

DISTRIBUTABLE (11)

LIZIWE MUSEREDZA AND 385 OTHERS

v

**(1) MINISTER OF AGRICULTURE, LANDS, WATER AND
RURAL RESETTLEMENT (2) MAPARAHWE PROPERTIES
(PRIVATE) LIMITED (3) KINGSDALE HOUSING
COOPERATIVE SOCIETY LIMITED (4) EXECUTOR,
ESTATE OF LATE PIETER NICHOLAS NEL (5)
HARDWORK CHIMINYA (6) GIVEMORE DUBE (7)
PRETTY KURERA (8) SPIWE MATAMBO (9) EXECUTOR,
ESTATE OF LATE SIBANGANI KOKERA (10)
ATTORNEY GENERAL OF ZIMBABWE (11) REGISTRAR
OF DEEDS**

**CONSTITUTIONAL COURT OF ZIMBABWE
GWAUNZA DCJ, GARWE JCC, MAKARAU JCC, GOWORA JCC, HLATSHWAYO
JCC, PATEL JCC AND UCHENA AJCC
HARARE: 7 JULY 2021 AND 3 NOVEMBER 2021**

L. Madhuku for applicants

L. Uriri for second respondent

A. Dracos for fourth respondent

Application in terms of R449 of the High Court Rules, 1971.

MAKARAU JCC: After hearing argument on the preliminary point whether the applicants required leave of the court to bring their application, the court ruled that leave was necessary. Having been filed without leave, the matter brought by the applicants was struck off

the roll with no order as to costs with the court indicating that its reasons would follow in due course.

I now set these out.

The matter is an application in terms of the then r 449 of the High Court Rules 1971, now r 29 of the High Court Rules 2021, as read with r 45 of the Constitutional Court Rules, 2016, (“the Rules”). Rule 449 of the High Court Rules provided:

“449. Correction, variation and rescission of judgments and orders

- (1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order—
 - (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or
 - (b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
 - (c) that was granted as the result of a mistake common to the parties.
- (2) The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed.”

This rule of the High Court is applicable in this Court by virtue of the provisions of r 45 of the Rules. Rule 45 imports into the practice and procedures of this Court, as near as may be, the practice and procedures of the Supreme Court, or where the rules of the Supreme Court are silent, of the High Court, in any matter that is not dealt with by the Rules. There is no equivalent of r 449 of the High Court Rules in the Rules or in the rules of the Supreme Court.

The applicants seek the rescission of an order of this Court dated 18 November 2015 on the basis that the order, handed down with the consent of the parties to that suit, was sought and

granted in error and in the absence of the applicants who are adversely affected by it. They further contend that they bring the application in terms of s 167(5) (a) as read with s 176 of the Constitution of Zimbabwe. Section 167(5)(a) provides for the enactment of rules for this Court to allow litigants, when it is in the interests of justice, with or without leave of the court, to bring matters directly to the court whilst s 176 grants this court inherent powers to protect and regulate its own processes. I shall advert to these two sections of the Constitution in detail below.

Factual Background

The applicants allegedly reside on a piece of land in the District of Hartley known as Kingsdale of Johannesburg. I note in passing that the exact nature of each applicant's tenure on the land in dispute was not described in the founding affidavit. Fleeting mention is however made in the opposing affidavit that the applicants may be occupying the land as beneficiaries of the land reform programme that was undertaken by the State commencing in the year 2000. The tenure of each applicant on the land in question was however of no import in the determination of the preliminary point.

Kingsdale of Johannesburg was agricultural land, owned by one Pieter Nicholas Nel, ("Nel"), now deceased and represented herein by the fourth respondent, Adam James Hartnack. In or about 2015, the land was identified for acquisition by the State under the Land Acquisition Act [*Chapter 20:10*] and processes to acquire the land were put under way. The acquisition of the land was contested.

At the time the current Constitution became operative in 2013, Kingsdale of Johannesburg, together with other pieces of agricultural land, had been listed in Schedule 7 of the repealed constitution. The significance of such listing is to be found in s 72 (4) (a) of the Constitution which provides that ownership of all agricultural land which was itemized in Schedule 7 to the former Constitution continues to be vested in the State.

Following litigation brought by the second respondent herein, Maparahwe Properties, (Private) Limited, Nel and five others over the nature and ownership of the land, which litigation commenced before the Constitution became operative, this Court, with the consent of the parties in case Number CCZ 43/15, issued an order declaring that Kingsdale of Johannesburg is private land. In consequence thereof, the first respondent herein, the Minister of Agriculture, Lands, Water and Rural Resettlement, was ordered to withdraw his or her acquisition of the land under the Land Acquisition Act and to publish such withdrawal in the Government Gazette and in the Herald Newspaper within 14 days of the order. It was further declared that ownership of the land vested in the second respondent, Maparahwe Properties (Private) Limited, which had purchased the land from Nel during his lifetime. The order authorized the second respondent herein to proceed with its development of the land into urban residential stands.

I reproduce the order in full:

- “1. Kingsdale Housing Cooperative Society limited be and is hereby joined to these proceedings as the second respondent.
2. It is declared that the applicant’s right under s 68(1) of the Constitution of Zimbabwe to fair, just and prompt administrative action has been violated.
3. It is declared that Kingsdale of Johannesburg measuring 161, 8238 hectares in the District of Hartley is private land.
4. Consequently, it is ordered that:

- 4.1. The first respondent be and is hereby ordered to withdraw its acquisition of land aforesaid and shall cause the publication of such withdrawal in the Government Gazette and the Herald Newspaper within fourteen (14) days of this order.
 - 4.2. The land aforesaid vests in the first applicant who shall proceed with urban development of the said land up to the issuance of title surveys in accordance with permits issued or to be issued by the relevant town planning authority.
 - 4.3. Any agreements of sale between first applicant and any other person as of the 26th February 2015, (the date of purported acquisition) remain valid and enforceable.
 - 4.4. All persons, with the exception of the second respondent's registered members as at 12 November 2013, in illegal occupation or possession of any portion of the said land forthwith vacate the land failing which the Sheriff of Zimbabwe or his lawful Deputy be and is hereby authorized to eject them.
 - 4.5. The First applicant hereby donates to the Government of Zimbabwe twenty-one (21) hectares of land in the area covered by Garikai/Hlalani Kuhle Housing Scheme and ZESA Servitudes.
 - 4.6. The first applicant shall develop the land in terms of paragraph 4.2 above and the members of the second respondent and persons referred to in paragraph 4.3 above shall compensate the first applicant for the remaining land measuring 140 hectares at US\$5.00 per square metre in accordance with the terms of a Deed of Settlement to be signed by the parties and incorporated in the order of the Administrative Court.
5. Each party to bear its own costs."

Contending that the declaration by this Court under para 3 and the consequential relief granted under para 4 of its order are unconstitutional as they violate the provisions of s 72(4)(a) of the Constitution, the applicants approached this Court as detailed above. To support the contention, it was argued that this Court cannot override or ignore the express provisions of the Constitution on what is and is not State land. By virtue of being itemized under schedule 7 of the repealed constitution, it was argued, Kingsdale of Johannesburg remained and is State land. In the circumstances of the matter, the argument proceeded, it was clearly an error for this Court to declare, as it did, that the land is private land.

Strongly believing, and still arguing at the hearing of the application, that such was not necessary, the applicants' legal practitioner and counsel did not seek leave of this Court as is provided for in r 21(1) of the Rules. The non-observance of the provisions of r 21(1) gave rise to the preliminary point taken by the respondents as to whether the application was properly before the court. The precise issue that arose for the determination of the court was whether leave of the court in accordance with r 21(1) is required for an application for the setting aside of an order of this Court under r 449 of the High Court Rules 1971 as read with r 45 of the Rules. As indicated above, the Court ruled that such leave is a pre-requisite.

The arguments

Mr *Dracos* for the fourth respondent made the simple point that the matter before the court, being an application in terms of r 449 of the High Court Rules, is not listed in r 21 of the Rules as one that does not require leave of the court before it is instituted. He invoked the *expressio unius est exclusio alterius* maxim to buttress his argument in this regard.

By invoking the *expressio unius est exclusio alterius* maxim, Mr. *Dracos* was in essence arguing that the Rules are exhaustive and, consequently, if a matter has been excluded from the list of matters for which leave is not required, then leave is always required.

Correctly understood, the argument by Mr *Dracos* represents a narrow view of the inter-play between the exclusive jurisdiction of this Court and the right to access that jurisdiction directly and without leave. The view point is not fully reflective of and is not borne out by the practice of this Court. There are matters that are not listed in r 21 as not requiring leave and for

which leave is not necessary. Examples of such matters are applications for joinder of parties for instance, or for the consolidation of causes already before the court. These primarily are cases that routine and arise incidentally during the determination of causes properly before the court. I will advert to such matters in detail below.

Submitting that the point *in limine* was well taken, Mr *Uriri* associated himself fully with the arguments advanced by Mr *Dracos* and made no additional submissions.

Mr *Madhuku* for the applicants on the other hand, strongly argued that leave of the court in the circumstances of this application was unnecessary. He made three distinct submissions.

Firstly, he argued that in matters where this Court has exclusive jurisdiction, leave to trigger that jurisdiction is not required. Also focusing on r 21, he argued that it becomes an illogical interpretation of the rule for leave to be sought where the court is the only court that can determine the matter. In this vein he pointed, and indisputably so, to the fact that this Court is the only court that has jurisdiction in this matter as only this Court can rescind its own decision as prayed for in the draft order.

Secondly, and as an offshoot of the first argument, Mr *Madhuku* argued that it is only in instances where this Court enjoys concurrent jurisdiction with other courts that the notion of leave arises and may become necessary. He argued that in such circumstances, for one to avoid or bypass the other equally competent courts and gain direct access to this Court, as a general rule, one can only do so with leave. Direct access then becomes an indulgence in the discretion of the

court. In contrast, he continued, where this Court is the only available forum, access to that court is not and should not be an indulgence but a right.

Finally, and to counter the invocation of the *maxim expressio unius est exclusio alterius* by Mr *Dracos*, Mr *Madhuku* submitted that the rules of this Court are not exhaustive and were not drafted to be so or with the intention that they be so.

Correctly understood, the argument by Mr *Madhuku* advocates very liberal direct access to this Court in matters where it is the only court that can determine the matter. Such direct access must be without leave.

Thus, he argued that establishing prospects of success beforehand, a necessary element to be satisfied in an application for leave for direct access, has no place in a matter where the court has exclusive jurisdiction. Direct access to argue the merits of the matter must not be hindered or obstructed. In this regard he relied on the remarks of this Court in *Meda v Sibanda and Ors* 2016 (2) ZLR 232 (CC) where it was held in respect of a s 85(1) application that:

“It is clear from a reading of s 85(1) of the Constitution that a person approaching the Court in terms of the section only has to allege an infringement of a fundamental human right for the Court to be seized with the matter. The purpose of the section is to allow litigants as much freedom of access to courts on questions of violation of fundamental human rights and freedoms with minimal technicalities. The facts on which the allegation is based must, of course, appear in the founding affidavit.

Whether or not the allegation is subsequently established as true is a question which does not arise in an enquiry as to whether the matter is properly before the Court in terms of s 85(1).”

The law and analysis

The jurisdiction of a court and access to that jurisdiction are two distinct legal precepts. The two are complementary but are not synonymous. They are not to be conflated. They have their foundations in two different laws. The jurisdiction of a court is to be found in substantive law while access to that jurisdiction and the conduct of litigation in that court are part of the adjectival law. Broadly stated, particularly in civil matters, substantive law defines the rights, duties and obligations of the parties and the court that has the competence to define those rights, duties and obligations and where they lie. On the other hand, adjectival law lays out the practical procedural steps necessary for the injured party to enforce those rights and obtain appropriate remedies or redress.

The law governing direct access to this Court, with or without leave, is adjectival law. It is the law of practice and procedure.

The law governing access to this Court is to be found largely in the Rules of this Court and less in the provisions of the Constitution setting out the jurisdiction of this Court.

The jurisdiction of this Court is provided for in s 167(1) of the Constitution as follows:

- (1) The Constitutional Court –
 - (a) is the highest court in all constitutional matters, and its decision on those matters bind all other courts;
 - (b) decides only constitutional matters and issues connected with decisions on constitutional matters, in particular references and applications under s 131(8)(b) and para 9(2) of the Fifth Schedule; and

- (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

The Constitution then proceeds in s 167(2) to provide for the four matters where only the Constitutional Court has jurisdiction.

I pause momentarily to underscore that the Constitution does not provide specifically when one can bring such matters or any other constitutional matter, directly and without leave, to the Constitutional Court. It instead provides in s 167(5) that:

- “(5) Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court –
 - (a) to bring a constitutional matter directly to the Constitutional Court;
 - (b) to appeal directly to the Constitutional Court from any other court;
 - (c) to appear as a friend of the court.”

Still digressing, I note that this is the section that Mr *Madhuku* relied on to argue that direct access to this Court without leave for an application in terms of r 449 of the High Court Rules is guaranteed. I am unable to read his argument in the section. My reading of the section is that it merely enables the promulgation of Rules of the court to provide for direct access to the court with or without leave, when it is in the interests of justice to allow such access.

Prior to the promulgation of the Rules of this Court, GWAUNZA JCC (as she then was) observed in *Prosecutor-General v Telecel Zimbabwe (Private) Limited* CCZ 10/15 that:

“Except for the specific instances stipulated in s 167(1)(b) and s 167(2)(b) ,(c) and (d), s 167 does not elaborate as to who, on what conditions or how, a party may approach the Court for it to exercise the jurisdiction conferred upon it by that provision.”

Her Ladyship continued:

“Thus s 167 (1), apart from the paragraphs mentioned, does not confer on anyone the right to approach the Constitutional Court directly, even if they have, or perceive themselves to have a constitutional matter needing the Court’s determination.” (The underlining is mine).

I again hasten to mention that, by design, the matters that GWAUNZA JCC (as she then was, specified as requiring no leave before institution have been listed amongst others as such in r 21. Whilst awaiting the promulgation of the Rules, the court, using its inherent jurisdiction as granted to it by s 176 of the Constitution, set the practice that such matters required no prior leave.

With the promulgation of the Rules, the position of the law is that, whilst the Constitution provides for the jurisdiction of the court in s 167, it leaves the development of the adjectival law regulating direct access to that jurisdiction, with or without leave, to the Rules.

It is a rule of common law and an entrenched part of our practice and procedure that matters are to be brought before the court in accordance with the rules of that court. The remarks of PATEL JCC in *Marx Mupungu v The Minister of Agriculture, Lands, Water and Rural Resettlement and Others* CCZ 7/21 are apt. He wrote:

“One cannot institute an action or application in the High Court, or any other court, without due observance of and compliance with the Rules of that court. The Rules inform a litigant of what is required of him to access the court concerned. If he fails to observe or comply with those Rules, he will inevitably be non-suited”.

Litigation in this Court is no exception. If anything, constitutional litigation has developed its own practice and procedures, distinct from civil procedure in the other courts of the

land, the fine nuances of which litigants and legal practitioners alike must familiarize themselves with.

Rule 21 (1) of the Constitutional Court Rules provides that:

- “21. (1) The following matters shall not require leave of the Court-
- (a) disputes concerning an election to the office of President or Vice President;
 - (b) disputes relating to whether or not a person qualified to hold the office of President or Vice President;
 - (c) referrals from a court of lesser jurisdiction;
 - (d) determinations on whether Parliament or the President has failed to fulfil a constitutional obligation;
 - (e) appeals in terms of section 175 (3) of the Constitution against an order concerning the constitutional validity or invalidity of any law.
 - (f) where the liberty of an individual is at stake;
 - (g) challenges to the validity of a declaration of a State of Public Emergency or an extension of a State of Public Emergency.”

But, as correctly argued by Mr *Madhuku*, the Rules are not exhaustive.

The Constitution in s 167 defines the jurisdiction of this Court. This is in respect of the subject matter that can be brought before the court. In s 176, it grants this Court inherent jurisdiction to protect and regulate its own processes. Matters that will then arise procedurally from the exercise of this inherent jurisdiction to protect and control its processes are naturally in the exclusive jurisdiction of this Court. I give examples of such matters elsewhere in this judgment.

Whilst the Rules have provided that matters that are in the exclusive jurisdiction of the court by virtue of s 167 of the Constitution, among others, do not require leave, they have not similarly provided for procedures that are in the exclusive jurisdiction of the court by virtue of s 176.

Whilst the Rules have not included procedural matters that may arise during the litigation of a constitutional matter in the list of matters for which no leave is required, it stands to reason that no leave of court is required before such matters are raised. Applications for postponement, for joinder of parties, for amendment of notices and papers filed with the court, for consolidation of matters before the court, and for the recusal of one or more members of the court among others, fall into this category. Self-evidently, it would be an illogical reading of r 21 to say that leave is required before such applications are made merely because they have not been specifically included in the list of matters for which no leave is required in terms of r 21.

Applied to the matters that are in this category, there is therefore some cogency in Mr *Madhuku's* argument that, for matters where the court is the only court that can determine the issue, leave is not required. But this rule, if it may be called that, is limited only to instances where the matter to be determined arises in the course of litigation and from the exercise of the power of the court to protect and control its processes. The issue must be procedural.

Applications for the setting aside of extant orders under r 449 of the High Court Rules 1971 do not arise during the course of litigation.

But that is not all.

Applications for leave for direct access under r 21 serve a dual purpose. Firstly, in matters where this Court enjoys concurrent jurisdiction with other courts, they serve to satisfy the court that it is in the interests of justice that this Court act as a court of first instance. In all other

matters, applications for leave to access the court directly serve to satisfy the court that it is in the interests of justice for it to determine the matter at all. The second purpose has a gate-keeping function. It acts to sieve matters that this Court must, in the interests of justice, determine and those that it should not, even if it is the only court that has jurisdiction in the matter.

As discussed above, an application to this Court in terms of r 449 of the High Court Rules as read with r 45 of the Rules is in the exclusive jurisdiction of this Court by operation of the law of practice and procedure. This is so because only this Court can correct or vary its own order sought or given in error and in the absence of a party adversely affected by the order.

Such an application is *sui generis* in a number of respects. Whilst it is brought to set aside an extant order of the court, it in essence seeks to bring before the court new facts or fresh legal argument for consideration. This is so because the applicants have perforce to allege that a material fact or law was not brought to the attention of the court and was therefore not considered by it before it made the order that is under challenge. In *casu*, evidence of the “new” fact was sought to be led through the founding affidavit in the form of the Government Notice that listed the land in dispute. The new matter that the applicants wish the court to determine is therefore the effect of this new evidence on the ownership of the land in dispute.

Secondly, the application is not between the same parties who were before the court in the matter that resulted in the extant order. It is brought by applicants who again perforce have to allege that they were not before the court when the order was granted. It therefore introduces not only a new matter but new parties.

These two aspects distinguish the application *in casu* from the application that was before the court in *President of the Senate and Another v Gonese and Another* CCZ 1/21, a case that Mr *Madhuku* made reference to. In that case, leave of the court was not required even if the matter was not listed in r 21 as a matter for which no leave is required. The court in that matter held that the application was a continuation of the cause or application that had been before the court and involved the same parties. For these reasons, contrary to the submissions by Mr *Madhuku*, that case is not of any assistance to the applicants whose circumstances are different.

The practice of this Court therefore is that, where a litigant wishes to bring a new and fresh cause and the matter is not listed in r 21 as one for which leave is not required, then leave must be sought even if the matter is in the exclusive jurisdiction of the court. The practice is based on and highlights the gate-keeping function of an application for leave.

A reading of the decided cases from this jurisdiction shows that the prime concern of the court is that direct accessibility to the court without leave should be limited to where it is in the interests of justice. The concern is thus against opening the floodgates by using applications for leave as a filtering mechanism.

“The filtering mechanism for leave for direct access effectively prevents abuse of the remedy. The rules requiring leave for direct access ensure that the power of constitutional review is exercised by the court in reviewable cases only.” (Per Malaba C.J. in *Lytton Investments (Private) Limited and Another* CCZ11/18.

Disposition

Regarding costs, the court did not see any justification for departing from its general practice of not making an order of costs in favour of any of the parties. None of the parties prayed for an order of costs.

It is for the above reasons that the matter was struck off the roll with no order as to costs.

GWAUNZA DCJ: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

UCHENA AJCC: I agree