

DISTRIBUTABLE (64)

SIBONILE DUBE

v

**(1) PAUL MUREHWA (2) MINISTER OF LOCAL GOVERNMENT,
PUBLIC WORKS AND NATIONAL HOUSING N.O**

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA JA & KUDYA AJA
HARARE: 06 JULY 2020 & 28 MAY 2021**

F. Chinwawadzimba, for the appellant

E. Dondo, for the first respondent

No appearance for the second respondent

Judgment No. SC 68/21
Civil Appeal No. SC 448/19

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MAVANGIRA JA:

1. This is an appeal against the entire judgment of the High Court sitting at Harare, in which the court granted a *declaratur* in favour of the first respondent asserting that he was the lawful holder of rights and interests in the property known as stand 6401 Retreat Waterfalls. The court also ordered that the appellant and all those in occupation through her should vacate the property.

FACTUAL BACKGROUND

2. The first respondent made an application before the court *a quo* seeking to be declared the *bona fide* holder of rights and interests in the property known as stand number 6401 Retreat, Waterfalls (hereafter referred to as “the property”). The first respondent

also sought to have all those in occupation of the property declared unlawful occupiers and to vacate the property. The appellant opposed the application.

3. The first respondent submitted that he had joined the Joseph Chinotimba Housing Co-operative Society sometime in 2009 and had, as a member, been allocated the property. He had proceeded to dig a well on the property and to buy the necessary building materials. According to the first respondent, the appellant invaded the property sometime in 2014 claiming that it was her own and proceeded to construct a temporary structure using some of the material that he kept and stored on the property.
4. With regard to the appellant's claim that the property was hers, as it had been allocated to her by her own co-operative known as Samora Machel Housing Co-operative, the first respondent submitted that her co-operative had no authority to do the alleged allocation. He submitted that this was so because the second respondent (the managing authority), had written to the appellant's cooperative reiterating its consistent position that stands numbers 6392 to 6414 (under which the property falls) had been allocated to the Joseph Chinotimba Housing Co-operative.
5. The first respondent further submitted that consistent with its position, the second respondent had entered into a lease agreement with him over the said property thereby giving him rights, interests and title to the property. The first respondent averred that neither the appellant nor her cooperative had any recognisable interests and rights whatsoever over the said property. He argued that the purported allocation of the property to the appellant had no legal basis as the second respondent had confirmed that he was the only recognised holder of rights in the property.

6. The appellant, on the other hand, averred that she was allocated the same property by her co-operative, namely the Samora Machel Co-operative as a vacant stand and she had proceeded to make lawful developments thereon. She argued that there was no basis for the first respondent's application since there had already been a full trial pertaining to the same matter in the magistrates' court wherein the first respondent had failed to prove his ownership of the property. The appellant also submitted that there were material disputes of facts which could not be resolved on the papers and that the first respondent had therefore used the wrong procedure in filing the application.

7. It was the appellant's case that the allocation of the property to her found favour with the Apex Board which was the authority responsible for allocating land to its members, including co-operatives. According to her the second respondent had allocated the property to the Apex Board which in turn allocated the property to her. She averred that the property had therefore been lawfully allocated to her and the first respondent was accordingly in unlawful occupation of the same.

8. The appellant therefore argued that as the allocation to her was done by her co-operative with the blessings of the Apex Board, the allocation was above board and remained valid. She averred that the first respondent's lease agreement was not conclusive proof of ownership and his allocation was based on an illegality. She therefore sought to have the first respondent's application dismissed with costs.

9. The second respondent's then Acting Permanent Secretary deposed to an affidavit confirming that the property had been allocated to the first respondent under the Joseph Chinotimba Housing Co-operative. He confirmed that the first respondent had

been issued with a lease agreement over the said property. The second respondent further confirmed that the appellant did not have a lease agreement with the ministry and as such she was an invader on the property. His stance was therefore that the order that was sought by the first respondent ought to be granted.

THE DECISION OF THE COURT A QUO

10. The court *a quo* noted that the cause of action in the magistrates' court had been for eviction whilst the application before it was for a *declaratur*. The court found that the second respondent had made it clear that the property in issue had been allocated to the Joseph Chinotimba Housing Co-operative and had also confirmed that the first respondent had a valid lease agreement for the stand. The court found that the first respondent had managed to establish that he had rights over the said property emanating from the lease agreement as well as correspondence and a sworn statement from the second respondent and the relevant Ministry's official.

11. The court *a quo* also noted that the appellant sought to rely on an allocation form from her co-operative, which form did not have the Ministry's letter-head or logo but only bore a stamp. The court further took into consideration the fact that the said allocation form was a 2012 document, whereas on record, there were documents from 2014, 2016, 2017 and 2018 indicating the Ministry's position pertaining to the first respondent's co-operative and lending support to the first respondent's claim.

12. In the result, the court *a quo* declared the first respondent to be the lawful holder of rights and interests in the property. It further ordered the appellant to vacate the property and give vacant possession to the first respondent. Aggrieved by the

decision of the court *a quo*, the appellant noted the present appeal on the following grounds;

GROUND OF APPEAL

- “1. The court *a quo* grossly erred and misdirected itself in making a finding that there were no material disputes of fact when it was apparent from the papers filed of record that there were issues which could not be resolved without hearing oral evidence.
 2. The court *a quo* erred and grossly misdirected itself in granting the *declaratur* in circumstances where the first respondent had failed to prove that he had rights and disregarded overwhelming evidence which proved that the appellant had rights in the property.
 3. The court *a quo* grossly erred and misdirected itself on relying (*sic*) on evidence whose authenticity and origins had been challenged given that same had not been availed at an earlier stage and whose authenticity was only going to be tested through *viva voce* evidence.
 4. The court *a quo* grossly erred and misdirected itself at law in completely disregarding the decision of the Magistrates Court on the similar facts of the dispute under Case Number 101166/18 and thereby effectively overruling the factual findings of the extant judgment which is already a subject of an appeal to the High Court under Case Number CIV 25/19.
 5. The court *a quo* grossly erred and seriously misdirected itself in failing to apply the principles of estoppel in view of the evidence placed before the court and given that the application was based on the similar set of facts and documents used in an initial litigation between the appellant and first respondent.
 6. The court *a quo* seriously erred and misdirected itself in dismissing appellant’s preliminary point to the effect that the matter and dispute between the parties was pending in the High Court under case number CIV 25/19 and further erred in granting eviction that is a subject matter of the pending appeal.”
13. In her prayer the appellant prays for the appeal to be allowed with costs and for the order of the court *a quo* to be set aside so as to dismiss the application for a *declaratur* with costs on an attorney-client scale.

SUBMISSIONS BEFORE THIS COURT

14. At the hearing of this appeal, Mr *Dondo*, for the first respondent, raised a preliminary objection to the appellant's grounds of appeal one, two, three and five. He submitted that they were defective on the basis that they were not clear and concise. He therefore moved the court to strike them out. Ms *Chinwawadzimba*, for the appellant, conceded that some of the grounds were defective and abandoned grounds two, three, five and six. She therefore motivated the appeal only in terms of grounds of appeal one and four.

15. On the merits, Ms *Chinwawadzimba* argued that, in the court *a quo*, the first respondent sought to overturn the decision of the magistrates' court but had disguised the proceedings as stet a declaratory order. She averred that the first respondent applied for a *declaratur* based on the same facts and evidence as had been placed before the magistrates' court, which court found that the first respondent had not proved that he had title to the property and thus had no basis to evict the appellant. She further averred that the court *a quo* erred in failing to take into account the fact that there was a pending appeal in the High Court dealing with the rights of the parties, thereby running the risk of having two conflicting judgments from the same court.

16. Ms *Chinwawadzimba* submitted that, by hearing the matter, the court *a quo* in essence reviewed factual findings made by the magistrates' court which findings were the subject of an appeal before the same court. She argued that the court *a quo* ought to have stopped the first respondent from litigating this matter in view of the pending appeal. Thus, the court *a quo* erred in granting consequential relief which was the subject of an appeal.

17. Counsel for the appellant also argued that the first respondent failed to provide sufficient evidence to prove that he had rights in the property. She averred that the first respondent relied on a lease agreement whose validity was challenged and was rejected by the magistrates' court. She argued that due process was not followed in the issuing of the first respondent's lease agreement as it did not go through the Apex Board. Counsel therefore submitted that there were material disputes of fact in relation to the allocation of the stand which could not be resolved *a quo* without leading oral evidence and thus prayed for the appeal to be allowed.

18. Mr *Dondo*, for the first respondent, submitted that there were no material disputes of fact in this matter as most of the relevant facts were clear. He submitted that the first respondent has a valid lease agreement which has not been cancelled or revoked and thus remains extant. He further averred that it was an established fact that the second respondent does not recognize the appellant as the legitimate holder of rights over the property. He argued that the appellant's housing co-operative did not challenge or dispute that the first respondent's co-operative had been duly issued with the necessary authority over the property. The appellant, therefore, had no basis to challenge what her own co-operative had accepted. It was Mr *Dondo*'s argument that there were no material disputes of fact at all in the circumstances.

19. Counsel for the first respondent further argued that the present matter had not been argued in the magistrate's court as claimed by the appellant. He averred that the parties in the magistrates' court matter were materially different from the parties in the present matter and that the causes of action and relief sought in the respective matters were different. In the light of these differences Mr *Dondo* submitted that the court *a quo*'s finding that the matter before it and the one that was before the

magistrate's court were different, cannot be faulted. He therefore sought the dismissal of the appeal with costs on the legal practitioner and client scale.

APPLICATION OF THE LAW TO THE FACTS

Whether or not the court *a quo* erred by finding that there were no material disputes of fact which warranted the matter to be referred to trial.

20. The appellant contends that the court *a quo* erred in making a finding that there were no material disputes of fact in this matter. She avers that the issues pertaining to the validity of the lease agreement, the competing legitimate rights over the property and the allocation of the property were disputed and as such they could not be resolved through the evidence placed on record without hearing *viva voce* evidence. SC 68/21
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21. With regard to this issue the first enquiry is to ascertain whether or not there is a real dispute of fact which could not be resolved without hearing evidence. In *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132(H) at 136 F-G, Makarau JP (as she then was) expressed the following sentiments:

“It is my view that it is not the number of times a denial is made or the vehemence with which a denial is made that will create a conflict of fact such as was referred to by MCNALLY J (as he then was) in *Masukusa v National Foods Ltd and Another* 1983 (1) ZLR 232 (H) and in all the other cases that have followed. A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

22. In the case of *Eddies Pfugari (Pvt) Ltd v Knowe Residents Association & Anor* SC 37/09, in assessing whether the court *a quo* erred in resolving the disputes raised on the papers without hearing evidence, this Court stated the following:

“The position is now well established that: in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned.”

23. In *Muzanenhamo v Officer in Charge CID Law and Order & Ors* CCZ 3/13, PATEL JA (as he then was) stated as follows:

“As a general rule in motion proceedings, the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party.”

24. In *casu*, I am in no doubt that the court *a quo* was correct in resolving the matter on the papers. The position is now well established, as reflected by the case authorities that not every dispute of fact in motion proceedings must be sent for trial. A material dispute of fact, it has been stated, “arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

25. The court *a quo* found that there were no material disputes of fact in this matter because the facts that the appellant sought to rely on were based on the findings of the magistrates’ court where the cause of action before the court had been for eviction whilst the application before it was for a *declaratur*. The learned Judge in the court *a quo* noted that:

“The first respondent sought very much to rely on what had transpired in the Magistrates’ Court where a claim for eviction had been raised by the applicant. The first respondent seeks to say that the allocation of stands should have been

done through the Apex Board hence the lease was not properly issued. What is before me is a valid lease, it has not been indicated that the lease itself is not valid. The complaints raised by the first respondent emanate from agreements between the Apex Board and the other entity where the parties had agreed on the modus operandi pertaining to the allocation of those particular stands.”

26. I am also of the view that sufficient facts were established by way of affidavits and relevant documentary evidence to establish, on a balance of probabilities, that the first respondent was the legitimate holder of real rights in the property. A valid lease agreement was furnished. The lease agreement had not been cancelled and it remains operative. Furthermore, the first respondent also produced affidavits from the second respondent, who is the authority responsible for the management of state land. The said documents verified and confirmed that the first respondent was the legitimate and recognised holder of rights to the property. His entitlement to the property was thereby established.

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27. The appellant’s contentions that there were material disputes of fact, based as they were on bare denials that were not supported by any documents, were thus of no avail to her case. The law is clear that bald and unsubstantiated allegations do not establish a litigant’s purported or announced position. ¹The court *a quo*’s decision cannot therefore be faulted because the evidence placed before it established on a balance of probabilities that the first respondent had rights emanating from the lease agreement with the second respondent whilst the appellant only made bare allegations which were not sufficient to prove the existence of any material disputes of facts. In the circumstances, the appellant’s first ground of appeal lacks merit and is hereby dismissed.

Whether or not the court *a quo* erred in granting the declaratur.

¹ *Akhtar v Min of Public Commission* SC 173/97.

28. It is the appellant's case that the matter before the magistrates' court was based on the same evidence placed before the court *a quo*. She avers that the court *a quo* erred in granting the *declaratur* in a situation where that matter was subject to an appeal in the same court. She avers that there is therefore a possibility of having two conflicting decisions in the same matter emanating from the same court.

The appellant further averred that the lease relied on by the first respondent was not valid and for that reason the court misdirected itself when it declared the first respondent as the lawful holder of rights over the property when in fact it was the appellant who had an agreement with the Apex Board which was the allocating authority of the said property.

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29. The court *a quo* found that the first respondent's case was more probable than the appellant's. It is settled in our jurisdiction that the standard of proof in civil matters is "a balance of probabilities." In *ZESA v Dera* 1998(1) ZLR 500 the court held that in a civil case the standard of proof is never anything other than proof on the balance of probabilities. It stated that the reason for the difference in onus between civil and criminal cases is that in the former the dispute is between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims. McNALLY JA stated at 504B:

"So in a criminal case one is primarily concerned with doing justice to the accused. In a civil case one is concerned to do justice to each party. Each party has a right to justice, and so the test for that justice has to balance their competing claims. Hence the 'balance of probability' test."

30. In *Bruce N. O. v Josiah Parkers and Sons Ltd* 1972 (1) SA 68 (R) at 70 C-E). Proof on a balance of probabilities was interpreted in the following manner:

“It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal it is not.”

See also *Milner v Minister of Pensions* 1947 2 All ER 372 @ 374, and *Thulisani Dube Nyamambi v Bongani Ncube* HB82 15.

31. *In casu*, the first respondent produced as Annexure C a valid lease agreement between him and the second respondent. It was signed by the first respondent on 16 June 2016 and by the second respondent’s representative on 27 September 2016. It is significant that the second respondent, through its then Acting Permanent Secretary, filed an affidavit. He indicated therein that according to the second respondent’s records, in 2008 the Ministry, through the office of the resident Minister, allocated blocks of stands to about 28 housing co-operatives at Retreat Farm. Stand 6401 is within the range of the block of stands 6392-6414 which was allocated to the Joseph Chinotimba Co-operative Society. The said block of stands was never allocated to the Samora Machel Housing Co-operative.

32. He further stated that there was an agreement between the second respondent and the Housing Co-operatives that each respective co-operative would recommend to the second respondent beneficiaries who were paid up in terms of land servicing fees so that lease agreements could be issued to them. The Joseph Chinotimba Housing Co-operative being the co-operative to which the above mentioned block of stands was legitimately issued, recommended on 15 August 2013, that a lease be issued to

the first respondent. The Samora Machel Housing Co-operative never had the right to, neither did it recommend a beneficiary to the property, as the stand had never been allocated to it.

33. The Acting Permanent Secretary further categorically stated that the appellant does not have a lease agreement with the second respondent and is in fact an invader on the property.

34. The said allocation of the property on 15 August 2013 is backed by Annexure A1, a document of even date on the letterhead of the Joseph Chinotimba Housing Co-operative Society. Payments made by the first respondent are reflected on Annexure A2, a membership card on which are reflected monthly payments for the period spanning between January 2009 and December 2014. Judgment No. SC 68/21
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35. In addition and in further support of the first respondent's case, is a letter from the second respondent dated 27 May 2014 and addressed to the chairman of the Samora Machel Housing Co-operative advising of complaints that had been received from the Joseph Chinotimba Housing Co-operative Society in connection with stands 6392 - 6414 Retreat Township. The letter states *inter alia*:

“Please be advised that according to our records submitted by the Harare South Housing Union, stands 6392 – 6414 Retreat Township belong to Joseph Chinotimba Housing Co-operative and as such your co-operative should leave those stands for occupation by the rightful owners from Joseph Chinotimba Housing Co-operative.”

36. In another letter dated 19 December 2017 from the second respondent addressed to “To Whom It May Concern” the second respondent categorically stated the following:

“This letter serves to confirm that PAUL MUREHWA 27-127113-l-27 has a valid lease agreement for stand 6401 Retreat Township with the Ministry of Local Government, Public Works and National Housing. The lease agreement number is A/3823/16. Please note that he is the only recognized legal owner of the residential stand in question.”

37. Yet another letter from the second respondent dated 21 June 2018 and addressed to the chairman of the Joseph Chinotimba Housing Co-operative pertinently states as follows:

**“RE: REQUEST FOR OFFICIAL POSITION OF LEASE AGREEMENT:
JOSEPH CHINOTIMBA HOUSING CO-OPERATIVE SOCIETY:
RETREAT TOWNSHIP**

...

Please be advised that according to the land management policy for Stateland, when a co-operative is offered a piece of land, the co-operative in turn recommends its members to the Stateland office for lease processing on individual stands once the member has fulfilled the co-operative’s requirements. The Lease document is thus a legal document which is entered into between Government and the co-operative beneficiary who should enjoy vacant possession of the stand upon being allocated. The Lease Agreement No. SC 68/21 which will eventually be used to process the title deed for the stand is in favour of the lessee. In addition, the Lease Agreement is also required when building plans are being submitted for approval to the relevant Local Authority.

For all the lessees who have paid the full purchase price, the Government is now awaiting completion of construction of buildings so that we can process title in favour of the beneficiaries. Please note that no other person is allowed on the stand except the one who has a Lease Agreement with the Ministry. (the underlining is added)

38. On the other hand, the appellant sought to rely on an allocation form issued by her co-operative but this was not sufficient evidence to prove her entitlement to the property and particularly so in the face of all the evidence furnished by the first respondent in support of his case. The documents that the appellant sought to rely on did not bear the second respondent’s logo and these documents could not further the appellant’s case.

39. The court *a quo* rightly noted that the appellant sought to rely on what had happened in the magistrates' court, where the proceedings had been for eviction, yet the application before it was for a *declaratur*. On the evidence that was placed before it, with particular reference to the valid lease agreement between the first and second respondents, the court could not have arrived at any other conclusion other than that the first respondent had real rights to the property in question.

40. The court *a quo* further noted that the second respondent had made it clear that the property in question had been allocated to the Joseph Chinotimba Housing

Co-operative, which was the co-operative that the first respondent belonged to. In fact, the second respondent, through the Resident Minister had allocated the block of stands 6392 to 6414 to the Joseph Chinotimba Housing Co-operative. The stand that

was allocated to the first respondent fell within the said block. The property in question, being the stand that was allocated to the first respondent by his co-operative,

had not been allocated to the Samora Machel Housing Co-operative to which the appellant belonged. Furthermore, the Apex Board which the appellant sought to rely on as the allocating authority did not have the power to supersede the authority of the second respondent, which was the ultimate authority over the land.

41. It is settled that this Court will not easily interfere with factual findings made by a lower court unless there has been such a gross misdirection by that court on the facts so as to amount to a misdirection in law, in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the conclusion reached by the lower

court.²

²*Chioza v Siziba* SC 16/11

42. In assessing whether the court *a quo* misdirected itself in finding that the first respondent had rights to the property, regard may be had to the case of *Reserve Bank of Zimbabwe v Granger & Anor* SC 34/01, wherein this Court stated the following:

“An appeal to this Court is based on the record. If it is to be related to the facts there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who applied his mind to the facts would have arrived at such a decision. And a misdirection of facts is either a failure to appreciate a fact at all or a finding of fact that is contrary to the evidence actually presented.”

In *Barros & Anor v Chimphonda* 1999 (1) ZLR 58(S) at 62G-63A the court stated the following:

“These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution provided always it has the materials for so doing. In short, this Court is not imbued with the same broad discretion as was enjoyed by the trial court.”

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DISPOSITION

43. *In casu*, the question therefore relates to whether or not the court misdirected itself in granting a *declaratur* in favour of the first respondent. In the circumstances of this case, the decision of the court *a quo* to declare, on a balance of probabilities, that the first respondent was the legitimate holder of rights in the property, cannot be impugned. This Court has therefore found no basis on which to interfere with the decision of the court *a quo*.

This appeal is without merit. On the question of costs I see no reason for departing from the rule that costs follow the cause.

It is accordingly dismissed with costs.

GUVAVA JA: I agree

KUDYA AJA: I agree

Bere Brothers, appellant's legal practitioners

Messrs Saunyama, Dondo, 1st respondent's legal practitioners

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