

CASTRO NDLOVU

Versus

IAN DAVID GUTHERLESS N.O.

And

DONALD MAZWI SIBINDI

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 16 AND 24 JUNE 2010

V Majoko for applicant
T Magwaliba for 1st and 2nd respondents

Opposed Court Application

KAMOCHA J: On 15 January 2009 a default judgment was granted by this court to the present respondents, who were then applicants, in the following terms:-

“It is hereby ordered that:-

- (a) The notice gazetted by 1st respondent on the 26th of September 2008 purporting to acquire certain piece of land situate in the District of Bulawayo, being the remaining extent of Broad Acres, measuring one hundred and forty-five comma eight five six four (145,8564) hectares held under Deed of Transfer Number 2815/83 and registered in the names of the late Christopher Gutherless and Marie Elizabeth Gutherless be and is hereby declared unlawful and invalid to the extent that such action is in breach of the terms of the Certificate of No Present Interest issued in favour of 1st applicant on 4 September 2008 pursuant to the provisions of section 47 of the Land Acquisition Act [Chapter 20:11].
- (b) In consequence, leave be and is hereby given to 1st applicant to proceed with the transfer of the said piece of land in favour of 2nd applicant pursuant to the terms of the agreement of sale executed and signed by the parties on 19th September 2008.
- (c) The Registrar of Deeds be and is hereby authorized and directed to register the Deed of Transfer in favour of 2nd applicant.
- (d) Pursuant to the above, 2nd respondent together with all those claiming through him be and is hereby ordered to vacate the aforesaid piece of land, forthwith and to give

- vacant possession thereof in favour of 1st applicant to enable the latter to give vacant possession thereof to 2nd applicant in terms of the agreement of sale executed and signed by the parties on 19th September 2008.
- (e) Should 2nd respondent fail to vacate the aforesaid piece of land as provided for above, the Deputy Sheriff of this honourable court be and is hereby authorized and directed to forthwith evict 2nd respondent together with all those claiming through him from the aforesaid piece of land.
- (f) The costs of this application shall be borne by 1st and 2nd respondents jointly and severally, the one paying the other to be absolved, on the legal practitioner and client scale.”

On 26 January 2009 the present applicant who was the second respondent in the above matter filed an application under a certificate of urgency seeking to interdict the then applicants from executing the warrant of execution under case number 2348/09 pending the finalization of the application for rescission filed simultaneously with the urgent application under case number HC 127/09. In the event that execution had already been effected the Deputy Sheriff would be ordered to restore to the applicant vacant possession of Plot 6 Airport Road, Bulawayo.

The urgent application was dismissed with costs on 29 January 2009 and the full reasons for the dismissal are contained in judgment number HB-33-09. Thereafter the application for rescission which had been simultaneously filed with the urgent application seems to have been abandoned. It has not been prosecuted up to this day – a period of over a year and half. It has not been withdrawn but is still pending in this court.

Instead the applicant has launched the present application wherein he seeks an order in the following terms:-

“It is ordered that:-

1. It be and is hereby declared that the compulsory acquisition of land by the Government of Zimbabwe under the Agricultural Land Settlement Act [Cap 20:01] after the 8th of July 2005 is not, in terms of the Constitution of Zimbabwe Amendment Act No. 17/2005, justiciable except insofar as a challenge may be made regarding the amount of compensation payable.
2. It be and is hereby declared that the jurisdiction of the courts of the land to entertain challenges arising from the compulsory acquisition of land was as from 8 July 2005 ousted by the Constitution of Zimbabwe Amendment Act No. 17/2005.

3. It be and is hereby declared that any judgment or order by a court in which the compulsory acquisition of land by the Government of Zimbabwe under the Agricultural Land Settlement Act is under challenge would be void and of no force and effect.
4. The respondents jointly and severally pay the cost of this application, the one paying the other to be absolved."

It is clear from the order being sought that the applicant is asking this court to make a declaratory order against its own decisions. He relied on section 14 of the High Court Act [Chapter 7:06] which provides that:-

"The High Court may, in its discretion, at the instance of any interested person inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

With respect, the above provisions do not enjoin the High Court with the powers to make declaratory orders in respect of its own decision. It cannot sit as a review court over its own judgment. It is *functus officio*. Having abandoned the rescission of the court order, the applicant cannot have the judgment declared invalid or void by the same court which granted it. It is only a superior court which could do that i.e. the Supreme Court. The matter of *Bulawayo Bottlers (Pvt) Ltd vs Minister of Labour & Others* 1988 (2) ZLR 129 on which reliance was placed related to a decision made by a regional hearing officer of the Labour Court. The High Court had discretion to make a declaratory order in such a case.

All that the applicant is trying to do in this case is to have this court set aside its order of 15 January 2009 without utilizing the application for rescission procedure. That would be incompetent as the court does not have jurisdiction to review its own decisions other than by way of application for rescission.

Having arrived at this conclusion the need to deal with other issues raised in the application does not arise. In the result, I would dismiss the application with costs on the ordinary scale.

Messrs Majoko and Majoko, applicant's legal practitioners
Magwaliba and Kwirira, 1st and 2nd respondents' legal practitioners