's ("Mwenye and Vera") property known as Stand Number 31843 Mabvazuva Township, Ruwa ("the property in question"). The application was made in terms of ss 79 and 80 of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*] ("the Money Laundering Act")
6. On 18 May 2020 Mwenye and Vera filed opposing papers with the Prosecutor –General filing an answering affidavit and heads of argument on 8 June 2020.
7. Mwenye and Vera, through their erstwhile legal practitioners, filed their main heads of argument. Therein, they not only dealt with the merits of the matter but also contended that ss 79 and 80 of the Money Laundering Act were unconstitutional. The main heads of argument were filed on 2 July 2020.
8. On 27 August 2020 Mwenye and Vera filed supplementary heads of argument.
9. The matter was heard on 25 November 2020 with Mwenye and Vera, through Counsel, not requesting the High Court to refer the question of the validity of the impugned law to the Constitutional Court for a determination. The hearing was therefore conducted on the understanding that the constitutionality of ss 79and 80 of the Money Laundering Act was not under challenge.
10. In a judgment handed down on 9 December 2020 as HH 74/20, the High Court found that the property in question was acquired using proceeds of crime and ordered it forfeit to the state.
11. Aggrieved by the decision of the High Court, Mwenye and Vera noted an appeal to the Supreme Court on 18 December 2020. The appeal attacked the factual findings on which the forfeiture order was predicated. The appeal was dismissed on 21 October 2021.
12. Aggrieved by the decision of the Supreme Court, they then cited the Minister of Justice, Legal and Parliamentary Affairs and the Prosecutor- General of Zimbabwe in an application for an order of direct access to the Constitutional Court in terms of S 167(S) (a) of the Constitution of Zimbabwe, 2013 ("the constitution") as read with R 21(2) of the

Constitutional Court Rules, 2016. In the event that direct access were granted, they intended to file a substantive court application in terms of S 85(1) of the Constitution as read with R 22 of the Rules of the Constitution Court. In the substantive application, they intended to seek an order declaring para(s) (a) and (c)(i) of subs (3) of S 80 of the Money Laundering Act unconstitutional for violating their fundamental rights enshrined in ss 56(1), 70(1)(a) and 71(2) of the Constitution. By way of consequential relief, they intended to seek an order setting aside the judgments of the High Court and Supreme Court confirming the forfeiture of the property in question.

13. Having found that the intended substantive application to the Constitutional Court did not enjoy prospects of success, that the application for direct access was a disguised appeal against the judgment of the Supreme Court, that there was need for finality in litigation and that the matter was now moot the Constitutional Court, on 28 April 2023, dismissed the application for direct access with no order as to costs. In that matter, under the names *Russel Tatenda Mwenye and Rutendo Vera* v *Minister of Justice, Legal and Parliamentary Affairs and Prosecutor-General of Zimbabw*e CCZ 05/23, GARWE JCC with the concurrence of MAKARAU JCC and GOWORA JCC said at p 19 para 42:

> "A final decision on a non-constitutional matter having been pronounced by the Supreme Court, the question whether the decision is correct is now moot. There are no longer any live issues between the parties to the original dispute. It is too late for the applicants to raise the issue of the validity of the legislation upon which that decision was predicated. The court should certainly decline the invitation to exercise its powers given the circumstances of this case"

14. I pause to record the following facts. On 1 November 2021, the Asset Management Unit (a body created in terms of s 00 of the Money Laundering Act under whose control the property in question now falls) wrote to Mwenye demanding that he vacates the property and give the Unit vacant possession no later than 5 November 2021, failing which it would take steps for his eviction and costs of suit. This was pursuant to the Supreme Court decision dismissing the appeal against the High Court judgment ordering forfeiture of the property in question. I think its necessary to reproduce in full the contents of a subsequently issued notice to vacate the property in question. It reads;

"7 January 2022

Messers Kajokoto and Company Legal Practitioners
Number 19 Colchester Road
Avonlea
Harare

NOTICE TO VACATE: RUTENDO TATENDA MWENYE AND RUTENDO VERA - STAND 31843 MABVAZUVA, RUWA

Dears Sirs,

Reference is made to our letter of 1 November 2021 seeking vacant possession of the above –mentioned property and your subsequent response dated 4 November 2021 which culminated in the physical meeting to discuss your concerns at the Bank on 8 November 2021.

You will recall, that, at your clients request, it was agreed that your client would remain in occupation for the duration I November 2021 to 31 January 2923, a period which would allow your client the opportunity to secure alternative accommodation. The parties were to sign the necessary lease agreement upon agreement of the market rentals as determined by the appointed estate agent.

You have communicated with the Unit's property manager and you have on divers occasions promised to facilitate the signature of the lease agreement (which you have in your possession) and the payment of the rentals. It is regrettable that to date you have not favoured the Unit with the signed documents and the payment of the applicable rentals and we will not be faulted for concluding that your clients are deliberately frustrating the agreement reached in good faith.

As a result of non-payment of rentals and refusal, neglect and avoidance to cooperate as agreed, we have no option but to demand payment of all rentals due and payable and vacant possession of the property by no later than 32 January 2022.

Please be guided accordingly

(signed)
W Madera
Interim Director- General- Asset Management Unit.
CC : (EPG Global –Mr Antony Chibaya)"

15. Mwenye and Vera having ignored the notice, the Asset Management Unit, under case number HC 936/22, issued summons against them. It claimed payment of US$2000 or its lawful equivalent in local currency being arrear rentals for their occupation of the property

in question for the period November 2021 to March 2022, interest, holding over damages at the rate of US$13-34 per day or its equivalent in local currency calculated from 1 April 2022 to the date of vacation or eviction, their eviction as well as that of all those claiming occupation through them and costs on a punitive scale.

16. In default, the relief sought was granted by the High Court on 15 June 2022.
17. Under case number HC 4166/22, Mwenye and Vera issued a court application seeking an order for rescission of the default judgment. They followed this up with an urgent chamber application for stay of execution. This resulted in the signing of a Deed of Settlement. The terms thereof were as follows. That pending the determination of the application for direct access to the Constitutional Court, execution of the default judgment was stayed; Mwenye and Vera would withdraw the application for rescission within forty-eight hours of the signing of the Deed of Settlement, with each party paying its own costs and that each party would pay its own costs of the application for stay of execution. The Deed of Settlement was signed on 7 July 2022.
18. On 5 July 2022 this court disposed of the application for stay of execution by way of a consent order. The order provided that pending determination of the Constitutional Court application for direct access execution of the default judgment was stayed. Each party would bear its own costs.
19. Aggrieved by the judgment of the Constitutional Court, Mwenye and Vera, on 29 May 2023, under case number HC 3511/23, filed, in the High Court, a court application in terms of S 85 of the Constitution as read with R 107 of the High Court Rules, 2021. They are seeking an order declaring para(s) (a) and (c)(ii) of S 80(3) of the Money Laundering Act as unconstitutional and void:

> "for the reason that they infringe the following fundamental rights of the applicants enshrined in Chapter 4 of the Constitution.
> 1.1 The fundamental right to protection of the law enshrined in S 56(1) of the Constitution
> 1.2 The fundamental right to be presumed innocent until proved guilty enshrined in S 70(1)(a) of the Constitution
> 1.3 The fundamental right to property enshrined in S 71(2) of the Constitution."

They will pray for an order that each party bears its own costs.

20. In *Mwenye and Vera* v *Minister of Justice, Legal and Parliamentary Affairs and Anor* (*supra*) the Constitutional court said at p 20 para 46:

> "Mr Madhuku, faced with the fact of the finality of the Supreme Court decision, submitted that the applicants could abandon the consequential relief sought and merely ask for the declaratur. The submission was made very belatedly and appears to me to be inconsistent with the case that the respondent had been asked to contest. The present application is not a class action seeking, in general terms, the setting aside of the impugned law. This is a S 85(1) application in which the applicants intend to act in their own interest in order to undo a final decision of the Supreme Court which affects them. They make it clear that the law upon which the two courts predicated their determination was unconstitutional for infringing their fundamental rights. The declaration of invalidity sought in the intended application is inextricably linked to the consequential relief sought, namely, the setting aside of the two court judgments ordering forfeiture of what they call their only home. The matter therefore remains moot."

THIS APPLICATION

21. What is before me is an urgent chamber application, filed on 30 May 2023, with what was couched as the interim relief sought reading as follows:

> "TERMS OF THE INTERIM RELIEF GRANTED
>
> Pending the determination of this matter on the return date, the applicant is granted the following relief:
> 1. Second respondent or any party acting through him or at (*sic*) its instructions be and is hereby ordered to stay the execution- of the order HC 1936/22 pending the determination of Declaratur Proceedings filed under HC 3511/23."

22. The relief which the applicants would have sought on the return date is confirmation of the interim relief as final, a stay of execution of the default judgment and costs on a punitive scale.
23. The bases for claiming that the application is urgent is this. The mere filing of the application for a declaratur does not stop the Asset Management Unit, through the Sheriff of the High Court of Zimbabwe, from evicting the applicants, all those claiming through them and from otherwise executing the default judgment granted on 15 May 2022. Following the dismissal of the Constitutional Court application on 28 May 2023 the Asset Management Unit wrote to the applicants on 16 May 2023 demanding that they vacate the property in question and to pay all arrear rentals and holding over damages within seven

days reckoned from the latter date. The applicants, who deposed to their affidavits on 30 May 2023, stressed that the seven days within which they were told to vacate the property were lapsing on the very day that they made their depositions. They also said:

> "The applicant (*sic*) stands to suffer commercial loss should the present application not be granted. Massive investments have been put in the property by applicants and the damage and extent of inconvenience caused should applicants and their minor children be evicted is beyond imagination. Only this court's urgent intervention will save the applicants."

What it was that was said to be commercial loss was not explained at the hearing. It will be remembered that the property in question was forfeited to the state. The High Court, the Supreme Court and the Constitutional Court have all spoken on the forfeiture. It is no longer a live issue between the parties. There can be no urgency based on what is no longer an issue.

24. The applicants also claim the matter is urgent because the court application for a declaratur has prospects of success. Mt Kufaruwenga countered by drawing my attention to the fact that the reason why the Constitutional Court dismissed the court application for direct access was that it found that the intended substantive application (which seems to be effectively what the applicants have now placed before the High Court as an application for a declaratur) has no prospects of success. I think it unnecessary to pronounce myself on the prospects of success or otherwise of the main application in determining the urgency or otherwise of that which is before me.
25. I have said that in their main heads of argument, filed on 2 July 2020, contesting the application for an order to forfeit the property in question, Mwenye and Vera raised the issue of the constitutionality of the provisions of the legislation upon which that application was based. What they could have done then was to thereafter request the High Court, at the hearing of the application proper, to refer the issue of the constitutionality of the impugned legislation to the Constitutional Court for determination. If that had been done, the High Court would then have been guided by the determination of the Constitutional Court in disposing of that which was before it. Although HIS LORDSHIP was not commenting on the exact issue which is before me, I am satisfied that what was said in *Mwenye and Anor* v *Minister of Justice, Legal and Parliamentary Affairs and Anor* (*supra*) applies to the issue of urgency with equal measure.

At p 16-17 para 36 GARWE JCC said:

> "In this case, the applicants have always been aware of the need to challenge the constitutionality of the impugned law. They said so before the High Court and the Supreme Court. However, they did not request either court to refer the question of the validity of the impugned law to this court for a determination. Instead they proceeded on the basis that the impugned law was not under challenge and that what was in issue was the cogency and sufficiency of the evidence adduced by the Prosecutor-General in establishing, on balance, that the property in question had been acquired from proceeds of crime. That conduct by the applicant had consequences" (the underlining is mine for emphasis).

26. The one consequence was that both the High Court and Supreme Court did not relate to the constitutionality or otherwise of the impugned legislation in rendering their decisions. Another consequence was that when the applicants sought direct access to the constitutional court with the intention of filing a substantive application to challenge the constitutionality of the impugned provisions that court dismissed the application for reasons highlighted elsewhere in this judgment. The applicants knew in July 2020 that they would be required to vacate the property in question if the High Court granted the forfeiture application. This is the reason why they appealed to the Supreme Court when the High Court ordered the property forfeited to the state. It mattered not that the judgment of the High Court was confined to forfeiture (since the court was not asked, in the same action, to order the eviction of the applicants). The letters demanding that the applicants vacate the property; the eviction suit, eviction order and everything else that occurred thereafter were consequences of the applicants' decision to merely raise the constitutional issue in July 2020 but not to employ it, then, in resisting forfeiture of the property in question.
27. That, having lost all the way to the Constitutional Court, the applicants have three years later decided to come back to the High Court where it all started is a classic case of self-created urgency.
28. In *Kuvarega* v *Registrar-Generaland Anor* 1998(1) ZLR 188(H) urgency was explained in the following terms, per CHATIKOBO J at 193 F-G:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of

> urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay." (the underlining is mine for emphasis)

See also *Document Support Centre* v *Mapuvire* 2006(2) ZLR 232(H) and *Trustees of the September Family Trust* v *Masimirembwa and Ors* HH 581/21. *In casu,* the certificate of urgency and the founding and supporting affidavits do not explain why they did not pursue in 2020, the constitutional issue which they raised that year. That they have now filed a High Court application raising the same issue that they raised three years ago cannot found urgency.

29. The importance or otherwise of the main application is immaterial for purposes of determining urgency. I think that the applicants have always been aware that the constitutionality or otherwise of the impugned provisions of the Money Laundering Act is not a small matter. That is why they raised it three years ago.
30. I do not accept Mr Kajokoto's argument that the matter is urgent because the applicants and their young children are currently staying at the property in question and have nowhere else to go. I got the impression that in so arguing Counsel was pleading with the Court to be merciful. This court is sitting to uphold and apply the law to the facts of this matter without favour or prejudice. It dispenses justice and not mercy.

COSTS

31. I agree with Mr Kufaruwenga that the applicants have exhibited a very high degree of dishonesty in the way that they have litigated. They have simply refused to concede that they have no legal basis for remaining in occupation of the property in question. They have sought to leverage on the pendency of the main matter to prolong their stay on the property, yet in that application they do not seek any relief, either relating to their occupation of the property or the property itself. They can no longer challenge the forfeiture of the property in Court, and their eviction is predicated on that forfeiture order which they can no longer contest. All the Superior Courts of this land namely the High Court, Supreme Court and the Constitutional Court have sealed the fate of the property in question. Despite all that, the applicants have abused court process by coming back to the High Court, which stands lowest in the hierarchy of the superior courts, to effectively render nugatory not only what this court has determined in rendering the eviction order (which remains extant) but also

the effect of the Supreme Court and Constitutional Court decisions. By asking me to relate to the application on an urgent basis, the applicants are in reality seeking to make this court complicit in their abuse of court process. In the process, they have unnecessarily put the first respondent out of pocket by causing it to defend this matter. Punitive costs are thus fully justified. See *Nel* v *Waterbuug Landbouwers Kooperative Vereening* 1946 AD 54; *Muduma* v *Municipality of Chinhoyi and Anor* 1986(1) ZLR 12(H) *and Mutunhu* v *Crest Poutry Group (Pvt) Ltd* HH 399/17.

ORDER

32. In the result, IT IS ORDERED THAT:
    1. The preliminary point that the application is not urgent be and is upheld.
    2. The application be and is removed from the roll of urgent matters.
    3. The applicants shall jointly and severally the one paying the other to be absolved pay the first respondent's costs of suit on the legal practitioner and client scale.

Kajokoto and Company, applicants' legal practitioners
Kufaruwenga Kajevu and Zihanzu, first respondent's legal practitioners