

EVERJOY MEDA

v

**(1) MAXWELL MATSVIMBO SIBANDA (2) ZAMBE NYIKA
GWASIRA (3) THE SHERRIFF OF THE HIGH COURT OF
ZIMBABWE (4) THE REGISTRAR OF DEEDS**

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC,
GOWORA JCC, MAVANGIRA JCC, BHUNU JCC & UCHENA JCC
HARARE, MARCH 9, 2016**

L Uriri, for the applicant

T Mpofu, for the first respondent

No appearance for the second, third & fourth respondents

MALABA DCJ: At the end of hearing argument for both parties, the Court dismissed the application with costs on the legal practitioner and client scale. It was indicated that reasons for the decision would follow in due course. These are they.

The applicant approached the Court in terms of s 85(1)(a) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 (“the Constitution”) which provides that any person acting in their own interests is entitled to approach a court alleging that a fundamental right or freedom enshrined in Chapter V has been, is being or is likely to be infringed and the court may grant appropriate relief.

The applicant is customarily married to the second respondent. During the subsistence of the marriage immovable property known as Stand No. 48 Dan Judson Road, Milton Park, Harare (“the property”) was acquired and registered in the name of the second respondent. The couple separated in 2001 and the second respondent moved out of the said property. The ownership of the house was not changed at the Deeds Registry and title remained with the second respondent.

In 2010, the second respondent entered into a business transaction with the first respondent in terms of which he undertook to cut timber at the latter’s plantation. The second respondent failed to perform his obligations in terms of the agreement leading to the first respondent suing him for breach of contract and loss of future earnings. The first respondent obtained a default judgment from the High Court and proceeded to attach the property, which was still in the name of the second respondent. The first respondent also applied to the High Court for an order declaring the property especially executable. The applicant opposed the application on the basis that she was entitled to 50% share of the property. She argued that the property could not be sold in execution, to recover her husband’s debts.

The court *a quo* granted the order sought by the first respondent declaring the property especially executable. The applicant did not appeal against the judgment. It remains extant. Instead the applicant approached the Court in terms of s 85(1) of the Constitution alleging that she has personal rights to the property which have been infringed by the order declaring the property especially executable. She alleged the right to property enshrined in

s 71(3) of the Constitution has been infringed. The founding affidavit made no reference to any other fundamental human right enshrined in Chapter V of the Constitution being infringed.

Mr *Mpofu* for the first respondent took several points *in limine*. He argued that the application was improperly before the Court, because the remedy the applicant should have utilized was that of an appeal to the Supreme Court as the application was in response to the judgment of the High Court. Mr *Mpofu* argued that the Constitutional Court has no jurisdiction to overturn an extant order of the High Court in a constitutional application not alleging that the decision was a violation of the right to equal protection of the law.

Mr *Mpofu* argued that if the decision of the High Court was on a constitutional point raised before that Court the applicant ought to have approached the Court by way of appeal on that point in terms of s 167(5)(b) of the Constitution. Mr *Mpofu* further argued that the court *a quo*'s decision was based on the interpretation and application of ss 2 and 14 of the Deeds Registries Act [*Cap. 20:05*] on real rights and the effect of their registration. According to Mr *Mpofu* having not appealed against the order of the court *a quo*, the applicant cannot have it set aside without impugning the constitutionality of the statutory provisions in terms of which the judgment was made.

Mr *Uriri* for the applicant indicated that he had instructions to withdraw the matter and sought to apply that the matter be withdrawn. Mr *Mpofu* opposed this application arguing that the matter should not be withdrawn, but that the Court exercise its discretion and dismiss the matter with costs on a higher scale.

While parties may at any time before a matter is set down, withdraw a matter, with a tender of costs the same does not hold true for a matter that has already been set down for hearing. Once a matter is set down, withdrawal is not there for the taking.

The applicable principles are set out in Erasmus “*Superior Court Practice*” B1-304. A person who has instituted proceedings is entitled to withdraw such proceedings without the other party’s concurrence and without leave of the court at any time before the matter is set down. The proceedings are those in which there is lis between the parties one of whom seeks redress or the enforcement of rights against the other. An application for appropriate relief on the grounds of alleged violation of a right is such a proceeding.

Once a matter has been set down for hearing it is not competent for a party who has instituted such proceedings to withdraw them without either the consent of all the parties or the leave of the court. In the absence of such consent or leave, a purported notice of withdrawal will be invalid. The court has a discretion whether or not to grant such leave upon application. The question of injustice to the other parties is germane to the exercise of the court’s discretion. It is, however, not ordinarily the function of the court to force a person to proceed with an action against his will or to investigate the reasons for abandoning or wishing to abandon one.

See - *Abramacos v Abramacos* 1953(4) SA 474(SR);
Pearson & Hutton NNO v Hitseroth 1967(3) 591(E) at 593D, 594H
Protea Assurance Co Ltd v Gamlase 1971(1)SA 460(E) at 465G
Huggins v Ryan NO 1978(1) SA 216(R) at 218D
Franco Vignazia Enterprises (Pty) Ltd v Berry 1983(2) SA 290(C) at 295H
Levy v Levy 1991(3) SA 614(A) at 620B
HERBSTEIN & Van Winsen “*The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa*” (5ed) p 750

From the above authorities, it is the law that a court, having satisfied itself that a matter is properly before it, can refuse to grant an application for withdrawal of the matter.

Faced with this compelling position of the law, Mr *Uriri* then sought to argue that there was no application before the Court to dismiss. It was his view that as an application in terms of s 85(1)(a) of the Constitution was brought before the Court instead of an appeal against the judgment of the court *a quo* the matter was improperly before the Court.

Mr *Uriri* failed to appreciate the import of s 85(1) of the Constitution. The section provides:

“85 Enforcement of fundamental human rights and freedoms

- (1) Any of the following persons, namely-
- (a) any person acting in their own interests;
 - (b)
 - (c) ...
 - (d) ...
 - (e) ...

Is entitled to approach a court, *alleging* that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.” (emphasis)

It is clear from a reading of s 85(1) of the Constitution that a person approaching the Court in terms of the section only has to allege an infringement of a fundamental human right for the Court to be seized with the matter. The purpose of the section is to allow litigants as much freedom of access to courts on questions of violation of fundamental human rights and freedoms with minimal technicalities. The facts on which the allegation is based must of course, appear in the founding affidavit.

Whether or not the allegation is subsequently established as true is a question which does not arise in an enquiry as to whether the matter is properly before the Court in terms of s 85(1). In this case, the applicant alleged in the founding affidavit that her right to property had been infringed.

Whether her allegation is true or not is not the issue. What matters is that she alleged a violation of a fundamental human right and as such the Court was properly seized with the matter. The question of the veracity of the allegation would have been tested on the basis of evidence placed before the Court.

The Court agrees with Mr *Mpofu* that there is an application before it to dismiss. Having made this finding, the Court also accepts Mr *Mpofu*'s preliminary point that the applicant should have exhausted the remedy of an appeal instead of making a constitutional application. The law provides a clear remedy of an appeal where an applicant is not happy with a decision of a lower court. Competent relief could have been granted by the Supreme Court, on appeal since all that the applicant wanted was an order that the property in dispute was not especially executable and subject to sale by execution.

In *State v Mhlungu* 1995 3 SA 867 (CC) at para. 59, a general principle is laid down to the effect that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.

In *MEC for Development Planning & Local Government, Gauteng v Democratic*

Party 1998(4) SA 1157 (CC) it was said:

“Where there are both constitutional issues and other issues in the appeal, it will seldom be in the interests of justice that the appeal be brought directly to this Court.”

Useful guidance can also be gleaned from the decisions of the United States Supreme Court. In *Spector Motor Services, inc. V. Mclaughlin*, 323 U.S. 101, 103 (1944),

JUSTICE FRANKFURTER remarked:

“[i] there is no doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionalityunless such adjudication is unavoidable.”

In *Ashwander V. Tennessee Valley Authority (TVA)* 297 U.S. 288, 345-48, (1936)

the Court held:

“The last resort rule states that a court should “not pass upon a constitutional questionif there is also present some other ground upon which the case may be disposed of.”

It was the unanimous decision of the Court that the matter be dismissed.

COSTS

The applicant, through Mr *Uriri* offered to pay costs on the ordinary scale. However, Mr *Mpofu* for the first respondent argued that the applicant should be mulcted with costs on the legal practitioner and own client scale. It was his submission that the matter, between the same parties, on the same facts and for the same relief had previously been brought by the applicant under a different case no. CCZ 31/15, and had been struck off the roll. It was

Mr *Mpofu*'s submission that the Court in that earlier case had highlighted the defects in the application to the applicant's legal practitioners. The same application has been brought with the same defects.

While it is rare for the Court to grant costs on a higher scale in constitutional matters, it is the unanimous view of the Court that the applicant's conduct justifies such an award of costs. The defects that afflicted the first application were not attended to. Just as was the case with the previous application it has not been shown in the founding affidavit how s 71(3) of the Constitution has been infringed. There is no doubt that the application should not have been brought to the Court.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GOWORA JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA JCC: I agree

BHUNU JCC: I agree

UCHENA JCC: I agree

Messrs Chinawa Law Chambers, applicant's legal practitioners

Messrs Coghlan, Welsh & Guest, first respondent's legal practitioners