

REPORTABLE: (75)

(1) ZIMBABWE HOMELESS PEOPLES FEDERATION (2)
TAWONGA SAVING SCHEME (3) NGWARU MASANZA
v
(1) MINISTER OF LOCAL GOVERNMENT AND NATIONAL
HOUSING (2) ZVIMBA RURAL DISTRICT COUNCIL (3)
LEENGATE PRIVATE LIMITED (4) MINISTER OF
LANDS, LAND REFORM AND RESETTLEMENT

**SUPREME COURT OF ZIMBABWE
GARWE JA, MAVANGIRA JA & MATHONSI JA
HARARE: 14 SEPTEMBER 2019 & 24 JUNE 2021**

N. Munetsi, for the appellant

V. Munyoro, for the first and fourth respondents

L. Uriri, for the third respondent

**Judgment No. SC 78/21
Civil Appeal No. SC 118/19**

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GARWE JA

[1] After hearing argument from the parties, the High Court of Zimbabwe made an order dismissing the application filed by the appellants in terms of s 85 (1) of the Constitution of Zimbabwe. The court also ordered the appellants to pay the costs of the application. This followed a finding by the court that the appellants could not properly seek to enforce their right to shelter in terms of s 85 of the Constitution of Zimbabwe as such a right was not a fundamental right enshrined in Chapter 4 of the Constitution which contains the declaration of rights. The court further found that the right to shelter was one of the national objectives under Chapter 2 of the Constitution and therefore not justiciable. This appeal is against that determination.

FACTUAL BACKGROUND

[2] The first appellant, the Zimbabwe Homeless Peoples Federation, is a *universitas* at law with an active membership said to be ten thousand homeless people who contribute and pool their resources together for the purpose of achieving and attaining the goal for housing for poor homeless people. The second appellant, Tawonga Savings Scheme, is a saving scheme established in terms of its constitution with the power to sue and be sued. The third appellant is a resident of Newpark informal settlement situated at Haydon Farm along the Old Mazoe Road.

[3] Although counsel for appellants attempted, unsuccessfully, to urge the court *a quo* and this Court to accept that the application brought by the first and second appellants in the court was not in terms of s 85 (1) of the Constitution of Zimbabwe, it is clear, when all is said and done, that all three appellants approached the court *a quo* in terms of s 85 (1) of the Constitution. This is an aspect I will revert to in the course of this judgment as it has an important bearing on whether or not the appellants were properly non-suited by the court *a quo* on the basis that they could not seek relief in terms of s 85 of the Constitution.

[4] The first respondent is the Minister of Local Government and National Housing whose Ministry is responsible for national housing and the administration of local authorities in Zimbabwe. He is hereinafter referred to as “the Minister” of Local Government. The second respondent is Zvimba Rural District Council, a local authority that operates under the aegis of the first respondent. It will be referred to in this judgment simply as “the Council”. It is the local authority for Haydon Farm which is at the centre of the dispute between the parties herein. The third respondent is Leengate (Pvt) Ltd (“Leengate”), a private company involved in housing development. It was this company which was given the right to develop a

portion of the farm in question. The fourth respondent is the Minister of Lands, Land Reform and Rural Resettlement, the acquiring authority of the farm. He is hereinafter referred to as “the Minister of Lands”. It was the Minister of Lands who handed over the farm to the Minister of Local Government for housing development who, in turn, allocated it to the Council and Leengate.

[5] Members of the Tawonga Savings Scheme, including the third appellant herein, took occupation of Haydon Farm sometime in 2000, during the height of the land reform programme. They proceeded to construct fixtures, some permanent, but these were demolished in 2005 during a government operation that came to be referred to as Operation Murambatsvina. It was shortly thereafter that the land in question was acquired by the State pursuant to Constitutional Amendment No 17 after which it became State land. The informal settlement at the farm was not regularised. In due course the third respondent, Leengate, was offered a hundred hectares of the land for residential development. It is common cause that some of the appellants occupy part of the land that was offered to Leengate for development.

[6] It is not in dispute that Leengate proceeded to have the land surveyed after which roads and storm drains were constructed thereon. Leengate proceeded to develop a hundred and fifty stands which it then sold to the public. About forty per cent of this land is still occupied by the second appellant’s members.

PROCEEDINGS BEFORE THE HIGH COURT

[7] In their founding papers before the High Court, the appellants averred that Council and Leengate then began to threaten them and proceeded to evict some of them from the farm. They gave notice to the remaining occupants to vacate the farm by a given date. The

appellants contended that the evictions were a breach of their rights enshrined under ss 28, 44, 48, 51, 56 (1) and 77 of the Constitution. They argued that, whilst there was no specific right to shelter or housing in the Declaration of Rights, other than for children, the right to dignity (S 48) necessarily incorporates the right to shelter as the latter right would be meaningless without the concomitant right to food and shelter. The appellants therefore sought an order interdicting the Council and Leengate from evicting them. They also sought orders compelling the Minister of Local Government and the Council to allocate serviced stands to them as well as construct basic houses for them. Alternatively they sought an order compelling the Minister of Local Government and the Minister of Lands to provide them with alternative land and serviced stands thereon. An application to further amend the prayer was abandoned at the hearing of this matter.

[8] All the respondents, including the City of Harare against which the application was subsequently withdrawn, opposed the application to interdict what the appellants termed forced evictions. The Minister of Local Government and the Minister of Lands took the common position that the land in question was State land and that the appellants had no lawful authority to occupy, use or hold it. They contended that the right to shelter was not part of the Bill of Rights and therefore the appellants could not seek relief against them in terms of s 85 of the Constitution. Leengate on the other hand averred that the appellants' occupation of the farm was illegal and that, as a corollary, they had no right of audience before the court. Leengate also submitted that there had been no illegal evictions undertaken by itself or at its instance. Instead what it had done was follow due process and to institute eviction proceedings against the appellants in the Magistrates' Court. Leengate further submitted that as the right to shelter was not entrenched in the Constitution, the appellants therefore had no cause of action against it pursuant to s 85 of the Constitution.

[9] In its determination, the court *a quo* found that all the applicants had approached the court in terms of s 85(1)(d), 85(1)(e) and 85(1)(a) respectively. The court held that s 85(1) was available to litigants who sought to enforce rights enshrined under the Declaration of Rights in Chapter 4. It found that since the right to shelter was not part of the Declaration of Rights, the appellants could not have properly approached the court in terms of s 85(1) alleging a breach of a fundamental right. The court found it unnecessary to determine the merits of the matter and, consequently, dismissed the application with costs.

PROCEEDINGS BEFORE THIS COURT

[10] Aggrieved by the above determination, the appellants noted an appeal to this Court. They alleged that the court *a quo* had erred in three respects:

- Firstly, in failing to recognise the right of shelter on the basis that it is not included in Chapter 4 of the Constitution whereas s 47 of the Constitution, which is part of the Bill of Rights, provides that Chapter 4 does not preclude the existence of other rights and freedoms that may be recognised or conferred by law, to the extent that they are consistent with the Constitution.
- Secondly, in finding that the appellants could not approach the court in terms of s 85 of the Constitution when there was in existence s 47 of the same Constitution which recognised the existence of other rights and freedoms conferred by the law.
- In not making a determination on the merits through the selective application of Chapter 4, when the very same Chapter contains the non-exclusionary clause under s 47 of the same Constitution.

[11] Both in his heads of argument and oral submissions, counsel for the third respondent raised the preliminary point that the appellants' heads of argument were not compliant with r 52(2) of the Supreme Court Rules, 2018. Although the parties had agreed before the hearing not to pursue the preliminary points taken by the respondents in their respective heads of argument, all addressed the court on whether there were proper heads of argument filed by the appellants before the court. The court directed the parties to address it on all the issues that required determination by this Court.

[12] Counsel for the appellants argued that the rationale for the lengthy and comprehensive heads of argument was that this was the first case before this Court dealing with socio-economic rights that speak to an extension of the right to dignity, life and equal protection of the law relating to housing. It was as a result of the need to give a historical context of the right to housing in relation to other fundamental rights that it was felt necessary to capture domestic and private international law and to provide a comparative analysis of the approach taken by other developing countries.

[13] On the merits, counsel for the appellants submitted that the right to shelter ought to be declared a fundamental right pursuant to s 47 of the Constitution. She further argued that the right to life, dignity and equal protection of the law do not exist independently of the right to shelter. Human rights are indivisible and interdependent. Indeed one cannot be said to have the right to life or dignity if one does not have the right to shelter or a home. Counsel urged the court to adopt a wide and purposive interpretation in order to determine whether the legislature intended to make shelter a fundamental right within the Constitution.

[14] Counsel further argued that the findings of the court *a quo* had not taken into account all the provisions of the Constitution. The Constitution has provided for adequate shelter as a national objective under s 28. It has provided for freedom from arbitrary evictions under s 74 of the same Constitution. It has also made provision for the right of children to education, health services, nutrition and shelter under s 81(f). It also provides for security of tenure to every person lawfully owning or occupying agricultural land. The court should therefore have adopted a purposive interpretation and paid due regard to all these provisions that have a bearing on the right to shelter. Taken as a whole, the Constitution provides for the fundamental right to housing.

[15] The appellants have further contended that the decision of the court *a quo* has far reaching implications as it effectively leaves the appellants' members homeless with nowhere to go. Before sanctifying the drastic measure of eviction, the court *a quo* should have gone beyond the facts. The court did not take into account the circumstances and length of time the appellants' members had been in occupation, the rights and needs of vulnerable sections of that group such as children and the failure by the relevant organs of the state to make suitable alternative accommodation available.

SUBMISSIONS BY THE MINISTER OF LOCAL GOVERNMENT AND THE MINISTER OF LANDS

[16] Counsel for the two Ministers submitted that, for the reasons given by Leengate, with which they agree, the appellants' heads of argument do not comply with the Rules of Court. He urged this Court to find that there are no proper heads before it.

[17] On the merits he argued that the right to shelter is not included in Chapter 4 of the Constitution but is envisaged as a national objective under s 28. He further submitted that the reliance by the appellants on s 47 was inappropriate as they had failed to point to any law that provides the right to shelter. In any event any rights recognised by s 47 of the Constitution are not fundamental rights. The provision simply means the Constitution does not exclude the existence of other rights confirmed in terms of other laws recognised as such by the Constitution.

SUBMISSIONS BY LEENGATE

[18] Counsel for Leengate submitted that there were no proper heads of argument before the court. The appellants' heads span fifty-eight pages and are clearly not in compliance with r 52 (2) of the Rules

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[19] On the merits, counsel also submitted that the right to shelter is just but an aspiration. Section 47 of the Constitution refers to rights conferred by law. The appellants have not pointed to any provision of law that creates the right to shelter. The matter brought before the court is therefore not a constitutional matter and consequently the principle of subsidiarity applies.

ISSUES ARISING FOR DETERMINATION

[20] From the above synopsis, four issues arise for determination. These are first, whether the appellants' heads of argument are compliant with r 52(2) of the Supreme Court Rules, 2018. Second, whether the right to housing is a fundamental right cognizable in our law. Third, whether the court correctly found that the appellants could not properly approach the court in terms of s 85 of the Constitution and whether the doctrine of avoidance is applicable

in this case. Last, whether the court *a quo* erred by not making a determination on the merits. I proceed to deal with each of these issues in turn.

WHETHER THE APPELLANTS' HEADS OF ARGUMENT COMPLY WITH THE RULES OF COURT

[21] Rule 52 (2) of the Supreme Court Rules, 2018, provides as follows:-

“(2) Within fifteen days after being called upon to file heads of argument in terms of subrule (1), or within such longer period as a judge may for good cause allow, the appellants’ legal practitioner shall file with the registrar a document setting out the heads of his or her argument together with a list of authorities to be cited in support thereof, and immediately thereafter shall deliver a copy to the respondent.”

[22] Rule 50 has however made provision for written arguments and not heads of argument to be filed. That Rule provides as follows:-

“50. A party to a civil appeal may, not less than five days before the date on which the appeal has been set down for hearing, file with the registrar a declaration in writing that he or she does not intend to be present in person or to be represented by counsel at the hearing of the appeal, together with four copies of such argument as he or she wishes to submit to the court. Such argument shall be in numbered paragraphs under distinct heads. ...”

[23] It will be apparent, from the foregoing, that our Rules of Court have deliberately made a distinction between, on the one hand, heads of argument and written arguments, on the other. Written arguments are filed in terms of r 50 by either an appellant or a respondent who does not intend to be present in person or to be represented by a legal practitioner at the hearing of the appeal. Written arguments are intended to be a lot more comprehensive for the reason that the party will not be present before the court to motivate his or her appeal. An appellant who is called upon by the registrar to file heads of argument in terms of r 52 (2) may not file written arguments. The filing of written arguments in that circumstance would not be compliant with the Rules.

[24] The option of filing written arguments is one that is by no means common in this jurisdiction. Invariably an appellant or applicant files heads of argument in compliance with a directive from the Registrar and failure to do so will result in the matter being deemed abandoned and dismissed – see r 39 (5). Equally, a respondent upon whom the appellant’s heads are served is required to file his or her own heads within ten days of receipt of the appellant heads. In my experience on the Supreme Court bench, the option available to file written arguments in terms of r 50 is one that has not, to date, been utilised by litigants.

[25] That there is a significant difference between heads of argument and written arguments there can be no doubt. Heads of argument are intended to set out, without elaboration, a relatively concise statement of the main points intended to be argued on appeal by, or on behalf of, the respective parties and represent the starting point of the debate which follows. They also constitute the background against which the actual debate during argument of the appeal coalesces but the parties may and often do depart from such heads and the debate can range beyond the bare submissions contained in the heads which, in the hearing process, are supplemented or amplified, as the debate continues.

[26] Written argument, on the other hand, is presented *in lieu* of heads of argument, and is intended to be so comprehensive and complete so as not to require any supplementing. It also presupposes that such argument adequately addresses all possible points which may arise in the course of considering the appeal.

[27] As noted in the South African decision in *Mandlakhe Khehla Shinga v The Society of Advocates (Pietermaritzburg Bar) (Intervening as Amicus Curiae) & Anor* Appeal No. AR 969/2004:

“... There is a clear distinction between “heads of argument” and “written argument”- The rules do not permit the latter. The operative words are “main”, “heads” and “argument”:

- “main” refers to the most important part of the argument
- “heads” means “points”, not a dissertation; and
- “argument” involves a process that must be set out in the heads.

In addition, and to emphasise the point, the rule requires the heads of argument to be clear, succinct, and without unnecessary elaboration.”

I agree entirely with the above remarks which, in my view, correctly reflect the law in this country.

[28] There can be no argument that both in the court *a quo* and in this Court, the appellants were, and are guilty of, presenting written arguments. Before the court *a quo*, the appellants’ heads of argument spanned a total of seventy (70) pages. In addition to those seventy pages, the appellants’ counsel then addressed the court at length, regurgitating the same points made in the written submissions. His oral submissions span a further thirty two pages. In the heads of argument filed before this Court, the appellants’ legal practitioner has filed “heads of argument” spanning forty five (45) pages.

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[29] There can also be little doubt that there has been a failure to comply with the Rules. The appellants were requested to file heads of argument. Instead what was filed is more of a dissertation. It is prolix, rambling and in some cases repetitious. No consideration has been given to the need to be concise.

[30] I note that the High Court of Zimbabwe has had similar experience. In *Milton Gardens Association & Anor v Mvembe & Ors* HH 94/16, the court, obviously exasperated, had this to say at p 5 of the judgment:-

“I must make observations concerning the heads of argument filed on behalf of the applicants in this matter. These stretch up to 127 pages. Heads of argument are meant to be simply that. The purpose of heads of argument is to set out fully one’s arguments. Heads of argument are required to be drawn up in a clear and concise manner. It is inappropriate to file voluminous papers and expect the other party as well as the court to plough through such a voluminous pile of papers and still be able to make sense out of them. What these heads contain is basically every fact and argument concerning this matter. This is most inappropriate. In fact, this is an abuse of court process. This style of drafting heads of argument and conduct ought to be discouraged. The eventual consequence of such conduct results in delays in delivery of the judgment concerned. Litigants who bombard the court with voluminous papers and information deserve to be penalised even if they are eventually successful in the litigation. This sort of conduct deserves censure by this Court....”

[31] The appellants were asked to file heads of argument. Instead they filed what appear to be written arguments. In filing written arguments, they thought they were complying with the direction to file heads of argument. In this regard, they erred. Ordinarily the failure to file heads of argument would have consequences. However, considering that this Court has heard the appellants on the basis of those lengthy and rambling submissions, the court, in the exercise of its discretion, will condone this anomaly, regard being had to the fact that this is perhaps the first time that this Court has taken the pains to emphasize the distinction between heads of argument and written arguments. Parties and their legal practitioners are admonished to pay heed to this distinction in the Rules. In future heads of argument that do not comply with r 52(2) may well be struck out, the result being that the party guilty of such non-compliance may well be regarded as being barred with the concomitant results that would normally flow from such a determination.

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WHETHER THE RIGHT TO HOUSING IS A FUNDAMENTAL RIGHT

[32] It is the appellants’ submission that the court *a quo* erred in failing to adopt a purposive approach in its interpretation of the provisions of the Constitution. They have argued that had the court *a quo* correctly interpreted the Constitution, it would have found that the right to housing and shelter is provided for in the Constitution, even though such a

right is not specifically provided for. For this proposition they relied on the provisions of s 47 as well as ss 48 and 51 of the Constitution. They further contended that the right to life and to dignity enshrined in the Declaration of Rights cannot be fulfilled if one does not have shelter. The right to housing is therefore part and parcel of the right to dignity.

[33] The appellants accept that the right to shelter is not specifically provided for in [Chapter 4] of the Constitution. They rely on Chapter 2 of the Constitution and in particular ss 8 and 28 thereof. Section 8 provides:-

“(1) The objectives set out in this Chapter guide the State and all institutions and agencies of government at every level in formulating and implementing laws and policy decisions that will lead to the establishment, enhancement and promotion of a sustainable, just, free and democratic society in which people enjoy prosperous, happy and fulfilling lives.
(2) Regard must be had to the objectives set out in this Chapter when interpreting the State’s obligations under this Constitution and any other law.”

[34] It is s 28 of the Constitution – which also falls under **Judgment No. SC 78/21 Chapter 2 of the Constitution CIVIL Appeal No. SC 118/19** dealing with National Objectives - that makes reference to access to adequate shelter. That section provides:-

“The State and all institutions and agencies of government, at every level must take reasonable legislative and other measures, within the limits of the resources available to them, to enable every person to have access to adequate shelter.”

[35] The appellants have sought to rely on a somewhat similarly worded provision in the South African Constitution. Section 26 of the South African Constitution provides as follows:

“26 HOUSING

- (1) Everyone has the right to have access to adequate housing.
- (2) The State must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right.
- (3) No-one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

[36] There is however a major distinction between the Zimbabwean and South African provisions. Section 28 of the Constitution of Zimbabwe falls under Chapter 2 which spells out the national objectives to guide the State and all institutions of government. Section 26 of the South African Constitution, to the contrary, is part of the Declaration of Rights of that Constitution. It is a justiciable right. Even though s 74 of the Constitution of Zimbabwe protects people from arbitrary evictions, it states clearly that persons can be evicted from their home, or have their home demolished if a court order is granted after considering all the relevant circumstances.

[37] It is correct that, in interpreting a Constitution, the ordinary grammatical meaning used in the Constitution is not always decisive. The Constitution itself provides, in s 46, that in interpreting provisions of the Constitution, a court must pay regard to all the provisions of the Constitution, in particular the principles and objectives set out in Chapter 2, Section 331 then stipulates that the provisions of s 46 apply, *mutatis mutandis*, to the interpretation of the whole Constitution.

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[38] This Court has, in the past, had occasion to consider the status of the objectives set out in Chapter 2 of the Constitution. It is now accepted that the national objectives are important in interpreting the various provisions of the Constitution and any other laws. But they are not justiciable. In *Zimbabwe Homeless Peoples' Federation & Ors v Minister of Local Government and National Housing & Others* SC 94/20, this court remarked at p 8 of the judgment:-

“These provisions are essentially hortatory in nature, given that they are qualified by that they are to be realised “within the limits of the resources available” to the State and the government. In this sense, they cannot be said to be strictly justiciable and enforceable in themselves. Nevertheless, they are not to be regarded as being entirely superfluous and otiose and therefore devoid of any legal significance whatsoever. They

remain interpretively relevant for the purpose of informing and shaping the specific contours of the substantive rights enshrined elsewhere in the Constitution.”

[39] The question remains whether, on a consideration of ss 28, 47, 48 and 51 of the Constitution, the right to shelter can be inferred. This is essentially a question of interpretation. In attempting to interpret whether such a right exists, one must bear in mind the remarks made by the Constitutional Court of South Africa in *State v Zuma* 1995 (2) SA. 642 (CC) that:

“While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single “objective meaning”.... But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce’s reminder that even a Constitution is a legal instrument, the language of which must be respected. If the language by the law giver is ignored in favour of a general resort to values, the result is not interpretation but divination....”

[40] It is the duty of this Court to give full effect to the obligations enshrined in the Constitution. The Constitution says so. However, a court does not itself create rights. It simply interprets the various provisions of the Constitution to ascertain the existence, nature and extent of those rights.

[41] The right to shelter is not provided for anywhere in the Declaration of Rights. Parliament, in its wisdom, merely made provision for the State and all institutions of government to take reasonable steps and measures, within the limits of the resources available, to actualise access to adequate shelter. That provision is essentially exhortatory but is one that the State and all institutions of government must bear in mind when formulating or implementing laws and policy decisions of government. Parliament is deemed to have been aware of the various provisions that make up the Constitution. It deliberately came up with founding values and principles. In Chapter 2, it came up with various national objectives that

must guide the State and all its institutions in formulating and implementing laws and policy decisions. It also provided that those national objectives must be considered in interpreting the Constitution. Many national objectives have been delineated under Chapter 2. These include the requirement, under s 28, for the State and all its institutions to do everything possible, within the limits of the available resources, to actualise access to adequate shelter.

[42] Chapter 4 of the Constitution contains the Declaration of Rights. Under Part 2 of that Chapter, the lawmaker has listed fundamental human rights and freedom. These include the right not to be evicted from one's home unless this is pursuant to a court order. Part 3 of Chapter 4 elaborates certain fundamental rights "to ensure greater certainty as to the application of those rights and freedoms". Part 4 then provides for the enforcement of fundamental human rights and freedoms and Part 5 the limitations of those rights and freedoms.

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[43] A number of national objectives captured under Chapter 2 of the Constitution are not part of the fundamental rights and freedoms that are delineated under Chapter 4 of the Constitution. In fact only a few of them are recognised as fundamental human rights. These include the right to education (s 75), right to health care (s 76), right to food and water (s 77), marriage rights (s 78), rights of children (s 81), rights of the elderly (s 82), rights of persons with disabilities (s 83), and rights of veterans of the liberation struggle (s 84).

[44] The Constitution deliberately left out a number of national objectives from the Declaration of Rights. Whilst there is an obligation on the government and its institutions to adopt reasonable measures to actualise these objectives within the limits of the resources available, these cannot be enforced under s 85 as fundamental rights and freedoms. On a

holistic consideration of the provisions of the Constitution, the inference is ineluctable that it was never the intention of the lawgiver to make the right to shelter a fundamental right which would be justiciable in terms of s 85.

[45] It is correct that s 47 of the Constitution provides that Chapter 4 does not preclude the existence of other rights and freedoms that may be conferred or recognized by law, to the extent that they are consistent with the Constitution. *Iain Currie & Johan De Waal*, commenting on a provision in South African similar to our s 47, states:

“Section 39(3) simply confirms that the Bill of Rights does not prevent a person from relying on rights conferred by legislation, the common law or customary law. But since the Bill of Rights is supreme law, such rights may not be inconsistent with the Bill of Rights.

For example, if the right to self-incrimination (s 35(3)(j)) is only available to persons accused in criminal proceedings, nothing prevents a person in any other proceedings from relying on his or her common law right against self-incrimination to the extent that the right is available.”

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[46] That is all that s 47 says. It simply recognizes other rights that may be bestowed by other laws subsidiary to the Constitution. It does not state, as the appellants would want this court to believe, that these rights automatically become Chapter 4 rights and that they are enforceable as such. Whilst these rights can be enforced, this would be in terms of the provisions of those laws and not s 85. As Mr. *Uriri* stated, correctly in my view, the right to shelter the appellants seek to enforce in terms of s 85 of the Constitution is not one in terms of our Declaration of Rights. I am aware that in terms of s 326 of the Constitution, customary international law is also part of the law of Zimbabwe, unless it is inconsistent with the Constitution or an Act of Parliament. Further, in terms of s 327 of the Constitution, an international treaty which has been concluded by the President has binding effect if approved by Parliament and domesticated. Whilst international conventions may recognize the right to shelter or housing, such right is not, in terms of our Constitution, a fundamental right, capable

of being enforced in terms of s 85 of the Constitution of Zimbabwe in favour of adult persons. It is the Constitution, the supreme law of this country itself, which has deliberately left out the right to shelter from the list of fundamental rights delineated under Chapter 4 of the Constitution.

[47] Everything considered therefore, the appellants have not shown that the right to shelter is a fundamental right in terms of our law and that it can be enforced pursuant to the provisions of s 85 of the Constitution in favour of adult persons. The right to shelter is a fundamental right that is accorded to children only, together with their rights to education, health care and nutrition (s 81). Indeed this was the finding of the Supreme Court in a matter involving the same parties in *Zimbabwe Homeless People's Federation & Ors v The Minister of Local Government and National Housing & Three Ors* SC 94/20. In the present matter, it is not the right to shelter for their children that is in issue. Rather the issue is whether the right to shelter under s 28 of the Constitution is a fundamental right and therefore justiciable in respect of persons who are not children. The conclusion by the court *a quo* that the right to shelter is not a fundamental right was therefore correct.

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WHETHER THE APPELLANTS COULD APPROACH THE COURT IN TERMS OF SECTION 85

[48] Section 85 of the Constitution is very clear as to the nature of the rights and freedoms that can be enforced pursuant to its provisions. It provides:

“85 ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

(1) Any of the following persons, namely –

(a) – (e) ... (not relevant)

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

[49] The section states in no uncertain terms that an application in terms of that section must allege that a fundamental right or freedom enshrined in that Chapter has been, is being or is likely to be infringed. The corollary to this is that other rights that are not fundamental rights or freedoms can be enforced through other provisions of other laws, but not in terms of s 85. Indeed the Constitutional Court of Zimbabwe has stressed this position in a number of decisions. For example in *M & Anor v Minister of Justice Legal & Parliamentary Affairs N.O & Others* 2016(2) ZLR 45, 55 G-H (CC) the Constitutional Court stated:

“Section 85(1) of the Constitution is the cornerstone of the procedural and substantive remedies for effective judicial protection of fundamental rights and freedoms and the enforcement of the constitutional obligation imposed on the State and every institution and agency of government at every level to protect the fundamental rights in the event of proven infringement.

..... The fundamental principle is that every fundamental human right or freedom enshrined in Chapter 4 is entitled to a full measure of effective protection under the Constitutional obligation imposed on the State

[50] Further, in *Prosecutor General of Zimbabwe v Telecel Zimbabwe (Pvt.) Ltd* GGZ Judgment No. SC 78/21 Civil Appeal No. SC 118/19 10/15, the court also remarked at p 10 of the judgment:-

“What is clearly evident from this provision is that the relief sought and to be granted by the court in terms of this section must relate to fundamental rights and freedoms enshrined in the relevant Chapter, and nothing else.....”

[51] Despite attempts by appellants’ counsel both *a quo* and in this court to urge this Court to accept that the application before the court *a quo* was not made in terms of s 85(1) of the Constitution, the papers on record reveal clearly that, in fact, the appellants approached the court *a quo* in terms of that section. For example, in its founding affidavit, in para 4, the first appellant, as first applicant stated: “The first applicant thus has a public interest in housing and asserting the right to housing. It is this same reason, which is the basis of this application by which this application is brought in terms of s 85(1)(d) It seeks in this case, to assert the existence of the right to housing for its members thereof”. The second appellant, as second applicant, in para 13 of its founding affidavit also stated: “We thus bring this

application, on behalf of our members in terms of s 85(1)(e) of the Constitution of Zimbabwe.” Likewise the third appellant, as third applicant, also stated in para 52 of his founding affidavit: “As a resident of Haydon Farm and a victim of the respondents’ unlawful actions, I bring this action in my own right to protect my interest as defined in s 85(1)(a) of the Constitution of Zimbabwe”.

[52] There thus can be no doubt that the appellants approached the court *a quo* in terms of s 85(1) of the Constitution. They were alleging a violation of their right to shelter, which is not a fundamental right. In the circumstances, the finding by the court *a quo* that s 85(1) was not available to them was correct.

PRINCIPLE OF SUBSIDIARITY

[53] It is the settled position of our law that where there exist other remedies, a litigant may not approach a court on a constitutional basis and ignore the remedies at his disposal in order to deal with what he perceives to be an infringement of his rights. The principle of subsidiarity, itself part of the doctrine of avoidance, recognizes that there are many disputes of right or interest which do not give rise to a constitutional matter. In this regard in *Moyo v Sgt Chacha & Others* CCZ 19/17, the Constitutional Court remarked as follows:

“The principle of subsidiarity ... states that a litigant who avers that his or her constitutional right has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing action to protect the right, unless he or she wants to attack the constitutional validity or efficacy of the legislation itself. Norms of greater specificity should be relied upon before resorting to norms of greater abstraction.”

[54] The principle of subsidiarity is particularly apposite in the circumstances of this case. Before the court *a quo*, the appellants sought the relief of an interdict against unlawful eviction. The relief of an interdict was available to them even without resort to the

Constitution. It was a relief that could have been granted by the Magistrates' Court or the High Court once the appellants had shown a *prima facie* or clear right. Moreover, there was a pending application filed by Leengate in the Magistrates' Court for their eviction which they could have opposed without them approaching the High Court on a constitutional basis. The appellants had also filed an ordinary court application under HC 1148/18 seeking to assert the government's obligation to the realisation of the right to housing under the Constitution, to order the halting of any evictions and for the court to determine whether Leengate had lawfully acquired land through the Council. This matter was apparently pending when the appellants filed the application in the High Court that is the subject of this appeal.

[55] For this additional reason, the appellants could not have simultaneously moved for relief under s 85 of the Constitution.

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THE ALLEGED FAILURE TO DETERMINE THE MATTER ON THE MERITS

[56] Having correctly found that the appellants could not approach the court in terms of s 85 of the Constitution, it became unnecessary for the court to deal with the matter on the merits.

DISPOSITION

[57] The court *a quo* was correct in finding that there was no fundamental right to shelter in terms of the Constitution of Zimbabwe. It was also correct in finding that the appellants had no standing to institute an application in terms of s 85(1) of the Constitution to enforce such a right. Part of the relief the appellants sought could have been enforced without the need to resort to remedies provided by s 85 of the Constitution.

[58] On the issue of costs, it seems to me that, although this matter has come to this court as an appeal, it essentially seeks to enforce what the appellants may have perceived, albeit wrongly, to be constitutional remedies. Rule 55 of the Constitutional Court Rules, 2016 states that, in general, a no costs order should be awarded in constitutional matters. Given the fact that the appellants may have genuinely believed that they could enforce the right to shelter, I see no reason for departing from this general position.

[59] In the result, it is ordered as follows:

“The appeal be and is hereby dismissed with no order as to costs”.

MAVANGIRA JA : I agree

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MATHONSI JA : I agree

Tendai Biti Law, appellant’s legal practitioners

Civil Division of the Attorney General’s Office, first and fourth respondents’ legal practitioners

Bherebhende Law Chambers, third respondent’s legal practitioners