

REPORTABLE (49)

PETROMOC EXOR (PRIVATE) LIMITED
v
**(1) KUDZANAI CHIMEDZA (2) CRANDID PETROLEUM
(PRIVATE) LIMITED (3) MINISTER OF LANDS,
AGRICULTURE, WATER, CLIMATE AND RESETTLEMENT (4)
SHERIFF OF ZIMBABWE**

**SUPREME COURT OF ZIMBABWE
BHUNU JA, CHIWESHE JA & MUSAKWA JA
HARARE: 8 JULY 2022 & 29 MAY 2023**

R. Mabwe, for the appellant

M. Ndlovu, for the first respondent

No appearance for the second and third respondents

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BHUNU JA:

[1] The appellant brings an appeal against the judgment of the High Court (the court *a quo*) handed down on 21 July 2021. The reasons for judgment were delivered on 28 September 2021 under judgment number HH 533-21. The order struck off the appellant's application to be declared the lawful lessee and occupier of Duncombe Service Station (the service station) situate at Duncombe Farm, Mazowe District in Mashonaland Central Province. The appellant further sought the eviction of the first and second respondents from the premises together with all those claiming the right of occupation and use through them.

BRIEF SUMMARY OF THE FACTS.

[2] The appellant and the first and second respondents are wrangling over the right of lease and occupation of the service station. The service station is situated at Duncombe Farm which has since been acquired by the government under the land reform programme. The first respondent is the current occupier of the service station. He claims lawful occupation through a 5 year lease granted to him by the third respondent in his capacity as the land owner through the Mazowe District Council. He also claims legitimate expectation to lawful occupation and use of the service station pursuant to certain verbal promises made to him by third respondent's officers.

[3] The second respondent did not oppose the appeal giving the impression that it will abide by the decision of the court.

[4] On the other hand the appellant claims the lawful right to occupy and use the service station through a 5 year lease granted to it by the third respondent on 17 July 2019.

[5] Before the court *a quo*, both contesting parties made claims and counterclaims disparaging the basis of each other's claim to legitimate lease and occupation of the service station. The 1st respondent in turn countered the appellant's application with an application for review seeking to invalidate the appellant's lease agreement with the third respondent.

[6] Having heard both parties, the learned judge *a quo* determined the appellant's application on the merits but ended up with an order striking off the matter from the roll. On the merits the learned judge *a quo* found that the appellant's lease agreement

was invalid because it had been signed by an Under-Secretary who had no authority to sign. At p 5 of the cyclostyled judgment this is what the learned judge *a quo* had to say:

“It goes without saying that the lease which the Under-Secretary issued is not valid. It has no legal force or effect. It violates clear provisions of the law. The Under-Secretary cannot issue any lease to anyone, let alone to the applicant. The Minister has neither the power nor authority to allow the Under-Secretary to issue the lease to the applicant. He cannot delegate the responsibility which is reposed in him to the Under-Secretary. The mandate to issue the offer letter or lease lies with no one else but the Minister.”

[7] Having determined the merits of the appellant’s application, the learned judge *a quo* noted that the application was fraught with serious procedural irregularities warranting the striking off of the matter so that it could be heard afresh. In coming up with that conclusion the learned judge *a quo* made the following remarks at the same page of his judgment:

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“It is for the mentioned reason, if for no other, that the first respondent was quick to cast doubt on the authenticity of the lease which the applicant attached to its application. The fact that the lease was not legible from pp 13 to 18 did not work in the applicant’s favour at all. As the *dominus litis* party, the applicant should have availed to me a lease whose contents were/are legible. It should not have availed to me a document the contents of which made no sense and expected me to make sense out of them. The lease was/is after all the backbone of its case. It should, therefore, have allowed it to make sense to the decision maker.

I mention in passing, that a matter which is not sustainable on a balance of probabilities but which is not so hopeless so as to warrant an outright dismissal is more often than not struck off the roll. It is struck off because it is fatally defective. The fatal defects which are inherent in it leave the court with no choice but to treat it as such.”

[8] Having said that, the learned judge *a quo* proceeded to strike the matter off the roll with remarks that the appellant could approach the court again within 90 days after putting its house in order.

ANALYSIS AND DETERMINATION

[9] It is plain to the Court that the learned judge *a quo*'s line of reasoning is rather convoluted and littered with gross irrationality so as to amount to fatal procedural irregularity. I am of the firm view that once the learned judge had found on the merits that the appellant's lease agreement was a nullity and unenforceable that should have been the end of the matter. No rights or obligations can flow from a nullity. It was therefore not within his discretion to proceed beyond that finding on the basis of spurious technical grounds.

[10] The learned judge struck the matter off from the roll on the basis that the appellant had tendered an illegible lease agreement. Again, it is plain and a matter of common sense that once the learned judge had held the lease agreement to be void and unenforceable it did not matter whether or not it was legible. It was therefore irrational for the learned judge to strike the matter off the roll in the vain hope that the appellant would again approach the courts with a legible but void lease agreement. It is unfathomable how the learned judge thought he was going to use a lease agreement which he had held to be void and unenforceable to determine the merits of the case which he had already determined.

[11] Tendering a defective exhibit in evidence in court cannot in my view amount to a fatal procedural irregularity. It merely affects the weight and credibility of evidence. It is not a fatal procedural irregularity warranting the matter to be struck off the roll. The learned judge therefore fell into error and strayed into fatal procedural irregularity when he struck the application from the roll on the basis that the appellant had tendered in evidence an illegible lease agreement. Faced with a defective document or

exhibit a judicial officer should not take the easy way out by striking the matter off, the roll. The judicial officer should first of all look at the relevance and admissibility of the exhibit tendered. If it is relevant and admissible then, one looks at whether the situation can be saved by calling for rectification where possible. A brief postponement may be allowed to effect rectification with a suitable award of costs. Judicial officers should always bear at the back of their minds that their primary function is to dispose of matters on the merits and not flimsy technicalities. This prompted SCHREINER JA in *Trans-African Insurance co Ltd v Maluleka* 1956 (2) SA 273 (A) at p 278F to remark that:

“No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. *But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits. (My italics).*

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[12] As previously stated, it was grossly irregular for the learned judge to first determine the merits of the case and then proceed to strike off the matter on a technicality. The court *a quo*'s decision is therefore confusing in that it provides an irreconcilable contradiction as to whether it determined the matter on the merits or a technicality. That irregularity can only be corrected by invoking the provisions of s 25 of the Supreme Court Act [*Chapter 7:13*]. The section provides as follows:

“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 subsection (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. “

[13] The section undoubtedly confers review jurisdiction on this Court whenever it comes to its attention that there has been a procedural irregularity in a lower Court as happened in this case. The gross procedural irregularity warrants the intervention of this Court on review by quashing the proceedings *a quo* and ordering a trial *de novo*. As the trial judge has already taken a stance on the merits of the case, it is necessary that the retrial be placed before a different judge.

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[14] As neither party is to blame for the learned judge’s error, each party is to bear its own costs. It is accordingly ordered as follows:

1. That the proceedings in the court *a quo* be and are hereby quashed and set aside.
2. That the matter be and is hereby remitted to the court *a quo* for a trial *de novo* before a different judge.
3. That each party bears its own costs.

CHIWESHE JA:

I agree

MUSAKWA JA:

I agree

Chikwengo Legal Practitioners, appellant's legal practitioners.

Mutamangira and Associates, 1st respondent's legal practitioners.

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