

CHIWOMBERERWA PATRICK MAPFUMO
and
ESTHER MAPFUMO
versus
DIVVYLAND INVESTMENTS (PVT) LIMITED
and
MINISTER FOR JUSTICE LEGAL & PARLIAMENTARY AFFAIRS
and
DAVID CHIWEZA

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE, 28 June & 21 July 2022

Opposed Application

T Chinyoka, for the applicants
S M Hashiti, for the 1st respondent
No appearance for the 2nd and 3rd respondents

BACHI-MZAWAZI J: On 5 November 2021 in case SC 250/19 judgement number SC 138/21 the Supreme Court issued an order, on appeal overturning the decision of this court of 10 April 2019 in case HC 6567/17. Of significance is paragraph 2.1 of the order stating that:

“The plaintiff’s claim for eviction of the respondent and all those claiming title through him from house number 12 Le Roux Drive, Hillside, Harare is granted.”

This order was in favour of the first respondent herein against the third respondent. The said order affected the applicant’s right of occupation as they were the ones in occupation at the time. For one reason or the other applicants had not been made part to both suits mentioned above yet their occupation was known by the feuding parties. Their right of occupation emanated from a deed of donation of the property in contention entered into between the third respondent and themselves. The decision of the appellate court is extant.

Applicants sought to resist the eviction as stated in the Supreme Court decision above, by the institution of this Constitutional court application for a declarator. The nature of the relief sought in detail is as follows:

- a. As a declaratory relief;
 1. The applicants are the occupiers of 12 Le Roux Drive.

2. The practice in eviction proceedings of claiming relief against one or more defendant(s) but for the eviction of “all those claiming title through him/them” without citing all occupiers in the home is in violation of s 56 and 74 of the Constitution of Zimbabwe.

b. As ancillary relief

1. The applicant as the occupiers of 12 Le Roux Drive cannot be evicted without an order of court against them made after considering all the relevant circumstances of the occupiers of the home.
2. That there be no order as to costs.

Briefly, the first and third respondents entered into a verbal instalment agreement for the sale of property, house number 12 Le Roux Drive, Hillside, Harare, sometime in 2009. Vacant possession was given at the time of the signing of the agreement and after the payment of the then agreed purchase deposit. Over a period of time as per the dictates of the said agreement, a substantial amount was paid by the third respondent, leaving a nominal amount. From the onset, it was agreed that the seller would reduce the agreement to writing, which he never did even after several requests resulting in the purchaser withholding the payment of the balance.

The third respondent, soon after getting vacant possession, donated the said property to the applicants pursuant to a deed of donation. Applicants, subsequently took occupation of the property. It is on record that, at one stage, the purchaser was informed of the rights of the applicants and the need to draft the agreement of sale in their names instead of that of the third respondent. Irrefutable evidence was placed before the courts that the applicants even paid the sum of three hundred dollars to the seller to facilitate the drawing of the long overdue agreement of sale. However, the seller, who is the first respondent herein, continued to play hide and seek. Contrary to the acreage in their verbal agreement, the third respondent learnt that, the first respondent had subdivided the property in issue after surreptitiously obtaining a subdivision permit from the respective authorities. When he registered his displeasure, the first respondent, reacted by issuing summons for his ejection and of all those who claimed occupation through him.

Despite the fact that, the first respondent was aware of the existence of the applicants and their rights and interests in the property, he did not enjoin them as parties to those proceedings. On the 10 April 2019, in a summons matter initiated by the first respondent for

eviction, case HC 6567/17, judgment was given in favour of the third respondent, both in terms of the main and counterclaim. The joy was short lived when the first respondent successfully appealed the decision in case SC 250/19, which granted the now contentious eviction order.

It is the applicants' case that, the Supreme Court decision to eject them when they were not part to the proceedings is an infringement of their Constitutional rights. Differently put, they argue that, they are and have always been in occupation of the property, therefore the failure to incorporate them in a suit whose resultant judgement affected their rights was a violation of ss 56 and 74 of the Constitution of Zimbabwe, Amendment Act No. 20 of 2013. They advanced that, they deserved equal protection and benefit of the law as espoused in s 56 of the Constitution. They also claim that by virtue of s 74 of the same, they had the right not to be arbitrarily evicted from their home. They argue that they had a constitutional right to have their own personal circumstances, canvassed, and considered as they had occupational rights independent of and not related to the contract of donation, nor the third respondent. They contend that it would have been fair and just if the courts, before the eviction gave them an opportunity to defend their rights of occupation and freedom from eviction. It is their further contention that the eviction is arbitrary as the order of the superior court was given without their inclusion.

Applicants further submit that s 74 of the constitution was meant to protect rights such as theirs irrespective of the fact that they derived their right of occupation from the person directly targeted by the order for ejection. They are saying an omnibus order evicting other people not part of the suit but in occupation contravenes their own personal rights. In their view, s 74 should be construed as the remedy or panacea to redress umbrella treatment of rights of occupation separate from contractual obligations of the other parties. In support of this position, Mr *Chinyoka*, equated the applicants' circumstances to those of the applicants in the case of, *Port Elizabeth Municipality v Various Occupiers 2005(1) SA217 CC*, where the court recognised the right of occupation of the illegal settlers on Municipal land, and protected those rights from arbitral eviction even from the owner of the land. In addition, they contend that they are not challenging the Supreme Court decision from the back door but rather seeking equal protection by the law.

The respondent raised four points *in limine* which are, un procedural attempt to interfere with a Supreme Court judgement, (jurisdiction), no *locus standi*, ripeness and constitutional avoidance and need for applicants to have applied for a joinder in case 6567/17.

They controvert that the Supreme Court has ruled and its ruling stands. The effect of that ruling is that, as the legally declared owners, they have the right to vindicate the said property from whosoever is in its possession without their consent. It is their submission that since the appellate court has made a decision that all occupants be evicted, this court has no jurisdiction to review query, rescind or set aside that decision even in respect of a constitutional argument. In their view, the applicant is seeking to indirectly challenge the Supreme Court decision under the guise of constitutional violations. They cited the cases of *Commercial Farmers Union v Mhuriro*, 2000 (2) ZLR 405 SC and *The Church of the Province of Central Africa v Diocesan Trustees for the Diocese of Harare and The Sheriff for Zimbabwe*, HH 206/11.

In response, the applicant maintains that they are not attacking the Supreme Court decision but the constitutionality of an order which has the effect of depriving people with right of occupation of their homes.

The compounded issue from the preliminary points particularly, from the oral submissions by Mr *Hashiti*, is that of jurisdiction. Whether or not this court has jurisdiction to entertain a Constitutional matter arising or sprouting from a decision of the appellate court of the land?

On analysis, the issue of *locus standi* does not hold as clearly from the record applicants have real and substantial rights, as people who had been in occupation from the date of sale of the property pursuant to a deed of donation whose legality was never challenged nor disputed. Not only that, s 85(1)(a) of the Constitution of Zimbabwe accords them the requisite *locus standi in judicio* within the backdrop of their peculiar circumstances. See, *Makarudze & Anor v Bungu & Ors*, 2015 (1) ZLR 15 (H), *Bonnyview Estate (Private) Limited v Zimbabwe Platinum Mine (Private) Limited & Anor* CCZ6/19. Section 85 (1) (a) of Amendment Act No. 20 of 2013 reads:

- a. Any person acting on their own interests;
is entitled to approach a court , alleging that a fundamental right or freedom enshrined in this Chapter has been , is being, or is likely to be infringed, and the court may grant an appropriate relief, including a declaration of rights and an award of compensation.

As such it will be misstatement to say that the applicants have no *locus standi*.

However, it is apparent that the Supreme Court has made a ruling. It is against this ruling that the applicants have launched their constitutional violations application. That being

so, even if this court has concurrent jurisdiction with the Constitutional Court, in term of s 171(c) of Amendment Act No. 20 of 2013, to sit as a court of first instance in constitutional matters, in my view it cannot do so in respect to a challenge of the decision of a superior court. See, *Mbatha v National Foods (Private) Limited* CCZ 6/21. In my view, the court with the inherent jurisdiction in all Constitutional matters is the Constitutional Court, irrespective of the fact that, the constitutional argument was not canvassed and determined by the lower court or the fact that it is not a constitutional invalidity case. See, *Bonnyview Estate (Private) Limited (supra)*, *De Lacy and Anor v South African Post Office* 2011 (a) BCLR 905 (CC) and *Chiite & Ors v The Trustees of the Leonard Cheshire Homes Zimbabwe Central Trust* CCZ 10/17.

From whatever angle you look or view this matter, constitutional argument or not, it zeroes in on the decision of the Appellate court. It is true that, indeed there is authority to the effect that, whenever a decision is to be made whose outcome affects the rights and interests of other people not part to suit then those people should be enjoined. See, *Drum City (Private) Limited v Garudzo* SC 57/18. In this case, it was held that in cases of necessity, if the parties do not raise the issue of non-joinder the court should raise it *mero motu* to safe guard the interests of third parties in any matter before it and should decline to hear the matter until such joinder is effected.

In casu, applicants had been in occupation for several years. In addition, they had made several improvements regarding the place as their family home. They had occupation rights emanating from a lawfully executed deed of donation. The first respondent chose not to incorporate them in the summons matter initiating the eviction proceedings on one hand. On the other hand, through ignorance or inadvertence the applicants testified in the action matter but never sought to be joined to the proceedings.

One cannot be faulted to say, as oft stated, “The law is an ass”, but nevertheless, it must be obeyed for the preservation of the rule of law. No matter how intriguing the applicant’s argument may be, the bottom line is, the appellate court made a decision that the third respondent and all who claim occupation through him be evicted on the property it ruled belonged to the first respondent. In *The Church of the Province of Central Africa*, above, it was explicitly stated that,

“... as already said , once the Supreme Court issues an order either in the exercise of its appellate or original jurisdiction, it can only be interfered with by itself and by no other court”

Although the court did not address on the rights that flowed from the deeds of donation in the possession of the applicants, their occupation or anything to do with those outside the scope of the appeal before it, it is clear that the applicants were in occupation for several years and considered the premises their home. As it were, the order of that court specifically spoke to their eviction. The court is cognisant of the judgment of this court in case HC 214/22 in favour of the applicant. The distinctive feature of this judgment is that the High Court has jurisdiction to execute and implement Supreme Court orders. It has no power to revisit the judgment itself even when it is clear that the application is based on a different constitutional dimension.

As already alluded to, *supra*, the law on this aspect is very clear. This court has no jurisdiction to determine a matter which has already been determined by the superior court. The appellate court has spoken. It is the final court of appeal unless there is a constitutional twist to the argument to be appealed against from its judgment. See, the Constitutional cases mentioned above as well as, *Gabriel Ntleli Swartbooi and Seventeen Others v Lilian Ray Brink and Gerrit Niewoudt*, Constitutional Court of South Africa, case CCT 27/02, *Mphahlele v First National Bank of South Africa Ltd* 1999 2 SA 667 CC. Its decision still stands. It is extant. The recourse available, even if it is a constitutional matter where this court has concurrent jurisdiction lies with the constitutional court in terms of s 171(c) of the Constitution as stated before. This is not the case, where it can exercise that jurisdiction. Grievances from the appellate court lie with the Constitutional Court.

I find the preliminary point on jurisdiction over an extant decision of a superior court being dispositive of the whole matter. There will be no justification in determining the rest of the preliminary objections raised.

Accordingly the applicants' claim is dismissed with costs.

Gunje Legal Practice, applicant's legal practitioners
Mushoriwa Pasi Corporate Attorneys, first respondent's legal practitioners