

DISTRIBUTABLE (4)

STREAMSLEIGH INVESTMENTS (PRIVATE) LIMITED

v

AUTOBAND INVESTMENTS (PRIVATE) LIMITED

CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, JULY 3 & 24, 2014

A P de Bourbon SC, for the applicant

L Uriri, for the respondent

Before: CHIDYAUSIKU, CJ, In Chambers

The facts of this case are lengthy and fairly complex, but have been fairly summarised by GOWORA J in judgment no. SC 43/14. There is no point in regurgitating them. However, I will restate some of the facts for the purpose of providing a context to this judgment.

The respondent, Autoband Investments (Private) Limited (“Autoband”), launched spoliation proceedings seeking to evict African Medical Investments (Private) Limited (“AMI”) from No. 15 Lanark Road, Belgravia, Harare (“the premises”) in the magistrate’s court. The present applicant, Streamsleigh Investments (Private) Limited (“Streamsleigh”) was not cited as a respondent in those proceedings although it contended that it was in occupation of the premises as owner of the premises. It follows from this contention that, according to Streamsleigh, Autoband was suing the wrong party. Although

Streamsleigh was not cited by Autoband in those proceedings, it filed papers in opposition to the application for spoliation against AMI. An order of spoliation was granted and the learned magistrate ordered the eviction of AMI, and all those claiming occupation of the premises through AMI, from the premises. It would appear that there was no specific order against Streamsleigh, which, as I have already stated, contends it was in occupation of the premises at the relevant time and that its occupation was not through AMI but in its own right as owner of the premises. On the strength of the magistrate's determination, Streamsleigh was evicted from the premises despite the spoliation order not being directed at it.

Streamsleigh was dissatisfied with this turn of events and launched a court application in the High Court. In that court application Streamsleigh sought to have set aside the spoliation order issued by the magistrate. The draft order attached to the application reads:

“IT IS DECLARED THAT:

1. The eviction order granted in Case MC 16435/11 between the respondent and African Medical Investments Plc is of no force, effect or application as against the applicant and its occupation of the premises known as Stand No. 2924 Salisbury Township of Salisbury Township Lands also known as 15 Lanark Road, Belgravia, Harare.
2. Any relief granted in Case Nos HC 619/11 and 2125/11 be and are hereby declared to be of no force, effect or application as against the applicant in respect of its occupation of their (*sic*) premises known as Stand No. 2924 Salisbury Township of Salisbury Township Lands also 15 Lanark Road, Belgravia, Harare.”

The High Court dismissed Streamsleigh's court application.

Streamsleigh appealed against that judgment to the Supreme Court. The Supreme Court upheld the appeal and set aside the High Court order. The Supreme Court set aside the High Court order and substituted in its place the following order:

“In the premises the appeal must succeed.

Accordingly, it is ordered as follows –

1. The appeal is upheld with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following –
 - a) The eviction order granted by the magistrate’s court, Harare, in the matter between *Autoband Investments (Private) Limited t/a Trauma Centre v African Medical Investments Plc* under case No. MC 16435/11 be and is hereby declared to be of no force, effect and application as against the applicant.
 - b) It is ordered that the applicant be and is hereby restored to possession and occupation of (the) premises known as Stand 2924 Salisbury Township of Salisbury Township Lands situated at Number 15 Lanark Road, Belgravia, Harare.
 - c) It is ordered that the respondent pays the costs of this application on a legal practitioner client scale.”

Autoband was dissatisfied with the judgment of the Supreme Court and filed the following notice of appeal to the Constitutional Court:

“TAKE NOTICE THAT the appellant hereby appeals to the Constitutional Court of Zimbabwe against the **whole** of the judgment of the **Supreme Court of Zimbabwe** given at Harare on the **17th June 2014**.

The appellant hereby tenders:

- (i) The costs for the preparation of the record of appeal, and
- (ii) The respondent’s security for costs in such an amount as may be agreed between the parties, or fixed by the Registrar, as soon as the same have been determined.

TAKE NOTICE THAT that the appeal raises Constitutional questions, in that

- A. The Constitution of Zimbabwe binds all the organs of the State including the Judiciary, and
- B. The Constitution of Zimbabwe has both vertical and horizontal application and binds private citizens by reason of section 2(2) as read with section 45 thereof, and

- C. The appellant obtained an order of spoliation from the Magistrates Court. The respondent appealed to the High Court. The appellant obtained leave to execute pending appeal. The respondent then sought a declaration of rights the effect of which was to undermine the process it had instituted in the High Court. For the stronger reason, the effect was to violate the appellant's right to the equal protection and benefit of the law guaranteed by section 56(1) of the Constitution. The matter before the Supreme Court was the appeal in respect of the denial of the declaration of rights, and not the appeal from the Magistrates Court. The Supreme Court granted a substantive constitutive (order), as opposed to a purely declaratory order that had been sought, and in so doing determined the substantive merits of the appeal pending before the High Court.
- D. The order of the Supreme Court infringed on the appellant's proprietary rights protected under section 71 of the Constitution, and for the stronger reason, the equal protection and benefit of the law aforesaid.

TAKE NOTICE THAT the grounds of appeal are as follows –

1. The Supreme Court erred in determining the merits of an appeal that is pending before the High Court, and in so doing infringed the appellant's right to the equal protection and benefit of the law protected and guaranteed under section 56(1) of the Constitution of Zimbabwe.
2. The Supreme Court denied the appellant the protection of the law in granting a substantive constitutive order, and not a purely declaratory order which had been prayed for.
3. To the extent that the appellant's principal shareholder is the beneficial owner of the immovable property in question, and to the further extent that an incident of ownership is the right to occupation, and to the even further extent that the effect of the Supreme Court judgment is to order the ejection of the owner of the property, the appellant was deprived of the property rights protected and guaranteed under section 71 of the Constitution of Zimbabwe.

WHEREFORE the appellant prays for the following relief –

1. It is declared that the appellant has been denied the right to the equal protection and benefit of the law protected and guaranteed in section 56(1) of the Constitution of Zimbabwe.
2. It is declared that the appellant's property rights protected in section 71 of the Constitution of Zimbabwe have been infringed.

3. Consequently it is ordered that the judgment of the Supreme Court be set aside and the following be substituted:

‘The appeal is dismissed with costs’.

4. The respondent shall pay the costs of this appeal.”

Attempts to evict Autoband on the strength of the Supreme Court order were resisted by Autoband on the ground that Autoband had noted an appeal to the Constitutional Court. Autoband contended that the appeal to the Constitutional Court had the effect of suspending the operation of the Supreme Court order. Given this situation, the Sheriff was at a loss on how to proceed.

In an effort to find a way forward, Streamsleigh filed the present Chamber application. In this Chamber application Streamsleigh contends that the notice of appeal is void and of no effect. Streamsleigh further argues that because the notice of appeal is a nullity, there is therefore no appeal before the Constitutional Court and the eviction of Autoband should proceed. Autoband, on the other hand, contends that the appeal is valid. The respective stances of the parties are aptly captured in paragraphs 1 and 2 of Autoband’s heads of argument, which read as follows:

- “1. The present application is one for:
 - 1.1 A declaration that the notice of appeal filed by the respondent in case number CCZ 43/2014 does not raise a constitutional question and is consequently void, and
 - 1.2 An order directing that a writ of execution, purporting to have been issued out of the Supreme Court (which does not issue writs) by the Registrar of the High Court, be carried into execution.
2. The relief sought is incompetent for several reasons:
 - 2.1 A single Judge of the Constitutional Court, sitting alone in Chambers, has no jurisdiction to determine whether a matter raises a constitutional question or is connected to a

constitutional issue, this being a function the Constitution reserves for the Constitutional Court sitting as a Bench, and

- 2.2 The direction sought carrying the writ into execution is predicated on a misconceived application which is a nullity, and
- 2.3 In any event the Supreme Court does not issue writs and to have the process of the Supreme Court issued by the Registrar of the High Court is unprecedented.”

Having considered the papers and the submissions of counsel, I have come to the conclusion that it would be more appropriate, but not necessarily as a matter of legal requirement, that the issues set out above be determined by the full Bench of the Constitutional Court. However, I am satisfied that the issue of whether execution of the Supreme Court judgment, namely the eviction of Autoband from the premises, should be effected despite the noting of an appeal is urgent and should be treated as urgent. The papers as they stand clearly establish urgency. I accordingly direct that that issue be determined in the first instance by a Judge of the court *a quo*. I accordingly refer the issue of whether Autoband should be evicted from the premises despite the noting of an appeal to any one of the Judges in the court *a quo* for determination on the same papers. It is up to the Judge dealing with the matter whether to grant leave for the filing of further papers. Costs of this matter will be costs in the cause.

Mtewa & Nyambirai, applicant’s legal practitioners

Venturas & Samukange, respondent’s legal practitioners