

REPORTABLE: (57)

LEATHOUT INVESTMENTS (PRIVATE) LIMITED
v
(1) FUTURE CHIRANGANO MUVIRIMI (2) PETRONELLA MUVIRIMI

**SUPREME COURT OF ZIMBABWE
GOWORA JA, PATEL JA, & BERE JA
HARARE: 4 OCTOBER 2019 & 7 JUNE 2021**

T. Mpofu, for the appellant

L. Uriri, for the respondents

GOWORA JA: The parties herein are engaged in various wrangles in the Magistrates Court and the High Court. The wrangles have seen the parties file complaints of alleged criminal activities against each other.

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In this appeal, the dispute relates to immovable property. On 2 April 2014, the appellant caused summons to be issued out of the High Court wherein it sought the eviction of the respondents, who are husband and wife from the immovable property, described as 69 Glenara Avenue Highlands Harare. The appellant averred therein that it was the registered owner to the property and that the respondents were in occupation of the same. The appellant alleged that their occupation was without its consent.

The respondents opposed the claim for their eviction. They filed an exception on 14 May 2014. This was followed up with a special plea filed on 16 May 20104.

In the exception, the respondents challenged the appellant's claim of ownership in the immovable property described above. The same defence was raised in the special plea.

On 27 June 2014, the respondents filed a plea on the merits. The substance of their defence was to challenge the appellant's claim to ownership of the property in question. They alleged that the registration of title was marred by fraud. They denied that the appellant had a legal and enforceable right to claim their eviction from the property in question.

On 20 November 2015, the parties jointly filed a special case with the registrar of the High Court.

A hearing for the determination of the special case was convened before a judge on 3 February 2017. The special case was not heard or determined. The respondents filed a chamber application for directions, which was heard on 22 February 2017.

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On 29 November 2017 the court issued a judgment in which it ordered as follows:

- “1. Case Number HC 2741/14 shall proceed to hearing as a stated case, subject to the directions given in paras 2 to 7 of this order.
2. The applicants be and are hereby granted leave to lead evidence at the hearing of the stated case to deal with facts relevant to the central issue of the existence or otherwise of valid title for the purposes of the action of *rei vindicatio*.
3. The applicants shall have the duty to begin.
4. The respondent shall if it so wishes be entitled to lead evidence in rebuttal.
5. The respondent shall if it elects to lead evidence in rebuttal, file a detailed statement of the evidence intended to be led, the witnesses to be called, and a bound and paginated bundle of documents if any, upon which reliance will be placed. This paragraph shall be complied with at least five clear court days prior to the set down date of the special case.
6. The parties shall address the court on the factual and legal issues involved as provided for by the rules and practice of this court relating to closing submissions at the close of an action.
7. No order as to costs.”

The appellant was aggrieved by the grant of the order aforementioned and, with the leave of the High Court, has noted an appeal on the following grounds:

- “1. The court *a quo* erred in not coming to the conclusion that the only application for directions made was one made orally and a fortiori invalidly made and stood to be dismissed on that basis.
2. The court *a quo* erred in coming to the conclusion that a stated case could have its character changed pursuant to the application for directions, however, made and so erred in failing to consider the true nature of the written application belatedly placed before it.
3. The court *a quo* erred further in coming to the conclusion that any cause existed for respondents to depart from the stated case and so erred in concluding that it had a discretion over the matter.
4. The court *a quo* erred in directing that the trial proceeds in terms of a course which is unavailable at law and is inconsistent with the nature of a stated case.
5. The court *a quo* erred at any rate in concluding that there was a dispute of fact and that the respondents had raised a defence worth interrogating in a trial cause.”

ISSUES FOR DETERMINATION

Although the appellant has set out five grounds, only three issues arise first, whether or not an oral application for directions was made and considered by the court; secondly, whether or not the court ought to have declined to hear the chamber application as not being properly before it; and last, whether the court *a quo* misdirected itself in granting the order for directions which was in direct contradiction of the stated case. I will proceed to consider each of the issues *ad seriatim*.

DID THE COURT A QUO HAVE BEFORE IT AN ORAL APPLICATION FOR DIRECTIONS?

Both in his written and oral submissions, Mr *Mpofu* argued that Mr *Uriri* had before the court *a quo* moved an oral application for directions on the challenges on the stated case as framed and the need to call evidence. He referred us to the record of proceedings on what transpired.

Mr *Uriri* does not argue that an oral application was not made. He suggested that there was no such application as the court *a quo* was disinclined to hear an oral application. In her judgment, written prior to the noting of this appeal, the learned judge remarked as follows:

“At the trial, Mr. Mpofu commenced making submissions on the merits of the matter when Mr. *Uriri* interjected arguing that there is no agreement over the matter proceeding as a stated case. He submitted that the plea and special case places the title in issue and that the court cannot turn a blind eye to the fact that one of the essential elements of the *rei vindicatio* is in issue. He urged the court to disregard the stated case and allow the parties to call witnesses to clarify the issue of ownership of the property in issue. Mr. *Mpofu* vigorously opposed the proposal to lead evidence arguing that the parties are bound by the stated case which constitutes pleadings. Mr. *Uriri* requested the court to give directions on how the matter should proceed. The court declined to entertain an oral application for directions and later acceded to another request by applicants’ counsel to file a formal written application seeking directions on the manner the matter was to proceed. The chamber application is opposed.”

I have carefully perused the record of proceedings. Mr *Uriri* did address the court on what he referred to as “an application for directions”. It was made orally but did not seem to have much by way of form. It sought the leading of evidence from witnesses on the issue of the title to the property. The court pointed to the rules and indicated that an application for directions must be made in writing. The court declined to make a ruling on what was purported to be an application.

Mr *Mpofu* was not asked to respond to the oral application. In our jurisdiction litigation is adversarial, meaning that each party must prove his or her case. The system requires that every person be heard in the protection of the party’s rights or interests. This is a common law right that has seen expression in our Constitution, both as it pertains to civil litigation and criminal trials.

The record does not show that the appellant was called upon to address the court on the so-called oral application. Instead of calling on the appellant's counsel to respond, the court referred to the rules and indicated that the rules required that an application for directions be made in writing. It enquired of the respondents' counsel if he was inclined to do so. The rest is history.

Undoubtedly the court was correct. The rules require that such application be in writing. The rules provide, in relevant part:

151. Application for directions after pleadings closed: notice to opposite party

- (1) In any action after pleadings are closed, or by leave of a judge, after appearance has been entered, either party may make a chamber application for directions in respect of any interlocutory matter on which a decision may be required.
- (2)

152. Matters to be stated in the notice

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- (1) The party applying for directions shall in his affidavit state the matters in respect of which he intends to ask for directions, and such matters shall, so far as is necessary and practicable, include generally the proceedings to be taken in the action and the costs of the application, and more particularly the following: pleadings, amendments of pleadings, particulars, special pleas and exceptions, admissions, removal of trial, the hearing of arguments on points of law, the hearing separately of one or more of the issues, discovery, inspection of documents, inspection of movable and immovable property, commissions, examination of witnesses, place, and date of trial.
- (2)

153. Opposite party may also apply for directions

- (1) The party to whom notice of an application is given shall also, as far as is practicable, apply at the hearing of the application for any directions which he may desire in respect of the matters specified in rule 152.
- (2) Such party, if he intends to apply for any directions, shall before the hearing give notice to the other party or parties to the action of the matters in respect of which he intends to ask for directions.
- (3)

154. Order on hearing of application

Upon the hearing of the application, the judge shall, as far as practicable, make such order as may be just as to any matters in respect of which directions were asked.

Given the nature of the contentious issues raised by both counsel before the court *a quo* as to their respective differences in the context of the stated case, the learned judge could not have adverted to the oral application and achieved a measure of justice. Although the fact of title being in the appellant's name was admitted, there was an issue as to the legality of that title, with an allegation of fraud attaching to such registration. The main issue for determination by the court was whether or not ownership of the immovable property was in dispute. This has to be considered against a statement on the agreed facts to the effect that the defendants' primary defence to the *rei vindicatio* was an allegation that the plaintiff's ownership of the property was tainted with fraud and irregularity, which the plaintiff disputed and believed to be irrelevant in the determination of the matter. In addition to the above, the respondents had not placed before the learned judge *a quo* a draft order spelling out the nature of the relief sought. I conclude that the learned judge's assertion that she declined to hear the oral application is borne out by the record.

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WHETHER THE COURT A QUO SHOULD HAVE DECLINED TO HEAR THE WRITTEN CHAMBER APPLICATION

I have found that the court declined to hear the oral application. Indeed, Mr *Mpofu* did not suggest that he made any submissions before the judge concerning the purported application. The judge did not make any ruling on the substance of the application to justify a finding by this court that there was an oral application before the court which it determined on the merits. The written chamber application was therefore properly before the court.

It is also pertinent to note that the appellant responded to the written application. In the opposing affidavit, a statement is made to the effect that the respondents had made an incompetent application for directions and that the said application was contrary to the rules. This was the view of the learned judge *a quo* and she rightly refused to hear the oral application. The first ground of appeal is without merit and is accordingly dismissed.

WHETHER THE COURT MISDIRECTED ITSELF IN GRANTING THE ORDER FOR DIRECTIONS.

A stated case, or special case, is provided for in the rules of court, High Court Rules 1971. Order 29 of the Rules is pertinent and provides:

ORDER 29

SPECIAL CASES

199. Special case by consent

- (1) The parties to a civil action or suit may, after summons has been issued, consent in a statement of the questions of law arising therein in the form of a special case for the opinion of the court.
- (2) Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the court to decide the questions raised thereby.
- (3) Upon the argument of such case, the court and the parties shall be at liberty to refer to the whole contents of such documents, and the court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial.

200. Special case by order before trial

If it appears to the court that there is in any cause or matter a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, the court may make an order accordingly and may direct such question of law to be raised for the opinion of the court, either by special case or in such other manner as the court may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

201. Special case to be typewritten, etc.

Every special case shall be typewritten or printed by the plaintiff and signed by the several parties or their counsel, and shall be filed by the plaintiff. If the

registrar so requests, one or more copies of the special case shall be filed for the use of the court.

202. Special case affecting person under disability

If a minor or person of unsound mind is a party to such proceedings, the court may, before determining the questions of law in dispute, require proof that the statements in such special case so far as concerns the minor or person of unsound mind, are true.

203. Judgment and directions regarding other issues

When giving its decision upon any question in terms of this Order, the court may give such judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceedings which may be necessary for the final disposal thereof.

204. Judgment without hearing evidence

If the question in dispute is one of law, and the parties are agreed upon the facts, the facts may be admitted and recorded at the trial and the court may give judgment without hearing any evidence.

The procedure provided for in the above rules is available to parties to a civil dispute. The parties must agree on the undisputed facts. The provisions are available when there is no dispute on the facts. It is meant for situations where only questions of law are in contention. The uniform rules of South Africa contain provisions that are substantially similar to our own. In *Bane v D'Ambrasio* 2010(2) SA 539 (SCA), the court had to consider what meaning was to be ascribed to the phrase 'stated case'. At 543E-G, the court remarked:

“Rules 33(1) and 33(2) make it clear that the resolution of a stated case proceeds upon the basis of a statement of agreed facts. It is, after all, seen as a means of disposing of a case without the necessity of leading evidence. The case drafted by the parties, with both of them reserving their positions with regard to the factual assumptions, was plainly contrary to the basic object of the rule and the procedure of asking the court to rule on issues thus defined was tantamount to asking the court to give advice on possibly abstract questions.”

It is trite that a statement in a special case must set forth the facts agreed upon, the question of law surrounding the dispute, and the issue for determination by the court. In this

jurisdiction, the *locus classicus* on the requisites of a stated case is *Kunonga v The Church of Central Africa* SC 25/17. GARWE JA set out the requisites to be the following:

“WHAT IS A STATED CASE

[14] The rules of court of most countries make provision for the reference of a matter as a stated case. But what is a stated case? It is a case that is brought upon the agreement of the parties who submit a statement of undisputed facts to the court but who take adversarial positions as to the legal ramifications of the facts, thereby requiring a judge to decide the question of law presented (*Legal dictionary. The free dictionary.com*). Put another way, it is a formal written statement of the facts in a case, which is submitted to the court by the parties, jointly, so that a decision may be rendered without trial. The facts being thus ascertained, it is left for the court to decide the question of law presented. A stated case is also called a special case, an amicable action, a case agreed, or a friendly suit (*US Legal, Inc.*)

[15] In the case of *Elizabeth Mambus v Motor Vehicle Accident Fund* Case No. SA 4/2013, a majority decision of the Supreme Court of Namibia, handed down on 11 February 2015, the court noted:

“... the intention is that the stated case will adjudicate the whole of the dispute as stated in the case that exists between the parties and that this is ideally done by setting out the facts agreed to, the questions of law in dispute, and the contentions of the parties. The parties may also require a court to decide an issue of law on the basis of alleged facts as if agreed.”

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[16] The court further cited with approval remarks made by the Irish Supreme Court in *Simon McGinley v The Deciding Officer – Criminal Assets Bureau* [2001] IESC 49 that:

“The case should set out clearly the judge’s findings of fact, and should also set out any inferences or conclusions of fact which he drew from those findings.

What is required in the case stated is a finding by the Judge of the facts and not a recital of the evidence. Except for the purpose of elucidating the findings of fact, it will rarely be necessary to set out any evidence in the case stated save in the one type of case where the question of law intended to be submitted is whether there was evidence before the Judge which would justify him deciding as he did. ... This court should not be required to go outside the case to some other document in order to discover them.

The same principle applies to the contention of the parties, the inferences to be drawn from the primary facts, and the Tribunal’s determination. All these must be found within the case, not in documents annexed ...”

[17] Once the facts are agreed, the court should proceed to determine the particular question of law that arises and not delve into the correctness or otherwise of the facts. It is bound to take those facts as correctly representing the agreed position and to thereafter determine any issues of law that may arise therefrom. It is not open to the parties to the stated case to seek to re-open the agreed factual position or to contradict such position. Nor can either party seek to ignore existing legal principles or findings of fact made in connection with the

same matter by another court. Of course, either party has a remedy at common law, to withdraw any concession made in a stated case owing to *justus error*, fraud, mistake, or any other valid ground.

- [18] It has become necessary to restate what a stated case is owing to the fact that in some instances, the appellant, in this case, has made submissions contrary to the stated case brought before the court. The appellant has also ignored in part the decision of this Court on which the stated case is predicated. It bears stating that if this happens, a party will be kept strictly to the terms of the agreed facts, as it is on the basis of those facts that the court would have been invited to make a determination on some specific question of law.”

The court *a quo* relied on Kunonga’s case in deciding whether or not to grant the application for directions. The learned judge reasoned as follows:

“What in essence this Court is being asked to determine is if it can resolve the dispute between the parties based on the stated case. Para1.1 of the stated case states that the respondent is the registered owner of the property. In para 1.4 of the special case, the parties recognize that the applicants’ primary defense to the *rei vindicatio* is that plaintiff’s ownership of the property is tainted with fraud and illegality. The parties recognize that the applicants have a defense to the claim having filed a challenge to the respondent’s title. An attempt to settle the matter failed after the withdrawal of a deed of settlement. The claim has since been reinstated. It is not surprising that the stated case has attracted so much controversy. The stated case states two mutually exclusive situations, one of which cannot be correct. The statement that the plaintiff is the registered owner of the property cannot be accepted on the face of it especially in the face of indications to the contrary in the stated case. The presumption of ownership can only be rebutted by evidence.

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Mention is made of a fraudulent power of attorney used to support the transfer. The stated case records that the respondent disputes the allegations of fraud. The stated case discloses a material dispute of fact over ownership of the property between the parties that cannot be resolved on the papers. The fact that the parties previously agreed that the matter should be dealt with as a special case in a case where there are glaring material disputes of fact that require to be ventilated at a trial has no effect of binding the court to such an arrangement. Resort to the special case procedure for the relief of a *rei vindicatio* in the face of the disputes existent on the papers is inappropriate. Where a special case discloses substantial disputes of fact, the court cannot simply rubberstamp it and accede to insistence on dealing with the case as a special case because the parties agreed on a statement of agreed facts. Whenever a material dispute of fact appears on the face of a stated case, which cannot be resolved on the papers filed, that dispute will require full ventilation. The applicants raise a defense of claim of right. An allegation of fraud cannot be proved in the absence of the documents allegedly used to commit the fraud. The best course to take is to allow the applicants to call evidence to substantiate their claim of fraud. I am not persuaded by the respondent’s argument that the defendants are bound by the stated case.

The stated case does not clearly or correctly articulate the issues to be dealt with. An issue arises regarding whether the respondent acquired valid title from the applicants. What the parties ought to have done is to request the court to determine who the owner of the property is, hence asking the court to determine the issue of ownership. Instead, the court was asked to determine, “*whether or not ownership of the immovable property is in dispute*”. What the court is being asked to do is just to make a declaration regarding the existence of a dispute over the property. If the court determines that ownership is in dispute then what? That determination does not dispose of the dispute between the parties. The court ought to have been asked to resolve the real dispute between the parties. The issue could have been worded along the following lines, “*whether the respondent acquired valid title from the applicants*”. That is the issue disclosed by the agreed facts. This way, the trial court is equipped to make a determination over the ownership of the property and dispose of the dispute.”

The special case in *casu* was set out as follows:

“WHEREAS the plaintiff issued summons and declaration against the two defendants under case number HC2741/14 seeking a *rei vindication* order against the said defendants, together with costs of suit;

AND WHEREAS the said defendants having been served with the summons, defended the proceedings and filed their Plea of record on 27 June 2014;

AND WHEREAS the plaintiff filed its replication to the said plea;

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AND WHEREAS the matter proceeded to a pre-trial conference before the Honourable Mrs Justice Matanda-Moyo;

AND WHEREAS at the pre-trial conference the parties agree to proceed by way of a special case;

NOW THEREFORE it is stated that:

1. THE AGREED FACTS

- 1.1 Plaintiff is the registered owner of the property in dispute, that is, Lot 1 of Stand 21A Oval Park Township measuring 5653 square metres, otherwise known as No. 69 Glenara Avenue, Highlands, Harare.
- 1.2 The defendants had filed a suit under HC5960/13 challenging, *inter alia*, the plaintiff’s title to the above-named property.
- 1.3 On 16th March 2015, a Deed of Settlement was executed under 5960/13 in terms of which defendants withdrew their claim against, among others, the plaintiff in respect of the abovenamed property. Find **attached** as annexure “A” a copy of the Deed of Settlement presented at the pre-trial conference.
- 1.4 Defendants’ primary defence to plaintiff’s *rei vindication* is the allegation that the plaintiff’s ownership of the property is tainted with fraud and illegality, which the plaintiff disputes and believes is of no relevance to its claim for *rei vindicatio*.

2. ISSUES FOR DETERMINATION

The parties set out the issues for determination in this matter as follows:

- 2.1 Whether or not the ownership of the immovable property in issue is in dispute.
- 2.2 Whether or not therefore the plaintiff is entitled to a *rei vindicatio* order.

3. HEADS OF ARGUMENT

The Parties Counsel agreed and undertook to file heads of argument in respect of their positions on the facts as set out above as follows:

- 3.1 The plaintiff's heads of argument shall be filed on or before 20 November 2015;
- 3.2 The defendants' heads of argument shall be filed on or before 25 November 2015."

A stated case must set out the facts as agreed by the parties. The facts must not be in contention nor should a material dispute of fact be manifest on the statement constituting the agreed facts. In this case, the registration of title in the appellant's name is admitted. The *causa* for the registration of title and how it came to be is challenged by the respondents *ex facie* the "agreed facts". They allege fraud on the part of the appellant and suggest that they wish to defend the action on the premise that the registration of title was illegal. The definition of a special case was spelt out in the *South African case of National Union of Mineworkers v Hartebeestfontein* 1986(3) SA 53, (AD), at 56-7, as follows:

".....In none of them is "special case" defined, presumably because the expression has an accepted meaning. Mozley and Whitely's Law Dictionary, 7th ed says *sv* "special case" that it is:

"1. A statement of facts agreed to on behalf of two or more litigant parties, and submitted for the opinion of a court of justice as to the law bearing upon the facts so stated."

Stroud's Judicial Dictionary 4th ed states that:

"A special case is a written statement of the facts in a litigation, agreed to by the parties, so that the court may decide these questions according to law.....It is also known as a case stated."

...

It is, therefore, implicit in the expression "in the form of a special case" that there should be a statement of the facts agreed by the parties."

The appellant has suggested that the procedure "created by the court a quo is unknown at law and cannot produce valid proceedings". It has sought reliance for that

contention on *Matanhire v B P Shell Marketing* 2005 (1) ZLR 140 (S), at 147F-G. I am unable to agree and I conclude that the reliance on the *Matanhire* judgment in this context is misplaced. The ratio in *Matatanhire*'s case is to the effect that an application for directions can only be made by a court in respect of a matter that was pending before the court. In this case there was a claim for a *rei vindicatio* pending before the court and the court could entertain an application for directions. The rules permit the giving of directions and it is trite that the High Court can do anything except that which the law expressly forbids it to do. In this case, the rules permit the court to give directions and that is precisely what the court did.

In this case, however, there is no statement of agreed facts. The parties have set out their respective positions with the respondents postulating a defence to the claim for *rei vindicatio*. The respondents challenged the validity of the appellant's title on allegations of fraud in the registration thereof.

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What the parties filed did not comply with the requirements of a special case, and given what the parties themselves set out on the "stated case", I cannot conclude that the learned judge in the court *a quo* misdirected herself in finding, as she did, that there were material disputes of fact requiring the adduction of evidence. Evident from the "stated case" as formulated by the parties was a clear dispute on the facts. The order gives the respondents leave to deal with facts relevant to the central issue of the existence or otherwise of valid title for seeking relief under *rei vindicatio*. The *onus* to begin is placed on the respondents and the appellant is afforded a right to rebut any evidence led by the respondents.

No one can be in doubt that these are the issues for determination, even under the stated case itself. The issues as recorded by the parties are: whether or not the ownership of

the immovable property in issue is in dispute, and whether or not the plaintiff was entitled to an order for a *rei vindicatio*.

It was the parties who were responsible for drafting the case and issues for determination. It was not the court. It seems to me that the manner of pleading adopted by the parties has resulted in the adoption of a procedure that the pleadings did not support. If the title to the property was not in issue, it should therefore not have been placed before the court for adjudication. The fact that it was so placed and that upon a consideration of the pleading themselves the court was of the view that it could not resolve the matter on the papers as a material dispute of fact was evident on title cannot be blamed on the court. The respondents, on the papers, raised a defence to the claim. The court was duty-bound to consider the defence. It could not do so based on a supposed stated case. The issue of how the appellant acquired its title was pertinent to the disposition of the dispute. The court could not and is not expected to turn a blind eye to allegations of fraud or illegality. It realized that there were real issues the determination of which required that the parties adduce oral evidence. There was a clear contradiction in terms of what the appellant's case was and what the respondents' case was. The court exercised its discretion, and there is no allegation that such exercise was injudicious or capricious.

The matter was therefore not properly before the court and ought not to have been referred for determination as a stated case.

The appellant suggests that the court *a quo* erred in holding that the stated case could be maintained but that the parties could give evidence on the question of the registration of title. I think this contention has merit. Once the court *a quo* concluded that

there were material disputes of fact on the “stated case” the complexion of the matter was altered. The claim for a *rei vindicatio* was premised on the appellant’s title which was being challenged by the respondents. The challenge to the appellant’s title as a consequence raised the appellant’s right to claim eviction as an issue. This was the only issue for determination between the parties. As a result, there was no stated case for adjudication.

Even if the court was inclined to entertain the application for directions, once it concluded that there were material disputes of fact it ought to have given directions in which it ordered the matter back to a pre-trial conference for the settling of issues for trial purposes. This, in my view, would allow the parties to properly consider their respective positions vis-à-vis the dispute to ensure that all issues pertinent to the determination of the matter are placed before the court.

Counsel for the respondent submits that the rules give the court the discretion on how to direct the case to be heard. I accept as correct the contention by the respondents on this point. Rule 154 provides that upon hearing the application, the judge shall, “as far as practicable make such order as may be just to any matters in respect of which directions were asked.” In my view, the rules give the judge the discretion to make such order as may result in the matter being dealt with to achieve justice between the parties. I did not understand the appellant to suggest that the court lacks the discretion to make an order for directions on the hearing of the matter. What the appellant suggested was that the order for directions was not one that the court is legally permitted to give.

However, in the instant case, there was no stated case to determine and to the extent that the court *a quo* continued to deal with the matter as if it was a stated or special case, there was a gross misdirection on the part of the court. This is a misdirection that

impacts upon the substance of the order issued by the court a quo. It was the wrong order in view of the fact that there was no stated case. It was thus a procedural irregularity warranting interference by this court. In my view, this is a proper case for this court to invoke its powers of review as provided in the Supreme Court Act, [Chapter 7: 13], which provides as follows in relevant part:

25 Review powers

- (1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.
- (2) The power, jurisdiction and authority conferred by subs (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.
- (3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court for determination.

Notwithstanding the fact that the appellant has not attacked the court *a quo* in deciding to entertain the parties herein in what was purportedly a stated case which ex-facie the pleadings raised material disputes of fact, the judgment of the court a quo cannot stand. It must be set aside on the basis that it was irregular.

In my view, the court did misdirect itself in ordering that the matter should proceed as a stated case. Once it found that there were material disputes of fact on the so-called stated case, it should have referred the matter to trial. This means that the appellant has partially succeeded in relation to ground 4. The costs should be apportioned between the parties.

However, because of the irregularity that ensued when the court dealt with the matter as a stated case in the light of the material disputes of fact ex-facie the alleged stated case, the order of the court cannot stand and must be set aside.

In the result it is ordered as follows:

1. The appeal is allowed in relation to the fourth ground only.
2. In the exercise of review powers vested in the court in terms of s 25 of the Supreme Court Act [*Chapter 7:13*], the order of the court is set aside in its entirety.
3. Each party is ordered to pay his or her own costs.
4. The matter is remitted to the court *a quo* for the setting up of a pre-trial conference before a judge in chambers.

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PATEL JA : I agree

BERE JA : (no longer in office)

Atherstone & Cook, appellant's legal practitioners

Thomson Stevenson & Associates, respondents' legal practitioners