

**REPORTABLE** (1)

**ERIZA MUHALA AND 50 OTHERS**  
**v**  
**PATRICK T. MUKORERA**

**CONSTITUTIONAL COURT OF ZIMBABWE**  
**CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,**  
**GWAUNZA JCC, GARWE JCC, GOWORA JCC,**  
**HLATSHWAYO JCC, PATEL JCC & GUVAVA JCC**  
**HARARE, JUNE 4, 2014 & FEBRUARY 18, 2019**

*T. Maanda*, for the applicants

*P. Takaidza*, for the respondent

**GWAUNZA DCJ:**

- [1] This is a purported referral to this Court in terms of s 175 (4) of the Constitution of Zimbabwe. The matter was argued before this Court on June 4, 2014. Judgment having been reserved, it is a matter of regret that unforeseen circumstances resulted in the delay in rendering this judgment.

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**BACKGROUND FACTS**

- [2] The respondent is the holder of an offer letter in respect of subdivision 9 of Reubine of Clare Farm in Manicaland granted to him by the Minister of Lands and Rural Resettlement. The farm was offered to the respondent on 6 June 2010. Before the farm was acquired by the State and offered to the respondent, it was owned by a certain Mr Tiny Van Resberg. After its acquisition, the farm was divided into nine (9) subdivisions. The respondent's offer letter relates to subdivision 9.

[3] The applicants were all employees of the said Mr Tiny Van Resberg and by virtue of such employment, lived at the farm until he left following its acquisition and re-allocation to the respondent and eight others. The applicants and their families continued to live on the farm (effectively on the subdivision allocated to the respondent), and those with children have them enrolled at Clare Primary School. Some had been employed by Mr Van Resberg from 1982 until the time he left. It is common cause that, apart from accommodation, Mr Van Resberg provided them with small pieces of land where they conducted their subsistence farming.

[4] After the respondent obtained the offer letter in respect of his subdivision, he took occupation thereof in September 2010. The applicants remained in occupation of the same subdivision. The respondent then gave all the applicants notice to vacate the farm in August 2012 but the applicants did not comply. Eventually, he filed a court application for the eviction of the respondents in the Mutare Magistrates' Court. This was on 10 September 2013.

[5] The applicants filed a notice of opposition to the application. With their notice of opposition however, they did not file any affidavit responding to the allegations in the application. They instead raised a point *in limine* relating to the jurisdiction of the magistrates' court to deal with the dispute. In that statement, they alleged that their employment *status* had never been terminated and that in terms of s 16 of the Labour Act, they remained employees of Reubine Farm entitled to their terminal benefits in terms of the *Labour (Terminal Benefits and Entitlements of Agricultural Employees Affected by Compulsory Acquisition) Regulations 2002*. Despite objecting to the magistrate court's jurisdiction, the applicants nevertheless notified the respondent of

their intention to file a request for referral to the Constitutional Court for the resolution of a number of constitutional questions.

- [6] The applicants thereafter filed an application for referral in terms of s 175 (4) of the Constitution before the magistrates' court, on 18 October 2013. In that application, they tendered evidence concerning their perceived entitlement to the land in question, which should properly have been contained in an opposing affidavit in the main issue before the magistrate. Be that as it may, the magistrate entertained the application. In it the applicants claimed they had been in occupation of the farm since 1982 and were offering labour to the former farm owner, Mr Van Resberg. The first applicant, for example, had been in occupation of the farm since 1982 and had worked on the farm for Mr Van Resberg ever since. The former owner gave the applicants one and a half hectares of land for their own subsistence farming and they had been growing maize and other crops like sweet potatoes on the land. The applicants feared that if they were evicted, their 'fundamental rights' would be breached. They were afraid of being evicted and thrown into the open exposing them to the 'indignity' of being at the mercy of 'dangerous agents of weather which include rains, the wind, storms, lightning, heat, the cold nights, the dangers of wild animals, reptiles and crawling creatures'. The applicants alleged that they were provided with accommodation as a direct result of their employment and they had not resigned from such employment. They further alleged that it was not the intention of the land reform programme to disempower former black Zimbabwean farm labourers who worked under the previous land occupation regime.

[7] The applicants in addition expressed the view that their employer had not properly terminated their employment contracts in terms of labour law and the eviction would take away their economic wherewithal as well as the social amenities of life that they had enjoyed at the farm. They also alleged that the intended eviction would violate s 28 of the Constitution, and sought referral of the following questions to this Court for resolution:

1. Whether the eviction of the respondents from Reubine farm would be in breach of the following fundamental rights of respondents as enshrined in the Constitution of Zimbabwe (Amendment No. 20)
  - (a) In breach of s 28 of the Constitution of Zimbabwe
  - (b) In breach of s 51 of the Constitution of Zimbabwe
  - (c) In breach of s 72(7) of the Constitution of Zimbabwe
  - (d) In breach of s 64 of the Constitution of Zimbabwe
2. Further whether the eviction of respondents without them being granted alternative accommodation is in breach of the Founding Principles s 28 of the Constitution of Zimbabwe.

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[8] The respondent opposed the request for referral, stating that his land allocation was in respect of subdivision 9 of the farm. He stated that the applicants were employed by Mr Van Resberg who occupied the whole farm, not just the subdivision that was offered to him by the Minister of Lands. He further alleged that the applicants worked for Mr Van Resberg and since he had left, they no longer had any right to remain on the farm. He further submitted that he did not inherit Mr Van Resberg's farming operations and denied violating any of their rights by virtue of the order that he sought against the applicants. Given that he never employed them he bore no obligation to provide them with accommodation. In any event, he alleged, accommodation by reason of employment is not permanent in nature, as it is tied to the employment relationship.

[9] The respondent also opposed the request for referral to this Court on the basis that s 28 of the Constitution binds the State and all institutions and agencies of government only, not individuals like him<sup>1</sup>. Further, that if the applicants wanted land of their own, they should approach the relevant authorities for land allocation in their own right. He averred that in terms of the lease agreement between him and the State, he was not allowed to cede his rights therein to third parties. Lastly, the respondent raised the point that the applicants were in any case, illegal occupiers of the farm since 2010 as they possessed neither an offer letter, land settlement lease or a permit as prescribed by the *Gazetted Land (Consequential Provisions) Act [Chapter 20.28]*. Further, that s 72(6) of the Constitution of Zimbabwe as read with s 3(2) of *[Chapter 20.28]* just cited, explicitly provides that a former owner or occupier who does not cease to occupy acquired land on the expiry of the period prescribed, in this case 90 days, shall be guilty of an offence. All that he sought to do was exercise his rights as a re-settled farmer by evicting those who continued to occupy it in open defiance of the law and the Constitution. The occupiers had thus been stripped of all rights they may have had to the land in question, including their living quarters, whose continued occupation is ‘criminalised’ by s 3(3) of the *Gazetted Land (Consequential Provisions) Act [Chapter 20.28]*.

Accordingly, the respondent prayed for the request for referral to be dismissed on the basis that it was frivolous and vexatious.

[10] The presiding magistrate however found for the applicants. She summarised the facts as alleged by the parties and stated as follows in her short judgment;

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<sup>1</sup> S28 of the Constitution obliges the State and all institutions at every level to take all steps necessary within their means to enable every person to have access to adequate shelter.

“It is my well-considered opinion that the application for referral to the Constitutional Court is not frivolous and vexatious but genuinely found(*sic*) on the respondent’s fear of their rights being violated.”

## THE ISSUE

### Whether the matter was properly referred to this Court.

[11] The matter came before this Court as a purported referral in terms of s 175(4), which provides as follows:

“(4) If a constitutional matter arises in any proceedings before a court, the person presiding over that court may, and if so requested by any party to the proceedings must, refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious.  
(*my emphasis*)

The ‘proceedings’ before the court *a quo* at the time the application for referral was made consisted only of the founding papers related to the respondent’s application for eviction of the applicants *in casu*. Without any opposing papers having been filed, the court was presented with an application, which it entertained and granted, for referral of certain questions to this Court. The question as to what constitutes ‘proceedings’ for purposes of s 24 (2) of the former constitution (s 175) (4) of the current Constitution) was authoritatively answered in *Tsvangirai v Mugabe & Anor*-2006(1) ZLR 148(S) at 158, where the court held as follows:

“Section 24(2) of the Constitution only applies when there is a question arising in the proceedings in the High Court or in the court subordinate to the High Court.  
... . The words ‘in any proceedings in the High Court’ mean proceedings that have come to be or have been instituted in the High Court ... .  
... . There are proceedings in being in the High Court from the moment an action is commenced or an application made until termination of the matter in dispute, or withdrawal of the action or application.”

When the above is applied to the circumstances of this case, and by parity of reasoning, there can be no doubt that the questions referred to this Court properly arose during proceedings in the court *a quo*. What remains to be determined is whether or not the magistrate should have referred the matter to this Court at all.

[12] The applicants were faced with an application for their eviction. In terms of laid down procedure they ought to have opposed that application in the manner prescribed in the Magistrates' Court Rules. They ought, in particular, to have filed an affidavit in opposition to the application in terms of Order 22 r 2 subrule 3 (b) of the Magistrates' Court Rules which provides as follows:

**“Statement in response to application**

- (1) The respondent may, not less than forty-eight hours before the time stated in such application, deliver a statement in writing in which he either-
  - (a) consents to the order mentioned in the application; or
  - (b) opposes the granting of such order.
- (2) Where the respondent consents to the order-
  - (a) the order shall be deemed to be granted from the time mentioned in the application;
  - (b) it shall not be necessary for either party to appear.
- (3) Where the respondent opposes the order, his statement shall-
  - (a) set out the grounds on which he opposes the order;
  - (b) if he denies the facts set out in the application or seeks to place additional facts before the court, be supported by affidavit.  
(*my emphasis*)

[13] The applicants clearly wished to deny the facts set out in the application for eviction and to place additional facts before the court. They were therefore required to lay out the factual basis for their defence in an opposing affidavit and thereafter request the magistrate to refer an identified constitutional question arising therein, to this Court. At that stage, it would have been shown that the determination of the constitutional question would be the basis of their defence to the application for eviction, in the

Magistrates' Court. This they did not do. For this reason, the basis for the referral was not apparent on the papers before the court.

- [14] A perusal of the presiding magistrate's ruling shows that she did not make any findings of fact in referring the matter to this Court. That is a serious misdirection. A constitutional question does not arise in a vacuum. It is an issue that arises from the facts of a particular matter. Put differently, for the court to find that there is a constitutional matter that warrants a referral to this Court, the question must arise from the facts before the referring court. This is particularly important considering that there are many instances where an analysis of the facts would make it palpably apparent that no constitutional matter would have arisen. Factual findings and their relevance to the alleged constitutional violation are crucial in the determination of whether the request for referral is frivolous or vexatious. **Judgment No. CCZ 2/19**  
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*General & Anor* 1993 (1) ZLR 153 (SC) 156H-157A the court had the following to say:

- 24(2) “Faced with the request to refer the question raised on the applicant's behalf to the Supreme Court, the magistrate had no option but to act in accordance therewith, unless of the opinion that the question was, as characterised in s of the Constitution, “merely frivolous or vexatious”. In order to be satisfied that it was not, he obviously had to consider, to some extent, the merits of the argument.” (*my emphasis*)

- [15] The applicants categorically stated in their ill-conceived application that they were employed by Mr Van Resberg and that they were given accommodation at the farm on the basis of such employment. They alleged that their employment had not been terminated hence they could not be evicted from the farm. In this respect the applicants stated that they were employed by Mr Van Resberg and not the farm. Before referring the matter to this Court, the magistrate ought to have satisfied herself



that there was indeed a relationship between the farm and the applicants. In the applicants' papers before the court *a quo*, it was common cause that the applicants were employed by the farmer as farm labourers. No attempt was made by the magistrate to establish the relationship between the applicants, the land and Mr Van Resberg before determining the application, in order to understand and contextualise the request for referral. Had the magistrate made the effort to call evidence on the required facts, and to make specific findings of fact in that respect, it would have been apparent that the only claim that the applicants had to the land was through their employment with Mr Van Resberg. Since Mr Resberg had ceased to occupy the farm, it fell to reason that such employment had come to an end.

[16] The magistrate therefore, ought to have, on this basis, considered whether there was any basis for referral of the matter to this Court. The applicants had, under the law applicable, lost the right to continue staying on the farm. In this regard, the findings of the Court in *Dhlamini and another v the State* CCZ 1/14 become apposite.

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It found in part:

“Section 24(2) of the Constitution clearly precludes a situation where the question is referred to the Supreme Court in respect of a matter which is no longer necessary for resolution by the lower court in the determination of the dispute before it. If that were to be permitted it would mean that the Supreme Court would not be rendering a decision on the question as a court of first instance in the exercise of original jurisdiction. It was no longer necessary for the High Court to place the applicants on remand and *ipso facto* to consider whether or not placing them on remand was likely to violate their right to personal liberty, the decision to place the applicants on remand having already been made by the magistrates' court. The applicants were before the High Court for trial on the basis of the decision that there was a reasonable suspicion of their having committed the offences with which they were charged.”

[17] The facts in this case are almost on all fours with the facts in *Yoramu and others v The State* CCZ 2/16. The only difference is that while in this case the respondent elected to sue the applicants for eviction, in the *Yoramu* case, the decision had been taken to prosecute the accused persons under s 3 (2) (a) as read with s 3 (3) of the Gazetted lands (Consequential Provisions) Act. This Court, on referral of the matter from the magistrates' court, was ultimately tasked with dealing with the question of whether the prosecution of the applicants in the magistrates' court under s 3 (2) (a) as read with s 3 (3) of the Gazetted Lands Act constituted a violation of their right to the protection of the law, GARWE JCC found:

who “Even on the merits, it is clear that there was no transfer of an undertaking following the acquisition of the farm and its subsequent allocation to a number of beneficiaries. The Constitution itself makes it clear that anyone possesses or occupies gazetted land without lawful authority may be guilty of a criminal offence. What constitutes lawful authority is defined in the Act. The applicants have no such authority. In these circumstances, there can be no question of the applicants having remained employees of, or the farming operations having been transferred to, the new beneficiaries.”

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[18] The Magistrate *in casu* was dealing with an application for eviction. The question before him was therefore whether the applicants had the authority to remain in occupation of the farm, in other words, did they have a valid defence to the eviction claim? The dispute was between the applicants and the respondent as between themselves. In this regard, the magistrate ought to have considered that question only. The magistrate, knowing that it was an application for eviction, ought to have satisfied herself that the alleged constitutional question would, if successful, clothe the applicants with lawful authority. It could not. The applicants simply did not have lawful authority to continue staying on the farm. Accordingly, the Constitutional Court cannot give them what is not provided for in the law.

Even if it were to be found that the applicants were entitled to land, the fact remains that they were illegally occupying the land in question. The dispute as it properly stood, without the perceived constitutional aberrations, could have been adequately resolved by reference to the common law or the Gazetted Lands (Consequential Provisions) Act.

[19] With respect to occupation of agricultural land compulsorily acquired for resettlement purposes, a person can only settle on the farm by virtue of lawful authority. Lawful authority is defined in s 2 of the Gazetted Lands (Consequential Provisions) Act as follows:

“lawful authority” means –

- (a) an offer letter; or
- (b) a permit; or
- (c) a land settlement lease;”

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Even though this case did not come through the criminal route, it would be ill conceived to ignore the provisions of s 3 of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*]. The provision reads:

**“3 Occupation of Gazetted land without lawful authority**

- (1) Subject to this section, no person may hold, use or occupy Gazetted land without lawful authority.
- (2) Every former owner or occupier of Gazetted land
  - (a) Referred to in para (a) of the definition of “Gazetted land” in s 2 (1), shall cease to occupy, hold or use that land forty-five days after the fixed date, unless the owner or occupier is lawfully authorised to occupy, hold or use that land;

- (b) referred to in para (b) of the definition of “Gazetted land” in s 2 (1), shall cease to occupy, hold or use that land forty-five days after the date when the land is identified in accordance with s 16B (2)(a)(iii) of the Constitution, unless the owner or occupier is lawfully authorised to occupy, hold or use that land:

Provided that –

- (i) the owner or occupier of that land referred to in para (b) may remain in occupation of his or her living quarters on that land for a period of not more than ninety days after the date when the land is identified;
- (ii) the owner or occupier shall cease to occupy his or her living quarters after the period referred to in proviso(i).”

[20] A constitutional question worthy of referral is a question that is necessary to be answered by the Constitutional Court in order that the referring court may dispose of the dispute before it. In this regard, BARON JA in *Mandirwhe vs Minister of State* 1986(1) ZLR 1 (S) 5E-H reasoned:

“The basis on which we declined to entertain this reference was that, since the determination of the question of an alleged contravention of the Declaration of rights was unnecessary for the purposes of the order the learned Judge had decided to make, it was not competent for him to refer that question to this Court.”

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In order to find that the question that is raised is one that is relevant for the resolution of the main dispute between the parties, the court has to be informed by findings of fact. It is from those findings that the court will consider whether the question raised is consistent with the proven facts. In referring the questions to this Court without following the procedure laid out above, the court *a quo* grossly misdirected itself.

[21] The question referred therefore had no bearing on the dispute that stood to be resolved between the parties in the magistrates’ court. Once a dispute can be resolved without recourse to the Constitution, no constitutional questions would have arisen and the matter in that form would not be properly before the Constitutional Court. (See

*Magurure & 63 others v Cargo Carriers International Hauliers (Pvt) Ltd t/a Sabot*  
CCZ 15/16. *Berry & another v Chief Immigration Officer & another* CCZ4/16.

Had the magistrate considered the request for referral properly, she would have found that for these reasons, such request was frivolous and vexatious.

[21] After all is considered, I find that the magistrate grossly misdirected herself in acceding to the request for referral. The referral is therefore not properly before this Court.

In the result, I make the following order:

The matter be and is hereby struck off the roll.

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**CHIDYAUSIKU CJ:** I agree

**MALABA DCJ:** I agree

**ZIYAMBI JCC:** I agree

**GARWE JCC:** I agree

**GOWORA JCC:** I agree

**HLATSHWAYO JCC:** I agree

**PATEL JCC:** I agree

**GUVAVA JCC:** I agree

*Maunga Maanda & Associates* applicants' legal practitioners

*Takaidza & Mubata* respondent's legal practitioners