

GOROMONZI RURAL DISTRICT COUNCIL
versus
PRECIOUS GWANDE

HIGH COURT OF ZIMBABWE
TSANGA & DEME JJ
HARARE; 30 January & 28 August 2024

Civil Appeal

D Halimani, for the appellant
C Warara, for the respondent

TSANGA J: This appeal arises from the dismissal, in the court a quo, of a summary judgment application in which the appellant and respondent herein were applicant and respondent respectively.

Appellant is Goromonzi Rural District Council (“Goromonzi RDC”), a local authority charged inter alia, with regulatory and planning oversight in its area of jurisdiction known eponymously as Goromonzi Rural District. In exercising its functions, Goromonzi RDC enjoys statutory powers, rights, and responsibilities derived from various instruments including the Rural District Councils Act [Chapter 29:13] and the Regional Town and Country Planning Act [Chapter 29:12]. (“RTP Act”) among many others. It describes itself in this matter as a local authority assigned to administer and allocate state land and whose area of jurisdiction includes Zimbiru Business Centre, Ward 4 Domboshava.

The common cause facts are as follows; - on 20 August 2021, the appellant Goromonzi RDC, issued an enforcement order against the respondent Precious Gwande following irregular development activities at Zimbiru Business Centre, Ward 4 Domboshava, a planned area under their authority on which she had constructed an unauthorised structure which she was running as a clinic. The structure included a boundary wall.

The enforcement order therefore brought to respondent's attention, the irregularities concerned, namely the construction thereon of an illegal unregistered clinic and a perimeter wall erected in breach of building regulations.

By such order, respondent was directed not only to cease further development in the form of construction activities on the stand, but to demolish the condemned structure and wall. Additionally, respondent was also required to restore the land back to its original state. Dissatisfied with the prohibition and demolition orders, respondent approached the Administrative Court challenging the enforcement order that had been issued. The Administrative Court, in its judgment of 22 February 2022, ruled that indeed the structures at Zimbiru Business Centre, Ward 4 Domboshava had been irregularly erected and that the enforcement and prohibition orders issued by appellant were warranted.

It is further common cause that the respondent then approached the Supreme Court on appeal against the decision of the Administrative Court. Equally, it is a fact that on 13 September 2022, the Supreme Court dismissed the Respondent's appeal with costs.

Following that dismissal, the appellant, then issued summons in the Magistrate's Court seeking an order for the following:

- a) the demolition of the Respondent's illegal clinic and boundary wall at Zimbiru Business Centre, Ward 4 Domboshava;
- b) authorisation for the Applicant to reclaim the land at Zimbiru Business Centre, Ward 4 occupied by the Respondent and have it restored to its original state;
- c) ejection of the defendant and all those claiming rights of use and occupation through her from the site at Zimbiru Business Centre, Ward 4 Domboshava;
- d) costs of suit on an attorney and client scale.

The Respondent defended the suit, proffering the defence in her plea that her structures at Zimbiru Business Centre, Ward 4 Domboshava were on a piece of communal land which she had inherited from her grandmother who had enjoyed occupation rights over it since 1961. Respondent herself had been in occupation since 2013 and her application to construct the structures had not received any response.

The appellant proceeded to file an application for summary judgment in the court *a quo*. The basis thereof was that respondent's plea disclosed no *bona fide* defence given that the

validity of the enforcement orders had been confirmed by both the Administrative Court and the Supreme Court through a determination of the underlying cause on the merits.

The court *a quo* was in full agreement with the Appellant that the issue of regularity or otherwise of the development had been resolved by the Administrative Court and the Supreme Court on the merits. In that respect, the court *a quo* ruled that the matter could not be “heard yet again”. The Court also held that the Magistrate Court did not have jurisdiction to order demolition, and, that the proper court to approach would be the High Court. It further took the view that the Appellant had effectively approached that court for registration of the Administrative Court Order for enforcement purposes and that this was not provided for in the rules or any statute. It was held further that the court’s jurisdiction being set by section 11 of the Magistrates Court Act, precluded it from exercising jurisdiction over the matter. It is against this decision that the Appellant appeals.

Grounds of Appeal

The grounds of appeal are that the court *a quo* erred and misdirected itself in the following ways:

1. *Mero motu* holding that it had no jurisdiction to deal with the matter, and, dismissing the application on that basis without affording the parties an opportunity to make any submissions or arguments on the issue.
2. Holding that it had no jurisdiction to deal with the application because it *inter alia* sought the demolition of an illegal structure.
3. Failing to appreciate that the matter before it was a species of an eviction which it had jurisdiction to deal with subject to the relevant monetary jurisdictional limit, which was not an issue before it.
4. Dismissing the application despite holding that the Respondent did not have a *bona fide* defence to the Appellant’s claim.
5. Reaching a contradictory conclusion in that it found that the Respondent had no defence on the merits of the matter and in the same judgment found that it had no jurisdiction to entertain the matter and dismissed the application.

The relief sought is that the appeal succeeds and that the judgment of the lower court be substituted with an order granting the application for summary judgment. In particular, the Appellant seeks an order that the illegal clinic and the equally irregularly erected boundary wall at Zimbiru Business Centre, Ward 4, Domboshava be demolished. In the event that the Respondent refuses or fails to restore the land to its original state as demanded, appellant seeks an order that authorises it to reclaim the land at the site of the illegal clinic and boundary wall, and restore it to its original state. Further, all those claiming rights of use and occupation of the illegal clinic and boundary wall at the site in Zimbiru Business Centre, Ward 4, Domboshava are to be ejected. Costs are sought on a higher scale.

In the alternative, the appellant seeks that the matter be remitted back to the Court *a quo* for a hearing afresh before a different Magistrate.

The legal arguments

The Appellant argued that the court committed a procedural irregularity in failing to get parties to address it before it reached the conclusion that it did not have jurisdiction. Drawn on were the remarks by Makarau JA as she then was in *Christmas Mazarire v The Retrenchment Board and Old Mutual Shared Services (Private) Limited* SC 105/2020 where she stressed that:

“There are a number of other legal principles that converge to discourage a court from going on a frolic of its own and determining a matter on an issue that is not raised by the parties in their papers and arguments. These include the duty of the court, where it is of the view that a certain factual or legal position is dispositive of the matter before it, to invite the parties to address it on the point before resolving the dispute wholly or partly on the point.”

Other cases drawn on for the same principle on the need to address issues pleaded include *Nzara and Others v Kashumba N.O and Others* SC 18/18; *Gateway Primary School and 3 Others v Fenesev and Another* SC63/2021; and *Chiwenga v Mubaiwa* SC 86/2020

The appellant also argued that ordinarily a dismissal of summary judgment would result in a matter being referred to trial whereas at this instance the matter was dismissed entirely. As for the critical issue of whether the court had jurisdiction, the appellant argued that section 11 (b) (vii) of the Magistrates Court Act [*Chapter 7:10*] gives the Magistrates Court power to handle “all actions other than those already specified in this paragraph...” subject to the claim or value of the matter in dispute not exceeding the prescribed monetary

jurisdiction. Further, the matters for which the Magistrates Court's jurisdiction is expressly excluded were said to be specified under section 14 of the Magistrates Court Act. The essence of Appellant's argument was that a demolition order is not one of them and that the court *a quo* therefore clearly made an error of law by declining jurisdiction to hear the matter when its jurisdiction was not excluded by statute.

Critically, the Appellant also argued that the Constitution deals compositely with eviction and demolition in s 74. It further submitted that the Magistrates Court is not excluded by section 74 of the Constitution which stipulates that "no person may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant circumstances." The thrust of the submission was that the Magistrates Court is one of the Courts in Zimbabwe vested with judicial authority by virtue of s 162 of the Constitution. The Appellant also submitted that the High Court would be inundated with cases were it the only court empowered to deal with demolitions as suggested in the court *a quo*. Also, unlike Magistrates Courts which are found throughout the country, High Courts are not as easily accessible.

The Respondent, on the other hand, argued that the Magistrate's Court is a creature of statute and that the Magistrate would have been usurping the powers of the High Court had it granted the order for demolition. Respondent also submitted that the Magistrate's Court does not have powers to enforce the orders of the Administrative Court. The Respondent further submitted that the Appellant had not pointed to any provision which gives the Magistrate's Court powers to deal with matters from the Administrative Court. The Respondent's position was essentially that the Appellant has powers to approach the High Court on the order that it seeks. Respondent's lawyer also sought to place arguments on the nature and ownership of the land which were out of place as the merits were dealt with by Superior Courts and those findings and orders were extant.

Analysis

Whether the court erred in not affording parties an opportunity to make submissions on jurisdiction

Jurisdiction in essence embodies the power by a court or tribunal to entertain a matter. A matter will go no further where a court has no jurisdiction, which will simply not attach if it is excluded by statute. Where a court on other hand has the powers to entertain the matter,

it can then move on to hearing the merits and making its determination. Suffice it to point out that when it comes to subject matter jurisdiction, a court on its own is free to raise that issue since the lack of jurisdiction would be absolute. In *Dube v Maphepha* 2009 (1) ZLR 29 the import of a lack of jurisdiction was explained as follows:

“When a magistrates’ court does what is not within its jurisdiction, the result of what it purports to do is void and it is a nullity in law with no force or effect. No benefit can be derived from it. It has been repeatedly stated that it is like trying to build something on nothing and expect it to stand; it will collapse.”

This principle has been repeated in case law as encapsulating the fact that as a creature of statute the Magistrate’s Court will not do anything that is not provided by statute. See *Luckson Mateure v Samuel Chiduma* HB 156/16. By adhering to the letter of the law on subject matter jurisdiction as provided for in the relevant Act, magistrates’ courts avoid judicial legislation.

While the court raised the issue of its supposed lack of jurisdiction on its own, it did not address it with the parties. Our view is that it ought to have done this as part of the right to be heard. The parties ought to have been allowed to make their submissions. This court finds merit in the ground of appeal particularly when the second ground of appeal is examined that the court erred in holding that it had no jurisdiction to deal with the application, which among other things also sought the demolition of the illegal structure. If the parties had been accorded right to be heard on the issue of jurisdiction, they would have been able to ventilate their reasoning before the court in order for the court to make an informed decision on whether or not it indeed lacked subject matter jurisdiction. Furthermore, even if the court had concluded that it lacked jurisdiction after hearing the parties, this would not have precluded the matter from being placed again in the appropriate forum. In other words, a finding on lack of jurisdiction would not have spelt the death knell for the matter entirely.

Whether the court lacked jurisdiction to order demolition

The real issue in this appeal is indeed whether in the framing of the relevant provision in the Magistrates Court Act on subject matter jurisdiction, it was the intention of the legislator that these courts would not adjudicate over matters that involve demolition even when intricately linked to a legal ejection. The third ground of appeal frames the issue of demolition as being a subspecies of an eviction which the court is said to have had

jurisdiction to deal with subject to the relevant monetary jurisdictional limit. It will be dealt with simultaneously in unpacking this second ground on whether the court lacked jurisdiction.

In outlining subject matter jurisdiction, s11 (1) (b) (iii) in particular gives powers to Magistrates' courts in "actions of ejection against any occupier of land house or premises situate within the province". This is subject to the proviso that the right of occupation of such house or premise should not exceed the prescribed amount in the rules in clear value to the occupier. Additionally s11 (1) (b) (vii) gives jurisdiction in all other matters not specifically specified in the relevant section subject to not exceeding prescribed monetary jurisdiction of the court. Matters that are specifically excluded from the subject matter jurisdiction of the Magistrates' courts are specifically outlined in s 14 of the Act and cover issues such as dissolution of a marriage which is not a customary law marriage; validity and interpretation of a valid will; status of a person in respect of mental capacity; a decree of perpetual silence; and specific performance without an alternative for damages among others. Suffice it to say that demolition is indeed not included among the list of those specific issues for which Magistrates courts have no jurisdiction.

It is vital to emphasise that s11 (1) (b) (vii) indulges Magistrates Courts outside the areas of strict prohibition outlined in s 14. Significantly, the Act leaves the determination of these other matters to the courts themselves. In other words, the Magistrates Court Act, specifically in this provision dealing with wider jurisdiction as explained, effectively empowers magistrates' courts, as opposed to severely truncating their jurisdictional discretion.

Where an issue is not expressly excluded from the jurisdiction of the court, there is no reason why an interpretation which accords with justice, practicality and the dictates of common sense ought not to prevail. This is against the backdrop of s11 (1) (b) (vii) which gives jurisdiction in all other matters not specifically specified in the relevant section subject to not exceeding prescribed monetary jurisdiction of the court

The arguments raised by appellant on a wider interpretation of ejection as not precluding demolition touch on public policy. These public policy considerations are actually critical in light of the purpose and responsibilities of Goromonzi RDC and the need to ensure that activities in its area are conducted in terms of the law for good order. When the total

factual circumstances of the case are examined in this particular instance, ejectment was inevitable since the Supreme Court had upheld the Administrative Court finding that the occupation of the land and the structure built by the Respondent were indeed illegal. The matter was not before the Magistrate's court for any re-hearing of the merits. Ejectment from an illegally constructed structure being inevitable, it would follow that appellant had the right to seek demolition in the same action from the same forum granting such ejectment. There was simply no legal reason in the Act why the Magistrate's Court could not grant an ejectment accompanied by demolition under the totality of the factual circumstances. It would certainly not have been tantamount to enlarging the jurisdiction of the Magistrate's court to say that demolition could be granted alongside the eviction. Denial of jurisdiction should stem from the right motives, particularly where there is nothing in the four corners of the Act to expressly support a claim that a demolition action sought alongside an order for eviction is beyond the capacity of the Magistrate court to entertain when the cause of action is the same and the factual basis is the same. The Magistrate's court was in error that it had been approached for registration of an Administrative Court order. It had not. Summons were issued for eviction against the backdrop of what had taken place in the Administrative Court and the Supreme Court.

Furthermore, there is nothing unique about Magistrates' courts granting demolitions since by way of an example, they already can grant such under the Housing Standards Control Act [Chapter 29:08] (also one of the Acts administered by or extending authority to appellant) where an Authority is of the view that a building within its locality does not meet requisite standards. Such powers or activities are intrinsic in the discharge of functions by entities such as appellant.

The Appellant, as highlighted, also argued that eviction and demolition are dealt with in the same breath by the Constitution as it seeks to protect persons from arbitrary eviction and demolition without a court order.

It reads:

“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 the relevant circumstances.”

The requirement of a court order is an important one although it is necessary to point out that s74 specifically addresses evictions and demolitions from homes. A home was specifically defined in *City Of Harare v Tawanda Mukungurutse & 3 Ors* SC 46/2018. Whilst a clinic is not a home, still the necessity of the constitutional imperative of a court order in instances of evictions and demolitions makes sense.

Whether the court erred in dismissing the application for summary judgment

The fourth and fifth grounds are also closely intertwined. They touch on the dismissal of the application for summary judgment despite a finding that the Respondent had no *bona fide* defence. Once the court had found that the respondent had no defence, if it had properly exercised its mind on the issue of jurisdiction, there is no doubt that the claim for summary judgment would have been granted for the reasons discussed on the import of the relevant section. There is no reason to remit the matter back to the magistrate's court before a different magistrate given that the issue of jurisdiction has been clarified in this appeal.

Costs have been sought on a higher scale. While the respondent may have been simply trying to have a second bite at the cherry well knowing that the matter had been dealt with by the Supreme Court and the Respondent's case had been dismissed, costs on a higher scale are not warranted. Given the emotions attendant in land matters there is nevertheless no streak of unreasonable and mischievous stubbornness, boasting or contempt. It would not be proper to punish a party simply because they have elected to fight to the last. She will also incur costs in pulling down the irregular structures.

Accordingly:

The appeal succeeds with costs.

2. The judgment of the Court *a quo* is set aside and substituted with the following:

The application for summary judgment be and is hereby granted on the following terms:

- (i) The Defendant be and is hereby ordered to demolish the irregularly erected structure presently operating as a clinic as well as the perimeter wall at Zimbiru Business Centre Ward 4 Domboshava within 14 days from the date of this Order.
- (ii) Defendant be and is hereby ordered to restore the site to its original status.

- (iii) In the event that the defendant fails and or neglects to comply with paragraph 1 and 2 or this Order within 14 days from the date of this Order, plaintiff is authorised to proceed and take reasonable steps to remove the structure operating as an unauthorised and illegally constructed clinic at Zimbiru Business Centre Ward 4 Domboshava as well as the perimeter wall, restore the land to its original condition and recover the costs of such from defendant..
- (iv) The Defendant and all those claiming rights of use and occupation of the site of at Zimbiru Business Centre, Ward 4, Domboshava whereon the illegal clinic is situate, be ejected; and

- (v) The Defendant shall pay the costs of suit.

TSANGA J:.....

DEME J..... AGREES

Winterons, applicant's legal practitioner
Warara & associates, respondent's legal practitioner