REPORTABLE (60)

BARIADE INVESTMENTS (PRIVATE) LIMITED
v
TENDAI MASHAMHANDA

SUPREME COURT OF ZIMBABWE
BHUNU JA, MAKONI JA & MUSAKWA JA
HARARE: 8 JUNE 2023.

T. Mpofu with *T.L. Mapuranga,* for the appellant

L. Madhuku, for the respondent

MAKONI JA:

1. This is an appeal against the entire judgment of the High court ("the court *a quo"*), wherein it removed the appellant's matter from the roll in order to pave way for the finalisation of an application filed before the Constitutional Court under case number CCZ 12/22.

2. After hearing submissions from counsel, the court granted the following order;

    1. The appeal be and is hereby allowed with costs.
    2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

        "The respondent's application for the removal of the matter from the roll be and is hereby dismissed with costs."

    3. The matter is remitted to the High Court for determination on the merits.

3. We indicated that reasons for the order will be furnished in due course. Below are the reasons for judgment.

FACTUAL BACKGROUND

4. The appellant is a company duly incorporated in terms of the laws of Zimbabwe while respondent is a male adult of full legal capacity. The parties are embroiled in a dispute over an immovable property known as subdivision C of Lot 6 of Lots 190, 191, 193, 194 and 195 Highlands Estate of Welmoed also known as 41 Ridgeway North, Highlands, Harare (hereinafter called "the property").

5. The dispute spilled over to the Supreme Court which resolved the ownership dispute in favour of the appellant in the case of *Bariade Investments (Pvt) Ltd* v *Puwai Chiutsi & Ors* SC 24/22.

6. After the above-mentioned Supreme Court judgment, the property was transferred into the appellant's name on 5 May 2022. Despite the Supreme Court's decision, the respondent retained possession and occupation of the property. He approached the Constitutional Court seeking to have direct access to that court under case number CCZ 12/22.

7. Meanwhile the appellant filed an application before the court *a quo*, seeking the eviction of the respondent from the property, under case number HC 3124/22.

8. The eviction was opposed by the respondent on the basis, *inter alia*, that there was a matter pending before the Constitutional Court relating to the ownership of the property. In opposing the application, the respondent argued that after purchasing the property, he went on to occupy the property in dispute and effected some improvements to the tune of US $ 1 500 000.00. He averred that as per those improvements he has an interest in the property within the definition of "property" under s 71(1) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013. He averred that "interest" is itself "property" under s 71 of

the Constitution and that the appellant in seeking to evict him without compensation on the improvements he made would result in compulsory deprivation of his property contrary to s 71 of the Constitution.

PROCEEDINGS BEFORE THE COURT *A QUO*

9. On the date of hearing of the matter, Mr *Madhuku,* counsel for the respondent, sought the removal of the application for eviction from the roll in order to allow the finalisation of the application filed by the respondent in the Constitutional Court. The basis of the request was that the court ought to await the outcome of the Constitutional Court case. He further submitted that the court can stay the proceedings where there is a possibility that its decision may be in conflict with the decision of the Constitutional Court.

10. Mr *Mpofu,* counsel for the appellant, strongly opposed the removal of the matter from the roll and insisted that the Constitutional Court matter had no bearing on the application that was before the court *a quo.* He submitted that the application to the Constitutional Court does not suspend the decision of the Supreme Court which resolved the ownership dispute. He referred the court to s 6 of the Constitutional Court Act [*Chapter 7:22*] which provides that an appeal from the Supreme Court to the Constitutional Court does not suspend the decision being appealed against unless the Constitutional Court orders otherwise.

11. Upon being asked by the court *a quo* whether the matter may not be stayed on the basis of *lis pendens*, Mr *Mpofu* argued that the cause of action in the two cases is different and hence *lis pendens* does not apply.

FINDINGS OF THE COURT *A QUO*

12. In disposing of the matter, the court found that the application before it met the test of *lis pendens* on the basis that the parties in the two matters were the same, the thing being contested was the same and that the cause of action was substantially similar as ownership was under consideration in both cases. The court also found that the dictates of justice and equity commanded that the proceedings before it be stayed until the Constitutional Court case was finalised. Further the court held that proceeding to determine the matter may run the risk of having a judgment that may end up being in conflict with the judgment of the Constitutional Court.

13. Accordingly, the court found that removing the matter from the roll was in the interest of justice and that any prejudice contemplated by the appellant may be cured by a claim for holding over damages if the respondent loses the case before the Constitutional Court.

THE APPEAL

14. Dissatisfied by the decision of the court *a quo,* the appellant noted the present appeal on the following grounds of appeal:

GROUNDS OF APPEAL

15. "The court *a quo* erred at law by –

    1.1. Finding that the matter before it should be removed from the roll on the grounds of *lis pendens* when this special defence had not been raised by the respondent.

    1.2. Finding that the matter before it was *lis pendens* when it was apparent that the matter and the application before the Constitutional Court under case number CCZ 12/22 were not based on the same cause of action but were only related in the sense of both arising from the dispute over the property.

1.3. Removing the matter from the roll and thereby granting the respondent a stay of execution of the judgment of the Supreme Court under judgment number SC 24/22 when the respondent had not made any such application.

1.4. Effectively considering equities and delaying the eviction of the respondent in an application based on the *rei vindicatio* for which such equities are never a consideration.

1.5. Removing the matter from the roll when the interests of justice and convenience dictated that the matter be heard and determined on its merits since the appellant had taken all steps to secure relief and the respondent had taken none.

16. The appellant sought the following relief:

> "1. The appeal be allowed with costs.
>
> 2.The judgment of the Court *a quo* be set aside and substituted with the following:
>
> '1. The respondent's request for the removal of the matter from the roll is dismissed, with costs'
>
> 3. The matter is remitted to the High Court for a decision on the merits before a different Judge.'"

POINTS *IN LIMINE*

17. Mr *Madhuku*, counsel for the respondent, raised three points *in limine*. The first point was that the order of the court *a quo* was not appealable, even with leave, as the court *a quo* merely removed the matter from the roll pending determination of the matter that is before the Constitutional Court. As such, the matter was still before the court *a quo*. It was also his submission that in terms of s 43(1) of the High Court Act [*Chapter 7:06*], it is not every decision of the High Court which amounts to a judgment and where an order is merely removing a matter from the roll, it is not a judgment within the contemplation of the section.

18. The second point was that the order granting leave, dated 28 March 2023, was irregular and void in that it records that counsel were heard when there was no hearing at which counsel for both parties had appeared and made submissions before the Honourable Justice DEME.

19. On the third point, Mr *Madhuku* submitted that the appeal was fatally defective as the relief sought by the appellant was not exact and not competent. He submitted that the law is that if a party prays for a relief that would not have been granted by the court *a quo,* then that relief is defective. Consequently, he prayed that the appeal be struck off the roll.

20. Per *contra*, Mr *Mpofu* argued that the Judge *a quo* did not just remove the matter from the roll but placed a condition on that removal which froze the rights of the parties and as long as the condition exists then the matter may not be re-enrolled. Mr *Mpofu* also submitted that any removal of a matter from the roll, to the extent that it interferes with the rights that are sought to be vindicated, is actually appealable as long as leave has been sought and obtained. Counsel relied on the following cases to support this submission; *The Zimbabwean Open University* v *Magaramombe & Anor* 2012 (1) ZLR 397 (S), *University of Zimbabwe* v *Wamele* SC 45/13, *Alshams Global BVI Ltd* v *The Deposit Protection & Ors* SC 52/22.

21. Regarding the second point Mr *Mpofu* submitted that an application for leave to appeal does not require a hearing of oral submissions. A Judge is at liberty to grant that application on the papers. He also submitted that an order granting leave to appeal is final and may not be interfered with. It was also his submission that if the respondent took the view that the name of its legal practitioner ought not to have appeared, that is a clerical mistake that can be remedied by having resort to r 29 of the High Court Rules, 2021. In his view, the court *a quo* would not even waste its time on that matter because there is nothing to correct .

22. On the third point *in limine*, Mr *Mpofu* submitted that the relief sought by the appellant was exact and competent as it was based on a ruling made by the court *a quo* after the respondent had requested the removal of the matter before it from the roll. He further submitted that the application for removal of the matter from the roll was strongly opposed by the appellant. It was also his submission that it is clear that an application was made in the court *a quo*. It is the resultant decision from that application which the appellant seeks to be set aside, hence the relief sought is exact and competent.

23. The court considered the 3 points *in limine* and found that they were unmeritorious and accordingly dismissed them. It indicated that the reasons for such dismissal will be contained in the main judgement. These are the reasons.

THE JUDGEMENT OF THE COURT *A QUO* IS NOT APPEALABLE, EVEN WITH LEAVE

24. Mr *Madhuku's* bone of contention is that the court *a quo* merely removed the matter from the roll pending determination of an application by the Constitutional Court. The removal of the matter from the roll essentially meant that the application remained before it and could be re-enrolled. Such a decision is not a judgment as contemplated in s 43 (1) of the High Court Act. In terms of s 43 of the Act an appeal lies against a judgment of the High Court.

25. Mr *Madhuku* further contended that the decision given by the court *a quo* was not a judgment. It is merely a procedural ruling which is not appealable. For authority he relied on the case of *Dickinson Fisher's* v *Executors* 1914 AD 424 wherein it was held as follows:

> "But every decision or ruling of a court during the progress of a suit does not amount to an order. That term implies that there must be a distinct application by one of the parties for definite relief. The relief prayed for may be small, or it may be of great importance, but the court must be duly asked to grant some definite and

> distinct relief, before its decision upon the matter can properly be called an order. A trial court is sometimes called upon to decide questions which come up during the progress of a case, but in regard to which its decisions would clearly not be orders. A dispute may arise, for instance, as to the right to begin: the court decides it, and the hearing proceeds. But that decision, though it may be of considerable practical importance, is not an order from which an appeal could under any circumstance lie, apart from the final decision on the merits."

26. He concluded by submitting that in the absence of a "judgment" within the contemplation of s 43(1) of the Act leave to appeal does not arise. There is no judgment from which an appeal can lie. Therefore s 43(2) of the Act does not arise.

27. *Per contra*, Mr *Mpofu* submitted that an order for the removal of a matter *simpliciter* is actually appealable but only appealable with leave. He further submitted that a postponement removes a matter from the roll and it is common cause that a postponement is appealable. It was also his submission that any removal of the matter from the roll, to the extent that it interferes with the rights that are sought to be vindicated by a party, is appealable, as long as leave has been sought and obtained. He relied on the case of *Alshams Global BVI Ltd* v *Deposit Protection & Ors* SC 52/22 where it was held that the striking off of the appellant's application from the roll was interlocutory in the sense that it did not determine any issue which was the subject of the main suit but was however appealable in the sense that it brought the entire activities of the application to a screeching halt.

28. He concluded by submitting that, in this matter leave had been sought and granted and that this Court does not question the grant of leave.

29. Section 43 (1) of the High Court Act provides as follows:

> "43 Right of appeal from High Court in civil cases

> (1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction."

30. This necessarily raises the question whether the order issued by the court *a quo* can be termed a judgment in the contemplation of s 43 of the Act.

31. In *Zweni* v *Minister of Law and Order* 1993 (1) SA 523 (A) at 531H-532A it was held as follows:

> "For different reasons it was felt down the ages that decisions of a 'preparatory or procedural character' ought not to be appealable (per Schreiner JA in the Pretoria Garrison Institutes case supra at 868). One is that, as a general rule, piecemeal consideration of cases is discouraged. The importance of this factor has somewhat diminished in recent times (SA Eagle *VersekeringsmaatskappyBpk v Harford* **[1992] ZASCA 42**; **1992 (2) SA 786** (A) at 791B – D). The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution (Friday t/a Pride Paving v Rubin **1992 (3) SA 542** (C) at 548H – I). (Emphasis is mine)

32. The court in the *Zweni* case (*supra*) further stated at 536B that:

> "... it appears to me that, generally speaking, a non-appealable decision (ruling) is a decision which is not final (because the court of first instance is entitled to alter it), nor definitive of the rights of the parties (emphasis is mine) nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

33. The court *a quo* removed the matter from the roll on the premise that the matter was *lis pendens*. Mr *Madhuku*'s contention is that the court *a quo's* pronouncement was not an order and is therefore not appealable even with leave. He made the submission being conscious that the appellant had obtained leave to appeal from the court *a quo*. On the other hand, Mr *Mpofu* argues that what was granted by the court *a quo* is an order though of an interlocutory nature. Hence the need to seek and obtain leave.

34. I agree with Mr *Mpofu* that the court made an order which order is interlocutory in nature. It is of a procedural character but has the effect of freezing the rights of a party. It falls into the category of orders examined in the *Zweni* v *Minister of Law and Order* in para 31 above (*supra*) where it was stated as follows:

> "The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution".

35. I would distinguish the order *in casu* from a mere procedural order standing down a matter to the end of the roll which was given by Mr *Madhuku* as an example of a non-appealable order. Such an order is an interlocutory order made during ongoing proceedings. The matter is still being heard. In *casu*, the court *a quo* removed from the roll, the matter before it, pending the determination of an application filed before the Constitutional Court. It put a condition that the matter could not be re-enrolled, no matter how long it took for the constitutional matter to be determined. The respondent's pursuit of his claim for *rei vindicatio* was brought to a screeching halt. His rights were frozen, as Mr *Mpofu* correctly puts it. An order with such an effect would be appealable with leave. An appeal, in such circumstances, would lead to the speedy resolution of the dispute between the parties.

36. The order issued by the court *a quo* was therefore appealable with leave.

THE ORDER GRANTING LEAVE, DATED 28 MARCH 2023 WAS IRREGULAR AND VOID

37. Mr *Madhuku*'s gripe with the order granting leave is that it records the names of counsel as having appeared before the judge and yet no counsel appeared. Mr *Mpofu*, on the other hand, submitted that a Judge is at liberty to grant an application for leave on the papers filed of record. He also submitted that an order granting leave to appeal is final and may

not be interfered with. It was also his submission that if the respondent took the view that the name of its legal practitioner ought not to have appeared, that is a clerical mistake that can be remedied by having resort to r 29 of the High Court Rules, 2021.

38. This is a point that should not detain the Court. I agree with Mr *Mpofu's* submissions that in terms of r 94 (4) of the High Court Rules, 2021 leave can be granted based on the papers filed with the presiding judge without the need for oral argument. The inclusion of the counsel`s names in the order was a mere clerical error that, if the respondent felt aggrieved, could have approached the High Court in terms of r 29 of that court's rules for correction of the error without the involvement of this court.

THE APPEAL WAS FATALLY DEFECTIVE AS THE RELIEF SOUGHT BY THE APPELLANT WAS NOT EXACT AND NOT COMPETENT.

39. On this point *in limine*, this Court is inclined to agree with Mr *Mpofu* as the relief sought by the appellant is based on what transpired in the court *a quo*. The respondent made an application for the removal of the matter from the roll which application was granted. The appellant is saying that the court *a quo* should have dismissed the application hence the relief that they seek before this Court. It is a competent relief which the court *a quo* could grant.

40. It was for the above reasons that all the points *in limine* were dismissed

SUBMISSIONS ON THE MERITS

41. Mr *Mapuranga* co-counsel for the appellant submitted that as per s 26 of the Supreme Court Act [*Chapter 7:13*], decisions of the Supreme Court, on non-constitutional matters, are final. Only decisions in constitutional matters are subject to interference by the Constitutional Court. He submitted that the judgment under SC 24/22 ordered that the

appellant receive title and rights to the property in dispute. This was not a decision on a constitutional matter and as such was final and not subject to interference by any other court. It was also his submission that as per s 6 of the Constitutional Court Act and common law, the challenge to the Constitutional Court had no effect on the judgment under SC 24/22. If the respondent wanted to interfere with the judgment, he should have made a written application to the Constitutional Court seeking stay of the judgment.

42. Mr *Mapuranga* also submitted that the court *a quo*'s judgment *mero motu* purported to raise *lis pendens* when an application had already been made by the respondent for the removal of the matter from the roll on the basis that it should wait until the Constitutional Court had determined its matter. He also submitted that the court *a quo* granted positive relief which had been sought in a notice of opposition. The appellant then prayed that the order be vacated and that the matter be remitted to the High Court for a determination on the merits.

43. *Per contra,* Mr *Madhuku,* argued that nothing was placed before the court in terms of the grounds of appeal, heads of argument and oral submissions made attacking the exercise of discretion by the court *a quo.* He submitted that s 6 of the Constitutional Court Act was not relevant to this Court in seeking to determine whether or not the order of the court *a quo* was proper. He also argued that this Court has no jurisdiction to interfere with the court *a quo'*s exercise of discretion in such circumstances. He further submitted that the removal of the matter from the roll did not suspend the judgment of the Supreme Court as the judgment of the Supreme Court gave ownership to the appellant and what was before the court *a quo* was an application for eviction.

THE ISSUES

1. Whether or not the court *a quo*'s removal of the matter from the roll on the ground of *lis pendens* granted the respondent a stay of execution of the Supreme Court judgment SC 24/22.
2. Whether or not the law calls for the strict application of *rei vindicatio.*

APPLICATION OF THE LAW TO THE FACTS

WHETHER OR NOT THE COURT *A QUO*'S REMOVAL OF THE MATTER FROM THE ROLL GRANTED THE RESPONDENT A STAY OF EXECUTION OF THE SUPREME COURT JUDGMENT NUMBER SC 24/22

44. In motivating the appeal, co-counsel for the appellant, Mr *Mapuranga,* argued that s 26 of the Supreme Court Act makes it very clear that decisions of the Supreme Court are final. He further argued that it is only the Constitutional Court which can interfere with Supreme Court decisions only on constitutional matters. Mr *Mapuranga* also argued that the respondent's Constitutional Court application had no effect on the judgment of the Supreme Court under SC 24/22. He further argued that, if the respondent wanted to interfere with that judgment, he was required by s 6 of the Constitutional Court Act [*Chapter 7:22*] and the common law to make a substantive written application for the stay of the Supreme Court judgment. He supported his argument by relying on the findings of this Court in the *CFU* v *Mhuriro & Ors* 2000 (2) ZLR 405 (SC) at 408B wherein it was held that while s 7 of the Supreme Court Act undoubtedly leaves it to the High Court to execute and enforce judgments of the Supreme Court, this does not mean that the High Court is empowered to suspend even temporarily, the effects of an order of the Supreme Court

45. In response, counsel for the respondent, Mr *Madhuku,* argued that the court *a quo* exercised its discretion in removing the matter from the roll. He further argued that the court *a quo* found that the proceedings in the Constitutional Court would have an eventual effect on

the judgment of the Supreme Court. Mr *Madhuku* contended that what was pending in the Constitutional Court is an application for direct access which if granted would eventually vacate the judgment of the Supreme Court and that the court *a quo* in its wisdom and exercise of discretion, having considered the implications of the pending proceedings in the Constitutional Court, felt that it could remove the matter from the roll and deal with issues once and for all. He further argued that s 6 of the Constitutional Court Act was not relevant to this Court in seeking to determine whether or not the court *a quo* could properly *remove* a matter from the roll.

46. The court *a quo,* after concluding that the matter was *lis pendens*, wrongly so in our view, removed the matter from the roll and placed a condition that the eviction application would not be heard until the determination of the Constitutional Court application under CCZ 12/22. The effects of the removal of the matter from the roll by the court *a quo* meant that the appellant could not exercise the ownership rights granted to it under SC 24/22. A judgment had been granted in its favour and it in turn sought to enforce that judgment through the institution of the eviction application. The court *a quo*, by removing the matter from the roll barred the appellant from benefitting from a judgment granted in its favour by the Supreme Court. The court *a quo* thus, in effect, suspended the judgment of a superior court when it had no jurisdiction to do so.

47. The law is very clear that the High Court has no power to suspend the judgment of a superior court. In *CFU* v *Mhuriro and Ors* 2000 (2) ZLR 405 (SC) at 408B it was held that –

> "Counsel for the first respondent placed much reliance on this provision. He advanced the submission that, as the High Court is empowered to execute and enforce any judgment of the Supreme Court as if it were an original judgment of its own, it necessarily followed that the High Court is vested with the authority to stay the operation of such judgment.
>
> While s 7 of the Act undoubtedly leaves it to the High Court to execute and enforce judgments of the Supreme Court, this certainly does not mean that the High Court

> is empowered to suspend, even temporarily, **the effect of an order of the Supreme Court** either made in the exercise of its appellate jurisdiction or pursuant to s 24 (4) of the Constitution. For such would constitute a direct interference with the authority of a superior court by one subordinate to it. It would be to sanction, as occurred in this matter, an interference by a single judge of the High Court with an order concurred in by five judges of the Supreme Court. The proposition only needs to be stated to reveal its inherent flaw.
>
> The fact that an order of the Supreme Court was made by consent does notalter the situation. It remains an order of the Supreme Court and may only be varied, set aside or, in any way interfered with by the Supreme Court." (Emphasis is mine).

48. In the above authority the point is emphatically made that the High Court has no power to suspend the effect of a judgment of the Supreme Court. In the present matter, the judge a *quo*, suspended the effect of the Supreme Court judgment by removing a matter from the roll. The matter that was before the court *a quo* was to give effect to the Supreme Court judgment granted in appellant's favour by the Supreme Court. The fact that the same judgement was subject of proceedings in the Constitutional Court had no bearing on the execution of the judgment.

49. Mr *Mapuranga*, in support of his contention, further made reference to s 6 of the Constitutional Court Act [*Chapter 7:22*] which provides as follows:

> "**6 Appeals from Supreme Court**
>
> An appeal from the Supreme Court to the court shall not suspend the decision being appealed against unless the court orders otherwise."

He submitted that although the section refers to appeals, it is an accepted general principle that an application to a higher court does not suspend the decision of the lower court which is being challenged. He gave an example of an application for review which does not suspend the decision being reviewed.

In our view Mr *Madhuku* is correct that section of the Constitutional Court Act is irrelevant in the determination of this matter. It specifically relates to instances where an appeal has

been filed against a Supreme Court judgment, which is not the case in this matter. Mr *Mapuranga* is however correct that filing an application challenging a decision of a lower tribunal does not suspend the challenged decision. There are remedies available, in the rules of the courts, to such a party.

50. The point must be restated that decisions of the Supreme Court are final and cannot be interfered with except in instances where constitutional matters are raised or arise. The Supreme Court judgment in issue did not deal with constitutional matters. The court *a quo* therefore erred in removing the matter from the roll pending finalisation of the Constitutional Court application.

WHETHER OR NOT THE LAW CALLS FOR THE STRICT APPLICATION OF *REI VINDICATIO*

51. Mr *Mapuranga,* argued that, the court *a quo,* faced with an application for *rei vindicatio,* was only supposed to inquire whether respondent has a right at law to persist in the occupation of the property in question. He further submitted that the court *a quo* was only supposed to give the respondent an opportunity to place any defence he might have against the *rei vindicatio* and not determine the matter on the basis of a defence of *lis* pendens that in any event had not been raised by the respondent.

52. It is common cause that the court *a quo* did not relate to the merits of the matter. It found that the dictates of justice and equity command that the proceedings be stayed until the Constitutional Court case is finalised. The court *a quo* further held that the removal of the matter from the roll was in the interest of justice. It made these remarks in considering whether to grant the application for removal from the roll. It did not consider the requirements of *rei vindicatio*.

DISPOSITION

53. In light of the foregoing analysis, the effect of the removal of the matter from the roll, by the court *a quo,* resulted in a stay of execution of the judgment of the Supreme Court SC 24/22. The court *a quo* erred in assuming more power than it has in issuing such an order with the effect of wrongfully suspending the judgment of the Supreme Court. It is for the foregoing reasons that this Court issued the order set out above.

BHUNU JA : I agree

MUSAKWA JA : I agree

Gill, Godlonton & Gerrans, appellant's legal practitioner

Lovemore Madhuku Lawyers, respondent's legal practitioner