JERANIA ANTONYO
and
24 OTHERS
versus
EUNA MAKAMURE

HIGH COURT OF ZIMBABWE
TAGU AND MAXWELL JJ
HARARE, 17 May and 23 June 2022

Civil Appeal

T. Madzvamutse with *M.G. Musuka*, for the appellants
B. Diza, for the respondent

TAGU J: This is an appeal against the whole of the judgment of the Magistrates Court of Zimbabwe sitting at Chegutu on 14 October 2021. That day was an application for Summary Judgement made by the respondent for the eviction of the appellants and all those claiming occupation through them from a certain property (farm) namely, SUBDIVISION ONE, AMEVA EXTENSION, situate in Chegutu.

The sequence of events and the background facts were as follows.

At all relevant times the respondent was the holder of a valid offer letter for the property known as subdivision 1 of Ameva Extension in Chegutu district of Mashonaland West Province which is approximately 282.08 hectares. The respondent was duly offered an offer letter for the abovementioned land by the Ministry of Lands and Rural Resettlement on 24 March 2009. The respondent has always been in occupation of the property since then. The appellants have been former employees of the farm in question before it was Gazetted for resettlement. Hence have been resident on the land in question since pre-land revolution. On 30 October 2020 the respondent duly issued summons against the appellants and all those claiming occupation through them for their eviction from the respondent's premises and costs of suit.

The appellants proceeded to enter an appearance to defend. Their defence among other things being that when the respondent was awarded an offer letter to the land, they had been left there by the previous owner who had lost title to the land at the inception of the land reform programme. They then entered into an agreement with the respondent to remain there. Without an alternative accommodation their eviction would amount to infringement of their rights against arbitrary eviction as enshrined in the Constitution of Zimbabwe.

Having realized that the appellants have no *bona fide* defence to the action, the respondent filed for summary judgment. The court *a quo* having had submissions by the parties dismissed the appellants' defence granted the summary judgment in favour of the respondent.

The appellants' two grounds of appeal are as follows-

1. The court *a quo* erred and grossly misdirected itself by failing to give credence to the constitutional defences raised by the appellants and completely ignoring them specifically:
    a. Freedom of the appellants from arbitrary eviction as provided in Section 74 of the Constitution of Zimbabwe.
    b. Right to access to adequate shelter as envisaged in S 28 of the Constitution of Zimbabwe.
    c. Right of children to shelter as provided in S 81 (1) (F) of the Constitution of Zimbabwe.
2. The court *a quo*, with respect, erred and misdirected itself by failing to uphold the legal principle that what is not denied in affidavits is taken as having been admitted vis-à-vis the undenied averments of the appellants that the respondent agreed to mutually co-exist with them at the farm thereby waiving her rights to evict the appellants.

The appellants are therefore seeking the following relief:

1. That the instant appeal succeeds with costs.
2. That the order of the court *a quo* be set aside and be substituted with the following:

i. The application for Summary Judgment be and is hereby dismissed.
ii. The matter be and is hereby referred to the court *a quo* for trial.
iii. The respondent shall pay costs on an ordinary scale.

The appellants and the respondent filed comprehensive heads of argument in this appeal. The respondent raised four preliminary objections in her heads of argument. The preliminary

objections were mostly targeted at ground one of the appeal that was broken into three parts for specificity. We heard the preliminary objections first and proceeded to hear submissions on the merits without making a determination. We will dispose of the preliminary objections first and then deal with the merits if need be.

The respondent's first preliminary point was the citation of Constitutional provisions in the grounds of appeal with no reference to legislation. Mr. *Diza* for the respondent submitted that it is trite that national objectives do no create justiciable rights. He said the right to shelter that the appellants rely on in ground 1 (b) does not create justiciable rights. The referrals to section 28 of the Constitution as a ground to infer the existence of a legal right is improper. He said the citation by the appellants is revealing because in the aforementioned case the complains were directed to administrative authorities who bear the duty to provide reasonable housing within the limits of its resources. We were urged to take judicial notice of the fact that the appellants are not being candid with the court because one of the basis upon which the decision by the court *a quo* was the simple fact that there was no proof of lawful authority of occupation in terms of the Gazetted Lands (Consequential Provisions) Act *[Chapter 20.28]*. The present matter is against a private citizen who bears no such duties. Hence to the extent that the appellants have sought to invoke section 28 without identifying the specific right under the bill of rights, that submission is untenable. He referred us to the case of *Homeless Peoples Federation and Anothe*r v *Minister of Local Government and National Housing and Others* SC 78/2021 which held the same principle. He continued to cite the case of *Prosecutor General of Zimbabwe* v *Telecel Zimbabwe (Pvt) Ltd* CCZ 10/2015 where the court remarked at page 10 of the judgment-

> "What is clearly evident from this provision is that the relief sought to be granted by the court in terms of this section must relate to fundamental rights and freedoms enshrined in the relevant Chapter, and nothing else…"

Further submissions were that the appellants ought to have attacked the provisions of this enabling Act and the omission to enjoin the constitutionality of the Legislation is fatal to the appeal because it attacks the substantive effects of the Act without impugning the constitutionality of the provision that gave the basis of the decision. They simply ignored them to their detriment. They cannot approbate and reprobate at the same time. He cited S 3(3) of the Gazetted Lands which provides as follows-

> "If a former owner or occupier of Gazetted Land who is not lawfully authorized to occupy, hold or use that land does not cease to occupy, hold or use that land after the expiry of the appropriate period referred to in subsection (2) (a) or (b), or, in the case of a former owner or occupier referred to in s 2(b) does not cease to occupy his or her living quarters in contravention of provisio (ii) to s2(b) he or she shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

The appellants ignored the Act altogether and instead have mounted a challenge based on section 74 of the Constitution in ground 1(b).

The second preliminary point was that this is a Constitutional application disguised as an appeal. It was said this appeal does not address the substance of what was before the court *a quo*. The appellants are using this court as a forum to introduce an application in terms of section 85 of the Constitution alleging the violation of constitutionally guaranteed rights. The present appeal ceased to be one attacking the finding of the court *a quo* as the appellants continually raised constitutional issues that were neither here nor there in the *court a quo.* Hence to allow the appeal to proceed would entail that parties can simply 'whip up a constitutional argument *ex post facto'* after losing a case.

To support his argument Mr. *Diza* referred to the case of *Prosecutor –General* v *Telecel Zimbabwe (Pvt) Ltd* 2015 (2) ZLR 422 (CC) at 428C-F, where the Court said-

> "…while the applicant did not specifically state so in his application, in reality, the matter was an appeal brought to this Court under the guise of an application. This is abundantly evident from the relief that is outlined in his draft order. It is even more evident from his summary of the background to the intended application, as already indicated. He indicated that he wished to approach this Court 'for an order setting aside the Supreme Court judgment on the basis that it interferes with the independence of his office and as such, it is ultra vires provisions of s 20 of the Constitution of Zimbabwe…"
>
> Equally the apex court of the land in *Nyamande & Anor* v *Zuva Petroleum & Anor (Pvt) Ltd* 2015 (2) ZLR 351 (CC) at p 354C posited that "The applicants have not alleged that s 175 (3) of the Constitution applies in their case. Since no Constitutional issue was determined by the Supreme Court, no appeal can lie against its decision. The same is provided in s 169(1)."

In casu it is not only the appearance of a pleading which is titled appeal that confirms the same. It is the substance of what is being sought. The substantial averments of the appellants confirm that what is before the court is a constitutional application to vindicate constitutionally guaranteed rights. Whilst the appellants word their relief as a dismissal of the application for summary judgment, the substance of their pleading in essentially in seeking a declaratur regardless of there not being a legal basis for it.

There third preliminary point raised by the respondent is that this is a confused appeal/application. Mr. *Diza's* contention was that the appellants kept falling into the error of confusing the respondent with administrative authorities to whom most of their submissions are directed. He said the bulk of the cases that the applicants cited related to state obligations and not private citizens. It is the administrative authorities that give houses to people and not private citizens. To the extent that they seek relief against parties that they have not cited and in an appeal, this type of non-joinder is fatal to their cause. He further said whilst the respondent understands the full meaning of Rule 32 of the High Court that states that non-joinder is not fatal, in the present case it is. This submission is made because what is before the court is an appeal that seeks to review the correctness of the decision of the court *a quo*.

The last preliminary point was that this application has been wrongly brought to the corridors of the court because the appellants have admitted that they are illegal settlers in violation of the rule of law. The fact that they have no alternative accommodation is not the respondent's problem. It is the administrative authority that bears this duty. He prayed that appeal ought to fail on the basis of the preliminary points.

Mr. E. Madzvamure in response to the preliminary objections raised by the counsel for the respondent went to town in demonstrating that s 74 of the Constitution of Zimbabwe falls under fundamental rights. He said while the respondent had the right to occupy her piece of land she ought to have upheld the constitutional rights of the appellants. He further said when exercising her rights, she had to take into account the other parties' alternative rights to alternative accommodation before seeking to evict them. Mr. Madzamure did not address the court seriatim on the preliminary objections raised by the respondent. He referred us to a plethora of authorities in his heads of argument dealing with the need to provide alternative accommodation before anyone is arbitrarily evicted from one's accommodation.

Asked by the court as to whose responsibility it is to provide alternative accommodation in fulfilment of the Constitutional provisions he was relying on, Mr. Madzwamure conceded that that responsibility lies on the state and not private individuals like the respondent, but maintained that the respondent should have taken into account the appellants' constitutional rights before seeking to evict them.

Having heard Mr. Madzvamure's submissions Mr. *Diza* responded to say the first ground of appeal should be struck of.

It should be noted that the first ground of appeal broken into three parts largely deal with the failure by the court *a quo* to give credence to the constitutional defences raised by the appellants, namely freedom of the appellants from arbitrary eviction as provided in s 74 of the Constitution of Zimbabwe, right to access to adequate shelter as envisaged in S 28 of the Constitution of Zimbabwe and right of children to shelter as provided in S 81 (1) (F) of the Constitution of Zimbabwe.

The court having perused the record and in particular the court *a quo's* ruling noted that indeed Mr. *Diza* was correct in his submissions that this appeal, especially on ground 1, is an application disguised as an appeal. The appeal does not address the substance of what was before the court *a quo*. The appellants are in fact using this appeal court as a forum to introduce an application in terms of s 85 of the Constitution alleging the violation of constitutional guaranteed rights. The present appeal has ceased to be one as the appellants continuously raised constitutional issues that were neither here nor there in the court *a quo*. It is no surprise that the court *a quo* in its ruling never made any findings on these constitutional rights but on the defence raised by the appellants, that of an agreement to co-exist with the respondent. The infringement of appellants' constitutional rights is being raised for the first time in this appeal. The bulk of the appellants' arguments is an afterthought that arose after the ruling. The appellants ought to have placed with the court *a quo* such defences when asked to do so.

The court is not blind to the views of CHIDYAUSIKU CJ (as he then was) in the case of *Austerlands (Pvt) Ltd* v *Trade and Investment Bank Ltd And Ors* SC 92/ 05 where he stated as follows:

> "The general rule, as I understand it, is that a question of law may be advanced for the first time on appeal if its consideration then involves no unfairness to the party at whom it is directed."

In our view it is unfair to the respondent at this stage to respond to voluminous constitutional issues where the real subject of the appeal ought to be whether the court *a quo* was correct in granting an application for summary judgment. Without addressing the reasons for the judgment the appellants have effectively created their perception of the issues and gone to argue those. The sentiments of the Constitutional Court in the case of *Nyamande & Anor* v *Zuva*

Petroleum & Anor Ltd, supra, are apposite. We uphold the preliminary points raised and will strike out ground 1 of appeal.

The second ground of appeal is that the court *a quo* erred and misdirected itself by failing to uphold the legal principle that what is not denied in the affidavits is taken as having been admitted vis-à-vis the undenied averments of the appellants that the respondent agreed to mutually co-exist with them at the farm thereby waiving her rights to evict the appellants.

In his oral submissions Mr. Madzamure maintained that appellants have rights not to be arbitrarily evicted and that S 74 of the Constitution of Zimbabwe had to be taken into account. In their heads of argument the appellants submitted that in paragraph 12. 2 of its Answering Affidavit in the court *a quo*, which is p 170 of the record of proceedings, the respondent confirmed that indeed the meeting took place. She did not dispute that she expressed her readiness to co-exist with appellants. He said it is surprising that the court *a quo* despite that, insisted on a written document and minutes of such meeting which both parties agreed it took place. The court *a quo* in its ruling dismissed an oral agreement as having no legal effect whatsoever. That is a gross misdirection of law.

In its reasoned judgment the court *a quo* dismissed the appellants' defence of an agreement to co-exist with the respondent. At p 3 of the judgment the court *a quo* reasoned as follows-

> "What is however surprising is that the respondents have not tendered any written document to that effect, that indeed there was an agreement between the parties for their co-existence. There are also no minutes on when it was held, who was in attendance and the resolution made therefrom. It appears the respondents seek to move the court to speculate on their behalf. They rely on some alleged waiver by applicant to evict them, notwithstanding that she has exclusive rights over the property. Their assertions that applicant waived such right to evict them has not been supported by any evidence whatsoever.
> In my view, an oral undertaking by applicant, which was never reduced to writing, with no minutes as to whether or not it was a properly constituted meeting of all concerned, can never found legal basis to resist eviction. The respondents cannot be deemed to have acquired rights over the land and enforcement in a court of law from that purported informal gathering.
> With respect such purported undertaking by applicant to co-exist with respondents, has never been known to be a basis from which one acquires rights over agricultural land."

A reading of the respondent's submissions in her answering affidavit on p 170 of the record on the issue of co-existence is quite revealing. She said-

> "12.1. Doubting the authenticity of my offer letter is hardly a defence to my claim. Defendants had to do more than that and show that it is indeed unauthentic as they allege. This was not done.

> 12.2. Having said that, the defendants in the same paragraph state that when I accepted the offer I expressed my readiness to co-exist with them and held a meeting with them. Surely that could not have taken place if the offer had not been accepted and I did not have a claim to the property."

A reading of the respondent's answering affidavit does not reveal that she admitted to the appellants that she would co-exist with them. Her statement shows that she may have held a meeting with the appellants but the reason being that the appellants were doubting the authenticity of the respondent's offer letter.

In our view the court *a quo* did not err in granting summary judgment as it did. We agree with the court *a quo's* reasoning. At law, the allegation of peaceful co-existence was not *bona fide* because section 3 subsection 5 of the Gazetted Lands Act specifies documents that one ought to have to establish the lawfulness of occupation, none of which the appellants had. For avoidance of doubt, the section reads that-

> "subject to this section, no person may hold, use, or occupy gazetted land without lawful authority."

Section 2 of the same Act then defines what constitutes lawful authority as either-

> (an offer letter, permit, or a land settlement lease."

It followed that the appellants ought to have produced proof in terms of this Act that would have given them a *bona fide* defence. That they had agreed for peaceful co-existence, a fact that they could not prove was immaterial. They were not armed with valid proof in terms of the said law. The allegation of peaceful co-existence was simply not proved before the court *a quo*. A court sits as a court of law and not speculation. The law presupposes that he who alleges must prove and when such allegation has been traversed, it becomes a dispute that requires further evidence which evidence the appellants failed to produce. Their allegations of co-existence were mere hearsay on behalf of all 24 appellants, evidence which was at best inadmissible. In any event, even if it was true as the appellants alleged there was once agreement of peaceful co-existence, a fact that was traversed and not proved, the allegation was no legal basis to give the appellants a defence, at a time the lawful holder of an offer letter wants them to move away from her property.

Coming to the provisions of s 74 of the Constitution of Zimbabwe, which the counsel for the appellants kept on referring to it reads as follows-

"**74 Freedom from arbitrary eviction**

No person may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances."

As stated elsewhere in this judgment, the fact that the appellants have no housing was not the respondent's creation or making. It was them who had deliberately sat on their hands and done nothing all along to secure accommodation from the relevant authorities the moment they realized the piece of land on which they were staying had been legally allocated to the respondent. It is not the responsibility of the private individual to provide alternative accommodation but the state. In any case the respondent did not arbitrarily evict the appellants hence she followed due process. Therefore, the subject matter of this appeal ought to have been whether the court *a quo* erred in its finding on the question that was before it. Provisions of s 74 were never before the court *a quo* hence it was never an issue that the court *a quo* addressed in its ruling. The court *a quo* therefore was correct in deciding on granting summary judgment. There was no arguable case that the appellants advanced. We find the appeal as having no merit and we dismiss it with costs.

IT BE AND IS HEREBY ORDERED THAT:

1. The appeal is dismissed in its entirety.
2. The appellants be and are hereby ordered to pay costs.

TAGU J…….

MAXWELL J Agrees……

Karuwa and Associates, appellants' legal practitioners
Mhishi Nkomo Legal Practice, respondent's legal practitioners.