

DISTRIBUTABLE (75)

LOT SYATIMBULA
vs
CITY OF VICTORIA FALL (FORMERLY
VICTORIA FALLS MUNICIPALITY)

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ; MATHONSI JA & CHIWESHE JA
BULAWAYO, 18 JULY & 20 JULY 2022

K.I. Phulu with *Z.C. Ncube*, for the appellant

S. Siziba with *T. Nkala*, for the respondent

MATHONSI JA: Following a successful appeal to this Court against a judgment of the High Court ordering the eviction of the appellant from house number 484 Jakaranda Drive Victoria Falls (the house) when it had not heard the merits of the dispute but only points *in limine*, this Court handed down judgment which reads in part as follows:

- “1. ...
2. The appeal succeeds with each party bearing its own costs.
3. The judgment of the court *a quo* on the merits is set aside.
4. The matter be and is hereby remitted to the court *a quo* for determination of the merits before a different judge.” (The underlining is for emphasis)

After hearing the application in terms of the judgment of this Court, the High Court (the court *a quo*) handed down judgment on 17 March 2022 directing the eviction of the appellant and all those claiming occupation through him from the house. The appellant was also ordered to pay the costs of suit. This appeal is against that judgment.

THE FACTS

The respondent, a local authority established in terms of the Urban Councils Act [Chapter 24:03], is the owner of the house which it holds in terms of a Deed of Grant. It employed the appellant as its Director of Housing and Community Services and allocated the house to him as an employment benefit.

The appellant's employment was terminated on 31 March 2017 following disciplinary proceedings instituted against him for misconduct. When called upon to vacate the house as a consequence of his loss of employment, the appellant resisted. The respondent then brought an application for a *rei vindicatio* seeking the appellant's eviction from the house together with all those claiming occupation through him. The appellant opposed the application raising certain points *in limine* namely, that the Town Clerk who had deposed to the founding affidavit had no authority to do so.

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In addition, the appellant took the point that the matter was *lis pendens* given that the respondent had also instituted eviction proceedings in the Magistrates' Court. The latter proceedings were withdrawn. After dismissing these points *in limine* the court *a quo* proceeded, without hearing submissions on the merits, to determine the merits.

As already stated, on appeal this court upheld the appeal, set aside the court *a quo*'s judgment and remitted the matter to it for a determination of the merits by a different judge. Therefore when the court *a quo* re-engaged the matter, its mandate was to determine the merits. The issue before it was whether the appellant was entitled to remain in occupation of the house by dint of some enforceable right he had against the respondent.

PROCEEDINGS BEFORE THE COURT A QUO

Before the court *a quo*, counsel for the appellant sought to introduce a further point *in limine* based on the citation of the respondent in the proceedings. It was submitted that there was a mis-citation of the respondent as Victoria Falls Municipality which was a non-existent entity. It should have been cited, so it was argued, as Municipality of Victoria Falls.

As a corollary to that, it was submitted on behalf of the appellant that the respondent had failed to prove one of the requirements of a *rei vindicatio*, namely ownership of the house. This stemmed from the fact that the Deed of Grant recorded the owner of the house as Municipality of Victoria Falls and not City of Victoria Falls.

Per contra, counsel for the respondent submitted that the court *a quo* was clear that the court *a quo* was required to engage the matter on the merits and not on preliminary points as urged of it by the appellant. In that regard, so it was argued, the appellant was out of order in raising fresh preliminary points.

The court *a quo* found that the matter had been remitted to it for a specific purpose, namely a determination of the merits and nothing else. It refused to be drawn to the point *in limine* as it fell outside the purview of the directions issued by this court.

On the merits, counsel for the respondent submitted that the requirements for the grant of a *rei vindication*, that is, the respondent being the owner of the house which the appellant was occupying without its consent, had been satisfied. In resisting the application, the appellant submitted that he had a right of retention of the house emanating from the fact

that he was appealing the decision to dismiss him from employment and that there existed a compromise arrangement between the parties in terms of which the respondent agreed to let him remain in occupation until he was paid certain sums of money owed to him.

On that aspect, the court *a quo* found that the fact that the appellant was appealing against the decision to dismiss him did not accord him a right to hold on to the respondent's house. Regarding the alleged compromise the court *a quo* found that no compromise agreement existed between the parties. It took the view that the letter of 19 April 2018 relied upon by the appellant did not come anywhere near proving the existence of a compromise.

In the court *a quo*'s view the letter in question only recorded the appellant's own position in the dispute, that he would only vacate the premises upon being paid US\$10 000,00. The letter was not responded to and as such could not tie down the respondent to something it did not agree to.

PROCEEDINGS BEFORE THIS COURT

The appellant was aggrieved by that outcome. He noted an appeal to this court on four grounds the essence of which is to impugn the court *a quo*'s finding that the requirement of the *actio rei vindicatio* had been satisfied. In addition, the appellant also challenged the court *a quo*'s refusal to engage the point *in limine* he sought to motivate.

Only two issues commend themselves for determination in this appeal. These are:

1. Whether the court *a quo* erred in refusing to deal with the point *in limine* relating to the citation of a non-existent entity.
2. Whether the court *a quo* erred in granting the remedy of an *actio rei vindicatio*.

At the hearing of the appeal, Mr *Siziba* who appeared for the respondent, initially raised two preliminary points which, in his view, were dispositive of the appeal. The first related to the part of the notice of appeal wherein the appellant stated that he was appealing against “part of the judgment” of the court *a quo*. In his view this rendered the appeal fatally defective in that the appeal was effectively against the whole judgment of the court *a quo*.

Secondly, Mr *Siziba* sought to impugn the appellant’s grounds of appeal numbers 1 and 3 which he said do not meet the requirements of r 37 (1) of this Court’s Rules because they are not clear and concise. After exchanges with the court, Mr *Siziba* abandoned both preliminary points.

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For his part, Mr *Phulu* for the appellant also quickly abandoned his reliance on the challenge of the respondent’s ownership of the house because it is common cause that the respondent is the owner of the house in question. Mr *Phulu* motivated the appeal solely on the basis that there exists a compromise agreement in terms of which the appellant has a right of retention until such time that he is paid certain sums of money he believes he is entitled to.

On that aspect, the court *a quo* reasoned as follows at page 6 of its judgment:

“Was there a compromise wherein the applicant receded from its position in seeking to get its property back from the respondent? The respondent filed a letter written to the appellant by his legal practitioners, in which there was mention of payment of US\$10 000 for leave claims and that respondent would move out upon payment of this amount. In the same letter the respondent acknowledged a claim the applicant had for water, electricity and rentals and said that such amounts would be deducted from the US\$10 000 as well as the tax deductible component from ZIMRA. That letter also referred to a vehicle the respondent said he was of the view he was entitled to.

There was no response from the applicant. If there was, such was not attached to the respondent's opposition. The letter itself is what the respondent was stating as his position but with no acknowledgment from the applicant. How can it be said the parties agreed and therefore reached a compromise?" (The underlining is for emphasis)

It is this Court's view that these were factual findings made by the court *a quo*. The position is settled in this jurisdiction that an appeal court will not lightly interfere with the findings of the lower court. The appeal court will only interfere where it is shown that such finding is irrational. In other words, this court will interfere where "the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at such conclusion." See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670C-E.

The appellant has not shown that the court *a quo*'s findings on the letter relied upon as pointing to the existence of a compromise was irrational. Quite to the contrary, the court *a quo*'s reasoning is very sound.

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Mr *Phulu* also sought to argue that a compromise was proved by virtue of the fact that, after pleading its existence in the founding affidavit and attaching the letter referred to above, the respondent did not deny the compromise. In his view what is not denied is taken as admitted.

There is no doubt that this argument is flawed. In fact Mr *Siziba* drew the court's attention to para 6 of the respondent's answering affidavit where the respondent contested the claim of a compromise. The deponent made it clear that the appellant was free to litigate on

these claims if he was of the view that the claims were meritable. That cannot be said to be an admission.

DISPOSITION

The respondent is the owner of the house which the appellant occupies without its consent he having lost his employment. The respondent is entitled to vindicate against the appellant. The appellant has not shown a right of retention. The appeal is without merit. It ought to be dismissed.

Regarding the issue of costs, it is the view of this court that a good case has been made for the costs to be awarded on the adverse scale. The appellant has been persistent in his resistance and has unreasonably held on to the respondent's property without any justification whatsoever. In doing so, he has put the respondent unnecessarily out of pocket.

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In the result it be and is hereby ordered as follows:

The appeal is dismissed with costs on a legal practitioner and client scale.

GWAUNZA DCJ I agree

CHIWESHE JA I agree

Ncube & Partners, appellant's legal practitioners

Dube, Nkala & Company, respondent's legal practitioners