HENRY MUGABE

Versus

AUXILLIA CHIUMBURU N.O.

And

ATTORNEY GENERAL ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 14 & 20 OCTOBER 2011

P Dzimba, for applicant
S. Maphosa for the 2nd respondent

Opposed Application

NDOU J: The application is one for review. The applicant was charged with contravening section 3(2) as read with section 3(3) of the Gazetted Land (Consequential Provisions) Act [Chapter 20:28] in that he remained in occupation of gazetted land without the authority of the state. When the applicant appeared before the magistrate (i.e. the 1st respondent) he made an application for his case to be referred to the Supreme Court in terms of section 24(2) of the Constitution of Zimbabwe ("the Constitution"). The magistrate court dismissed the application on the ground that it was frivolous and vexatious. The dismissal is the source of this application for review. This application was served upon the 2nd respondent by delivering a copy of the application to an officer of the 2nd respondent at the 2nd respondent's office in Bulawayo.

In his opposing affidavit, the 2nd respondent raised two points *in limine*. The first point *in limine* was that he was not properly served with application. The second point was that the applicant should have made the application to the Supreme Court and not to the High Court.

I propose to deal with these points in turn.

Objection *in limine* as to jurisdiction

The gravamen of the objection is that this court has no jurisdiction to review a decision made by a magistrate court pursuant to the provisions of section 24(2) of the Constitution. It is

trite that no written law has yet been made in terms of section 24(9) of the Constitution which provides –

"A written law may make provision with respect to the practice and procedure –

(a) Of the Supreme Court in relation to the jurisdiction and powers conferred upon it by or under this section; and
(b) Of subordinate courts in relation to references to the Supreme Court under subsection (2)". (Emphasis added)

As no written law has yet been made in terms of section 24(9) of the Constitution, the Supreme Court itself has indicated the procedures to be followed in relation to matters which are raised under the provisions of section 24, supra – *Martin* v *Attorney General & Anor* 1993(1) ZLR 153 (S) and *Tsvangirai* v *Mugabe & Anor* SC-84-05. These cases make it amply clear that the procedure to be followed in relation to applications brought in terms of section 24 *supra*, of the Constitution is the procedure as announced by the Supreme Court itself in the absence of a written law prescribing such procedure.

The highlighted provisions of section 24(2), *supra* and the provisions of section 24(4) specifically mention the Supreme Court. There is no mention of such section 24, references being made to the High Court. This reference to the Supreme Court alone in section 24 is a deliberate limitation of the inherent jurisdiction of the High Court – *S* v *Mbire* 1997(1) ZLR 579 (S) at 581B; *Mandirwhe* v *Minister of State* 1981(1) SA 759 (ZA) at 764; *Catholic Commission for Justice and Peace in Zimbabwe* v *Attorney General & Ors* 1993 (1) ZLR 242 (S) at 250 and *Movement for Democratic Change & Anor* v *Chinamasa & Anor* 2001(1) ZLR 69(S) at 76.

This issue was discussed extensively in a judgment of this court in *Nyamandlovu Farmers Assoc* v *Min of Lands & Anor* 2003(1) ZLR 185(H) at 190F to 194B. The applicant should, in such a constitutional matter under section 24 approach the Supreme Court directly for a speedy redress. A section 24 order is a distinct legal redress established by the Constitution itself, to have important constitutional issues decided directly by the final court in the land, without protracted litigation. The Supreme Court is the only court empowered to deal with this kind of application and has indeed done so in similar circumstances – *William & Anor* v *Msipa & Ors* SC-22-10 at page 17 of the cyclostyled judgment; *Martin* v *Attorney General*, *supra* and *Beattie Farms (Pvt) Ltd a.k.a Chigwell Estate* v *Mugova N.O. & Anor* SC-32-09. Section 24 (2), supra, is intended to give the magistrate power in cases of this kind, to protect the Supreme Court from frivolous and vexatious litigation. A party who is not satisfied with the determination should approach the Supreme Court – M*artin* v *Attorney General*, *supra*. The issue in this case is whether the magistrate "paid up service to the interpretation of the words "frivolous or

vexatious" in her interpretation of section 24(2). The prayer sought by the applicant is in the following terms: "It is sought that 1st respondent's decision of the 29th of September 2009 be set aside and that the case be referred to the Supreme Court." This is a case which should clearly have gone straight to the Supreme Court. The Supreme Court has dealt with such matters on urgent basis if the circumstances so demand. The Supreme Court has granted a stay of proceedings where a case has been made for such relief – *Mukoko* v *Commissioner General* SC-3-09 and *Williams & Anor* v *Msipa*, *supra*. *In casu*, it is not clear why the applicant chose this long and winding route when the Constitution affords him, in section 24, *supra*, the opportunity to obtain expeditious redress. When this objection was raised, the applicant should, with respect, have withdrawn this application and approached the Supreme Court directly. From the foregoing the objection *in limine* has merit and should be upheld. On this point alone the application is dismissed with costs.

Objection *in limine* as to the method of service

The 2nd respondent filed opposing papers, presumably "under protest" notwithstanding his challenge to the method of service on him of the application. I have just upheld the other objection raised by the 2nd respondent. All these factors render this objection academic and I do not see any need to deal with it.

Accordingly, as alluded to above, the application is dismissed with costs.

Dzimba, *Jaravaza & Associates*, *c/o Messrs Coghlan & Welsh*, applicant's legal practitioners
Civil Division, *Attorney General's Office*, 2nd respondent's legal practitioners