FUTURE CHIRANGO MUVIRIMI
and
PETRONELLA MUVIRIMI
versus
LEATHOUT INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 29 November 2017

Chamber Application

L Uriri, for the plaintiffs
T Mpofu, for the defendant

DUBE J: This is a chamber application for directions brought in terms of r 151 of the High Court Rules, 1971.

The application stems from a stated case filed under HC 2741/14 in which the respondent brings a *rei vindicatio* claim against the applicants. The respondent claims that it is the registered owner of number 69 Glenara Avenue, Highlands, the property. The applicants are in possession of the property and the respondent seeks an order ejecting them from the property. The applicants defend the claim. They challenge ownership of the said property and claim that the respondent fraudulently transferred ownership of the property into its name.

In a statement of agreed facts, the parties agree that the plaintiff is the registered owner of the property and that the defendants filed a suit challenging *inter alia*, the plaintiff's title to the property. Paragraph 1.4 of the special case reads as follows,

> "1.4. Defendants' primary defense to plaintiff's *rei vindicatio* is the allegation that plaintiff's ownership of the property is tainted with fraud and illegality, which plaintiff disputes and believes is of no relevance to its claim for a rei *vindicatio."*

The following issues were referred for determination;

1. Whether or not the ownership of the immovable property in issue is in dispute.
2. Whether or not the plaintiff is entitled to *a rei vindicatio*.

At the trial, Mr. Mpofu commenced making submissions on the merits of the matter when Mr. *Uriri* interjected arguing that there is no agreement over the matter proceeding as a stated case. He submitted that the plea and special case places title in issue and that the court cannot turn a blind eye to the fact that one of the essential elements of the *rei vindicatio* is in issue. He urged the court to disregard the stated case and allow the parties to call witnesses to clarify the issue of ownership of the property in issue. Mr. *Mpofu* vigorously opposed the proposal to lead evidence arguing that the parties are bound by the stated case which constitutes pleadings. Mr. *Uriri* requested the court to give directions on how the matter should proceed. The court declined to entertain an oral application for directions and later acceded to another request by applicants' counsel to file a formal written application seeking directions on the manner the matter was to proceed. The chamber application is opposed.

The applicants' position is that they do not seek to resile from the stated case. The seek to have the stated case supplemented by evidence establishing the real facts. They contend that there is a dispute over ownership of the property arising on the papers which cannot be determined without the leading oral evidence. They seek to produce documents to substantiate their case. They also contend that the parties' stated case is inherently defective in that it is wrong in law. Applicants submitted that mere registration of a property in one's name does not constitute legal ownership. They argued that the issue of ownership requires to be ventilated through leading of oral evidence in the face of the challenge to ownership. The court was asked to consider whether or not the parties should proceed on the basis of the stated case and whether or not there is a dispute of fact that renders the dispute incapable of resolution on the papers. Applicants propose the following issue instead,

"Who between the applicants and the respondent is the true owner of the immovable property?"

The respondent submitted that when Mr. *Uriri* stood up he had made an oral application for directions on how to proceed and that he had insisted that he could make such an oral application. As the applicants had already made their application , it should be determined on its merits. The defendant argued that the written application for directives was improperly before the court and must be dismissed as it is contrary to r 151. It submitted that the applicants admit that the respondent has title to the property and still question ownership. The effect of this application is to withdraw an admission without following the proper procedure. The applicants should not be

allowed to resile from the stated case that they voluntarily entered into without making an application to withdraw the admission. The facts are agreed and the court is in a position to determine the matter and is bound to take those facts as correctly reflecting the position. The court was referred to the case of *Kunonga* v *The Church of the Province of Central Africa* SC 25\17 for that proposition. No recognizable defense is raised by applicants. It took issue with the fact that no supporting affidavit explaining why the applicants agreed to a stated case and why they are now resiling from it has been filed by the legal practitioners who drew up the stated case. It took issue with the fact that the application was filed a day out of time.

An application for directions is made possible by Order 23 Rule 151 (1) reads as follows,

> "151. ***Application for directions after pleadings closed: notice to opposite party***
> (1) In any action after pleadings are closed, or by leave of a judge after appearance has been entered, either party may make a chamber application for directions in respect of any interlocutory matter on which a decision may be required."

An application for directions may be made in respect of any interlocutory matter on which a decision of the court is required. An application for directions affords an opportunity to a litigant, in a case where there is no clarity in the law and there is disagreement between the parties over the course to be taken, to approach the court on the appropriate procedure to be adopted. Rule 151 was created to enable the court to control its own processes. See *Matanhire* v *BP Shell Marketing Services (Pvt) Ltd ZWSC* 5 2005 at p 4. An application for directions is required to be made by way of chamber application and may be made in respect of any interlocutory matter. For the reason that it is required to be made through the chamber book, it must always be by way of written application. The practice of this court is to require all applications for directions to be made in writing. An application for directions must be made on notice to the other side and may be made in respect of any interlocutory matter that arises after pleadings have closed. It is made with leave of court. The question regarding whether a matter should proceed as a stated case is an interlocutory question that falls in the category of matters covered under r 151.

The court declined to entertain an oral application for directions for the reason that it was not in the form prescribed by the rules. The court, in its discretion and in a bid to control its own processes granted the applicants an opportunity to make a written application and hence the application was made with the leave of the court. The court has no other application before it

except the written application for directions. Mr. *Uriri's* insistence in making an oral application for directions was misplaced.

The purpose of an affidavit is to provide factual information, establish facts and serves as evidence. Where a party seeks directions of the court in a case where it seeks to have an issue ventilated at trial on the basis that there are disputes of fact and that there has been a supposed wrong perception of the law, there is no legal requirement for the legal practitioner concerned to depose to an affidavit giving reasons why he agreed to the matter proceeding as a stated a case. It is not the purpose of an affidavit to explain legal issues. The applicants do not seek to withdraw from the stated case but simply ask to supplement it by oral evidence on the basis that there is a dispute of a fact disclosed by the stated case. A supporting affidavit is essential only in a case where a litigant seeks to withdraw an admission earlier made , explaining the reasons for withdrawal.

The application was filed a day out of time. The respondent did not seriously pursue the issue regarding the applicant's failure to file the application within the prescribed time. The delay in filing the application is minimal and was caused by the delays in processing the transcript. It has not been shown that the respondent suffered any prejudice resulting from the delay. I have decided in the exercise of my discretion to condone the non- compliance with the rules in terms of r 4 C.

A litigant who wishes to raise a preliminary point at a trial or other matter should not wait until the other party has made its submissions on the merits or led evidence to raise its preliminary point. This is despite that a litigant may have raised his preliminary point in his papers or made such indications informally to a judge in chambers. He is required at the hearing, to formally advise the court that he is pursuing the preliminary point and seek permission from the court to raise the point before the matter gets underway on the merits. It is not the duty of the court to enquire of the parties if there is a preliminary point any party wishes to raise. The conduct of allowing the other party to make submissions on the merits of the matter before one raise preliminary points is discouraged. It has the effect of delaying proceedings and gives an appearance of confusion and clumsiness on the part of the legal practitioner concerned and paints confusion in the proceedings as a whole. Once Mr. *Uriri* decided that he was challenging the procedure of a special case, he ought to have brought this fact formerly, to the attention of the court before counsel for the

respondent had commenced making his submissions on the merits of the case. Mr. *Uriri* was caught napping.

A special case is made possible by order 29 r 199. A special case is a written statement of agreed facts done by parties to a trial action for the court's decision on points of law. Where parties have agreed on a special case, the court dispenses with the need to call oral evidence. A special case proceeds along the same lines as an application and decides questions of law. The court is asked to dispense with the hearing of oral evidence. In the *Kunonga case*, the court stated as follows regarding the status of a stated case,

> "Once the facts are agreed, the court should proceed to determine the particular question of law that arises and not delve into the correctness or otherwise of the facts. It is bound to take those facts as correctly representing the agreed position and to thereafter determine any issues of law that may arise therefrom. It is not open to the parties to the stated case to seek to reopen the agreed factual position or to contradict such position. Nor can either party seek to ignore existing legal principle or findings of fact made in connection with the same matter by another court. Of course any concession made in a stated case owing to Justus error, fraud, mistake or any other valid ground… a party will be kept strictly to the terms of the argued facts as it is on the basis of those facts that the court would have been invited to make a determination on some specific question of law".

The *Kunonga case* is authority for the proposition that where parties to a stated case have agreed on the facts, the duty of the court is to determine the question of law referred. The court has no business enquiring into the correctness of the facts. The parties may not seek to change the facts or any admissions made. A party that wishes to resile from any admissions made can only do so where it applies to withdraw the admissions. See *Industry Pension Fund* v *United Refineries & Ors* HH 313/12, *Remo Investments Brokers (Pvt) Ltd & Ors* v *Securities Commission of Zimbabwe* SC 13/13.

In *Bungu &Anor* v *Makarudze & Anor* SC 39/15 the Supreme Court remitted a matter that had been heard as a stated case to the High Court for the reason that certain issues were not canvassed by the parties which had a bearing on the issue that fell to be decided by the court. The parties were ordered to reopen pleadings so that all issues could be ventilated at a pretrial conference to be reconvened.

The same approach ought to be adopted where a stated case discloses substantial and genuine disputes of fact. A court cannot proceed with a stated case simply because the parties have agreed on a stated case where there are conspicuous disputes of fact on the face of the stated case. It ought

to take the appropriate action to address the disputes raised especially in a case where these have been brought to the attention of the court and the court is satisfied that it is unable to resolve the dispute on the basis of the papers filed. Where it is necessary to call evidence to supplement the stated case, the court must endeavor to do so. The court may also direct that the matter proceed as a trial. The court may, where it is of the view that the issues require further ventilation, refer the matter back for a pretrial conference to be reconvened.

In *CUSA* v *Tao Ying Metal Industries* 2009 (2) SA 204 CC, the court dealt with the issue regarding wrong perceptions of the law and remarked as follows:

> "Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is it in fact also obliged, *mero motu,* to raise a point of law and require to deal therewith. Otherwise the result would be a decision premised on an incorrect application of the law. That would infringe on the principle of legality."

See also *Nedbank Lt* v *Mendelaw N.O &Anor* 2103 SASCA @7, *Cunningham* v *First Ready Devt*,2010 (5) SA 249 ,*Thompson* v *South African Broadcasting Corp* 2001 (3) SA 746 (SCA).

This case is authority for the proposition that where a point of law is apparent on the papers but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled but obliged to raise the point, *mero motu* and require the parties to deal with it.

The *Kunonga case* is distinquishable from this case. This case raises issues to do with the existence of a dispute of fact arising on the face of the agreed facts and the parties' wrong perception of the law resulting in incorrect issues being referred for determination. The applicants have not sought to withdraw any admission they made. The applicants admit that they are in possession of the property and that the property is registered under the respondent's name. They challenge the manner in which title was obtained. Effectively, they challenge the respondent's ownership of the property. The disagreement is over the import of these facts and not the correctness thereof. Whilst courts are discouraged from delving into the correctness of the facts agreed to by the parties, I did not understand the court in the *Kunonga case* to be pronouncing that a stated case is cast in stone. The court must be satisfied that the agreed statement of facts does not raise any material disputes of fact and that the issues referred for trial are correct. It is the duty of

the court to ensure that the interests of justice are served by directing the correct course of action to take. What must be avoided is a situation where the court accedes to a suggestion to deal with a matter as a stated case only to have a superior court, on appeal ,upset or remit the matter back to it to deal with disputes of facts arising on the facts as happened in the *Bungu case*. This course has the effect of delaying the matter and frustrates the administration of justice.

A *rei vindicatio* claim is premised upon the common law principle that an owner may repossess its property from whosoever possesses it without his consent. The requirements of a *rei vindicatio* are trite. The plaintiff must prove that he is the owner of the property in dispute and that the defendant was in possession of the property when the action was instituted, without his consent. The plaintiff has the onus to prove that the defendants ceased to have rights in the property. See *Chetty v Naidoo* 1974 3 ALL SA 304, *Stanbic Finance Zimbabwe* v *Chivhunga* 1999 (1) ZLR 262. The law recognizes that a possessor of property may have enforceable rights against an owner, See *Oakland Nominees Ltd* v *Gelria Mining and Investment Co Ltd* 1976 (1) SA @ 452 The court remarked as follows,

> "Our law jealously protects the rights and ownership and the correlative right of the owner in regard to his property, unless of course the possessor has some enforceable right against the owner that is tangible through an existing or past relationships".

Where a possessor previously held rights or has an existing right in terms of any arrangement over the property, the plaintiff must prove in addition to the his ownership that the defendant has ceased to have those rights.

The applicants claim that they are the owners of the property and allege fraud in the manner in which the property was transferred into the respondent's name. Applicants maintain that a dispute over ownership of the property arises on the face of the stated case. The same principles applicable to application proceedings apply in the case of special cases. It is undesirable where material disputes of fact exist on the face of an application which is incapable of resolution on the papers, to resort to the trial procedure. See *Room Hire Co(Pty) Ltd* v *Jeppe Street mansions Ltd* 1949(5)SA 1155 ,*Plascon-Evans Ltd* v *Van Riebeck Paints (Pvt) Ltd* 1984(3) SA 277, *Masukusa* v *National Foods Ltd and Anor* 1983 (1) ZLR 232 (H). The same approach applies to stated cases. A court seized with a material dispute of fact in a stated case, where it is not able to dispose of the dispute on the papers before it, can resolve to have the issues tried. In appropriate cases, the court

may, with the consent of the parties, direct that evidence be led only on the issues arising. Where there is no consent, the court may have to direct the way forward.

What in essence this court is being asked to determine is if it can resolve the dispute between the parties on the basis of the stated case. Para1.1 of the stated case states that the respondent is the registered owner of the property. In Para 1.4 of the special case, the parties recognize that the applicants' primary defense to the *rei vindicatio* is that plaintiff's ownership of the property is tainted with fraud and illegality. The parties recognize that the applicants have a defense to the claim having filed a challenge to respondent's title. An attempt to settle the matter failed after withdrawal of a deed of settlement. The claim has since been reinstituted. It is not surprising that the stated case has attracted so much controversy. The stated case states two mutually exclusive situations, one of which cannot be correct. The statement that the plaintiff is the registered owner of the property cannot be accepted on the face of it especially in the face of indications to the contrary in the stated case. The presumption of ownership can only be rebutted by evidence.

The court was not furnished with the papers related to the challenge to ownership. The applicants intent to call evidence from the Zimbabwe Revenue Authority (Zimra) and the Office of the Registrar of Deeds to establish that the documents used in the transfer of the property to the respondent were irregular. Mention is made of a fraudulent power of attorney used to support the transfer. The stated case records that the respondent disputes the allegations of fraud.The stated case discloses a material dispute of fact over ownership of the property between the parties that cannot be resolved on the papers. The fact that the parties previously agreed that the matter should be dealt with as a special case in a case where there are glaring material disputes of fact that require to be ventilated at a trial has no effect of binding the court to such an arrangement. Resort to the special case procedure for the relief of a *rei vindicatio* in in the face of the disputes existent on the papers is inappropriate. Where a special case discloses substantial disputes of fact, the court cannot simply rubberstamp it and accedes to insistence on dealing with the case as a special case because the parties agreed on a statement of agreed facts. Whenever a material dispute of fact appears on the face of a stated case, which cannot be resolved on the papers filed, that dispute will require full ventilation. The applicants raise a defense of claim of right. An allegation of fraud cannot be proved in the absence of the documents allegedly used to commit the fraud. The best course to

take is to allow the applicants to call evidence to substantiate their claim of fraud. I am not persuaded by the respondent's argument that the defendants are bound by the stated.

The stated case does not clearly or correctly articulate the issues to be dealt with. An issue arises regarding whether the respondent acquired valid title from the applicants. What the parties ought to have done is to request the court to determine who the owner of the property is, hence asking the court to determine the issue of ownership .Instead, the court was asked to determine , *"whether or not ownership of the immovable property is in dispute"*. What the court is being asked to do is just to make a declaration regarding the existence of a dispute over the property. If the court determines that ownership is in dispute then what? That determination does not dispose of the dispute between the parties. The court ought to have been asked to resolve the real dispute between the parties. The issue could have been worded along the following lines, "*whether the respondent acquired valid title from the applicants*" .That is the issue disclosed by the agreed facts. This way, the trial court is equipped to make a determination over the ownership of the property and dispose of the dispute.

This case cannot proceed on the basis of the issues as defined. Both parties are to blame for the failure to articulate real issues between them and the applicable legal principles. Identifying issues for trial is quite a problematic area. Parties sitting down to identify issues must appraise themselves of the key facts of the pleadings and cause of action in the matter. The parties must ensure that the issues identified are relevant to and arise from the facts and are real issues between the parties. The issues identified must equip the trial court to dispose of the dispute between the parties. The courts will not endorse poorly identified issues.

I have decided, in a bid to control the court's own processes and in the exercise of my discretion to allow the application. I cannot sanction the adoption of a wrong procedure and wrong application of legal principles just because there was agreement between the parties. Litigation is not a game of cards. The quest for justice is for justice to be done even though heavens fall. The best course to take is not to further delay the matter by referring it back for proper issues to be determined at a pre-trial conference to be reconvened. The issues regarding whether the respondent acquired valid title from the applicants and the respondent' is entitlement to a vindicatory action will be reserved for the trial. I have decided not to make any order for costs. This is for the reason that both parties are to blame for the conduct that has resulted in this tassel.

In the result it is accordingly ordered,

1. Case Number HC 2741/17 shall proceed to hearing as a stated case, subject to the directions given in paragraphs 2 to 7 of this order.
2. The applicants be and are hereby granted leave to lead evidence at the hearing of the stated case to deal with facts relevant to the central issue of the existence or otherwise of valid title for the purposes of the action *rei vindicatio.*
3. The applicants shall have the duty to begin.
4. The respondent shall if it so wishes be entitled to lead evidence in rebuttal.
5. The respondent shall if it elects to lead evidence in rebuttal, file a detailed statement of the evidence intended to be led, the witnesses to be called and a bound and paginated bundle of documents if any, upon which reliance will be placed. This paragraph shall be complied with at least five clear court days prior to the set down date of the special case.
6. The parties shall address the court on the factual and legal issues involved as provided for by the rules and practice of this court relating to closing submissions at the close of an action.
7. No order as to costs.

Thompson & Stevenson & Associates, applicant's legal practitioners
Atherstone & Cook, respondent's legal practitioners