REPORTABLE (11)

TARUVINGA HAMURA
v
(1) MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS N.O. (2) THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS N.O. (3) REGISTRAR OF DEEDS N.O. (4) THE ATTORNEY GENERAL OF ZIMBABWE N.O. (5) AROSUME PROPERTY DEVELOPMENT (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, CHIWESHE JA & MUSAKWA JA
HARARE: 4 JULY 2024 & 14 FEBRUARY 2025

T.S.T. Dzvetero with Mrs *T. Dzvetero* for the appellant

D. Machingauta for the first respondent

S.M. Bwanya for the fifth respondent

No appearance for the second, third and fourth respondents

MAVANGIRA JA

INTRODUCTION

1. This is an appeal against the whole judgment of the High Court dated 20 December, 2023 dismissing the appellant's application in which he sought relief in the following terms:

> "**IT IS ORDERED THAT:**
> 1. The decision and conduct of the first respondent to cause the cancellation of the applicant's title deed number 0272/2010 by the third respondent on 1 February 2023 and any subsequent actions in relation to the said deed thereafter be and is hereby declared null and void and set aside.
> 2. The third respondent be and is hereby ordered to remove and/or cancel the endorsement on applicant's title deed number 02723/2010 and/or any other subsequent transfers or endorsements to the said title deeds.

3. The third respondent be and is hereby ordered to revive and reinstate applicant's title deed number 02723/2010.

4. It be and is hereby declared that the applicant paid ZWD30 480 000, 00 (Thirty Million Four Hundred and Eight Thousand Dollars) for the purchase of stand 300 Carrick Creagh Estate on 15 December 2008.

5. It be and is hereby declared that the amount of the purchase price for the property reflected on title deed number 02723/2010 being USD65, 00 is attributed to the first respondent, him being the seller and principal of the conveyance. (*sic*) That inscription is not attributed to the applicant.

6. The third respondent be and is hereby ordered to delete the amount of USD 65 appearing thereon on title deed number 02723/2010 and substitute it with the amount of ZWD 30 480 000 (Thirty Million Four Hundred and Eighty Thousand Dollars) paid on 15 December 2008.

Constitutional invalidity

7. It be and is hereby declared that s18 of the Deeds Registries Act is unconstitutional and invalid to the extent of its inconsistency with ss 56, 68 and 71 of the Constitution of Zimbabwe and is set aside.

   (a). It be and is hereby declared that land owned by private individuals is exempt from the application of s 18 of the Deeds Registries Act.

8. This order shall be subject to confirmation by the Constitutional Court.

9. Any respondents who oppose this application shall pay costs on legal practitioner– client scale jointly and severally the one paying the other to be absolved."

FACTUAL BACKGROUND

2. The dispute between the appellant and the participating respondents would require a lengthy exposé of the factual background. However, at the hearing of this appeal, the primary contention made by Mr *Dzvetero*, for the appellant, before he addressed the court on the other issues arising from his grounds of appeal, was a preliminary point of law to the effect that the court *a quo* failed to determine a matter that was placed squarely before it for and that such failure constituted a gross irregularity that had the effect of vitiating its decision. It is the court's view that the success of this contention would necessitate the remittal of the matter to the court *a quo* for a determination of

this issue. It is for this reason that, in the main, only the facts pertinent to the determination of the preliminary point of law are set out below.

3. Carrick Creagh Estate was acquired by the President by General Notice 161/2005 (GN161/2005). The said General Notice of acquisition spelt out that "… *the President has acquired compulsorily the land described in the schedule for urban development*." The estate is administered by the first respondent on behalf of the President of the Republic of Zimbabwe. Sometime in 2007 a tripartite agreement was entered into by and between "*the Ministry of Local Government, Public Works and Urban Development and Sally Mugabe Housing Co-operative and Arosume Property Development (Pvt) Ltd (The Developer).*" The agreement was headed "*PARTNERSHIP AGREEMENT FOR THE DEVELOPMENT OF RESIDENTIAL STANDS OF VARYING SIZES AT CARRICK CREAGH FARM – BORROWDALE.*" It regulates the acquisition of rights and interest in that land.

4. On 16 December 2008, the Minister of Local Government, Public Works and Urban Development entered into a lease agreement with one Michelle Hamura for the lease of Stand No. 300 situate in the township of Carrick Creagh in the district of Harare for a period of four years reckoned from 1 January 2007.

5. Subsequently, the first respondent entered into a lease agreement with the appellant for the same Stand No. 300 Carrick Creagh, and also for a period of four years reckoned from 1 January 2009.

6. The agreement also states as one of the conditions, that the land shall remain under the ownership of the first respondent until such time it can be transferred to the beneficiaries.

7. In June 2010, title in Stand No. 300 Carrick Creagh was registered in the appellant's name by way of Deed of Transfer No. 2723/10.

8. On 5 April, 2022, the appellant received from the first respondent, a notice of intention to cancel his deed of transfer in terms of s 18 of the Deeds Registries Act, [*Chapter 20:05*]. The notice was premised on an alleged error and unlawfulness of the transfer of title to the appellant. It called upon the appellant to make any representations within a given period failing which the first respondent would "proceed to cause the notice of cancellation to be published in the Government Gazette and in the media circulating in Harare as provided for under s 18 (3) of the Deeds Registries Act. The full text of the letter is reproduced below. It reads:

> "**RE: NOTICE OF INTENTION TO CANCEL DEED OF TRANSFER NUMBER 2723/2010 UNDER WHICH YOU HOLD RIGHTS TO STAND NUMBER 300 OF CARRICK CREAGH, BORROWDALE, HARARE, MEASURING 1.2384 HECTARES**
>
> I refer to the above described land ordinarily referred to as stand number 300 of Carrick Creagh Estate, Harare which is currently registered under your name as set out above.
>
> The purpose of this letter is to advise you that Government has concluded that when the stand was registered in your name on 19 June 2010, this was done, firstly, in error, and secondly, it was not done in accordance with the law. Accordingly, Government has resolved that the deed of transfer in your name should be cancelled so that the land reverts to the ownership of Government. As the implementation of this resolution will affect your present rights of ownership, this letter serves to place you on notice that I intend to direct the Registrar of Deeds to cancel Deed of Transfer No. 2723/2010 in favour of TARUVINGA HAMURA in terms of the provisions of s 18 (1) of the Deeds Registries Act [*Chapter 20:05*].
>
> In pursuit of this resolution, I shall cause notice to be published in the Government Gazette and in the media circulating in Harare as provided for under

s 18 (3) of the Deeds Registries Act [*Chapter 20:05*]. In terms of the law, you would be entitled, if so inclined, to raise any substantive objections to such cancellation within 30 days of the last publication of the notice of cancellation.

In the meantime, you may make representations to me concerning what I intend to do, and I advise that the period of notice will expire on a date which is fourteen (14) days after the date on which you are served with this letter at stand number 300 Carrick Creagh, Borrowdale Harare.

It is the view of Government that it has a right to claim transfer of the above described stand number 300 of Carrick Creagh. The reasons are as follows:-

1. Prior to 19 June 2010, the land was state land.

2. The intrinsic value of the land due to the state Twenty Four Thousand, Three Hundred and Eighty Four United States Dollars USD 24,384.00). (*sic*) This is in terms of the Memorandum of the Valuations & Estates Management department UL/162/12 dated 5 March 2009.

3. Records at hand record that you paid Sixty Five United States Dollars (USD$65.00) to the state before transfer was effected prejudicing the state of Twenty Four Thousand Three Hundred and Nineteen United States Dollars (USD 24, 319.00)

4. Our inquiry with the developer, **ARQSUME PROPERTY DEVELOPMENT PRIVATE LIMITED**, our tripartite partner, reveal that you have neglected/refused to pay your pro-rated share of the cost of development being US$ 804, 960.00 thereby prejudicing the Developer and other paying beneficiaries.

5. The Power of Attorney to pass transfer purportedly signed by **REJOICE PAZVAKAVAMBWA** is fraudulent in that;

   (a) She disowns it completely and;

   (b) Even is (*sic*) she acknowledged it, passing title in the circumstances outlined above was contrary to and inconsistent with her obligations as a public officer (Chief Estates Officer in the State Lands) in my ministry.

6. Stand number 300 of Carrick Creagh is part of the 10% government commonage reserved for paying beneficiaries. At the time of the allocation neither yourself nor your daughter **MICHELLE HAMURA** (to whom the offer letter was addressed) were government employees/entities.

7. Related to ground number 6 above, further enquiries with SALLY MUGABE HOUSING COOPERATIVE, reveal that you are neither their member nor one of their recommended nominees to benefit from the Carrick Creagh project.

> It is because of all the reasons set out above that the State is of the view that it has the right to reclaim title of stand number 300 Carrick Creagh, Borrowdale Harare by resorting to the provisions of s 18 (1) of the Deeds Registries Act.
>
> Kindly, therefore, let me have your representations within the time period which I have stipulated failure which I shall proceed to cause the notice of cancellation to be published."

9. On 22 April 2022, the appellant's legal practitioners authored a lengthy response to the above quoted letter, raising numerous objections thereto.

10. The first respondent invited the appellant for a meeting at his offices. The appellant's legal practitioners responded that the appellant was under bail conditions in a related criminal matter that forbade him to set foot at the first respondent's offices. Thereafter, a publication of the notice of the first respondent's intention to direct the Registrar of Deeds to cancel the title deed was made in the Government Gazette of 28 October 2022 under General Notice 2402 of 2022. The notice also called upon any person wishing to lodge any objection to the proposed cancellation to do so in writing within thirty days from the date of the publication. The appellant's legal practitioners wrote again reiterating the same objections raised in response to the earlier correspondence to him on the same subject. An invitation for a meeting was extended yielding the same response about the impediment hindering the appellant from attending at the first respondent's offices. On 14 March 2023, the appellant received a letter to the effect that his title deed, number 02723/2010, in respect of the stand, had been cancelled by the first respondent and that he was to vacate the stand.

11. Aggrieved by the cancellation, the appellant lodged what he described as "a three-thronged application" with the court *a quo* seeking a review of the actions and conduct of the first respondent of directing the third respondent to cancel his title deed and the cancellation itself. He also sought certain declarations regarding his exclusion and non-

involvement in what he alleged to be an error in his title deed and the rectification thereof. He further sought to challenge the constitutional validity of the provisions of s 18 of the Deeds Registries Act to the extent of their inconsistency with the Constitution. He contended that s 18 of the Deeds Registries Act ought to be declared unconstitutional and invalid for the reason that land owned by private individuals ought to be exempt from the application of the section. He prayed for an award of costs against any respondent who opposed the application. The full terms of the relief that he sought are captured in para 1 above.

12. The appellant further averred that in the event that the application for review was successful, he "would be in the hands of the court" as to whether the constitutional application would proceed as well. He stated that he was making his application firstly, in terms of the common law and also s 27 (1) of the High Court Act, [*Chapter 7:06*] as read with ss 3 and 4 of the Administrative Justice Act, [*Chapter 10:28*], (the AJA) and r 62 of the High Court Rules, 2021. Secondly, in terms of s 85 (1) (a) of the Constitution of Zimbabwe as read with r 107 of the High Court Rules, 2021 and thirdly, in terms of s 86 as read with s 6 of the Deeds Registries Act.

13. The first and fifth respondents opposed the application defending the reasons for the cancellation of the title deed. The second and fourth respondents opposed their citation in the application. They prayed for their removal from the proceedings and for exclusion from paying costs. They made no averments on the substantive issues. The first and fifth respondents actively opposed the relief sought.

14. In summarizing the application before him, the learned judge *a quo* stated at p 2 of his judgment:

> "Applicant seeks to review the first respondent's cancellation of his deed of transfer and the grant of declaratory relief consequential to the review, I am invited to consider the lawfulness and reasonableness of the reasons advanced for cancellation as well as the procedural fairness of the entire process from notice to cancel to eventual cancellation. In the event that the foregoing issues are not

decided in his favour, the applicant moves me to determine the constitutional validity of s 18 of the Deeds Registries Act."

15. At p 11 of the said judgment the learned judge further stated *inter alia*:

> "In conclusion, I am unable to arrive at the conclusion that the grounds upon which the first respondent directed the cancellation of the deed of transfer are unreasonable or irrational.… The substantive and procedural issues raised against the deed are foundational and successfully attack its validity."
>
> Finally, at p 14:
>
> "I find in the full circumstances of the matter that the applicant has not proven a case for the granting of the order he seeks in this case. … In the circumstances I order as follows:
>
> 'The application be and is hereby dismissed with costs.'"

THIS APPEAL

16. Aggrieved by the decision of the court *a quo*, the appellant appealed to this Court raising the following grounds of appeal:

"1. The court *a quo* erred in law and in fact and grossly misdirected itself in finding as a matter of common cause that the rights and obligations of the parties were regulated in terms of a Public Private Partnership Agreement when appellant had put in issue and disputed being bound by the said agreement.

2. The court *a quo* erred at law and in fact and grossly misdirected itself in failing to come to the conclusion that the appellant's title deed could not be validly cancelled without appellant's lease to buy agreement having been terminated.

3. The court *a quo* erred at law and in fact and grossly misdirected itself in not coming to the conclusion that the appellant paid the full purchase price on the 15 of December, 2008 in terms of a valid lease-to-buy agreement entered into

on the same date and that the appellant's lease-to-buy agreement is not a cession or transfer of rights from his child.

4. The court *a quo* erred at law and in fact and grossly misdirected itself in coming to the conclusion, contrary to the established evidence and facts in appellant's papers, that appellant was obliged and had fatally failed to pay development fees to the fifth respondent in terms of the lease-to-buy agreement in the following circumstances:

    (a). when no such obligation arises from the lease to buy agreement;
    (b). when fifth respondent has no privity of contract to the agreement;
    (c). when no cause of action for development fees had been placed and proven before the court by the fifth respondent;
    (d). when evidence had been placed before the court *a quo* to prove payment of the development fees by appellant to fifth respondent under protest.

5. The court *a quo* erred at law and in fact and grossly misdirected itself in disregarding and failing to give reasons for such disregard, of relevant considerations and evidence in support of appellant's claim including the following:

    (a). The expert's forensic report,

    (b). The developments made on the property,

    (c).The length of time appellant had occupied the property which gross misdirection results in a capricious and arbitrary determination.

6. The court *a quo* erred at law and in fact and grossly misdirected itself in failing to hold that the first respondent's actions were marred by gross irregularity; gross unreasonableness; irrationality; bias; arbitrariness; illegality; unlawfulness and procedural impropriety.

7. The court *a quo* erred at law and in fact and grossly misdirected itself in failing to hold that the first respondent's conduct amounted to unlawful expropriation.

8. The court *a quo* erred in failing to hold that the provisions of s 18 of the Deeds Registries Act are inconsistent with ss 56, 68 and 71 of the Constitution of Zimbabwe.

9. The court *a quo* erred at law and grossly misdirected itself in its assessment of the constitutional validity of s 18 of the Deeds Registries Act by, *inter alia*, applying inapplicable provisions of s 308 of (the) Constitution and the common law doctrine of vindication.

10. The court *a quo* erred in awarding costs against the appellant in a constitutional matter of public importance."

17. The appellant seeks the following relief:

"1. That the appeal be allowed with costs.

2. That the judgment of the court *a quo* be set aside and substituted with the following:

'1. The application be and is hereby granted with costs on a legal practitioner - client scale.'"

THE APPELLANT'S SUBMISSIONS BEFORE THIS COURT

18. In his primary submission and before addressing the merits of the appeal, Mr *Dzvetero*, for the appellant submitted, *inter alia*, that the court *a quo* failed to deal with issues and points of law raised by the appellant. He submitted that the appellant relied on s 3 of the AJA, but the court *a quo* did not deal with the issue, thereby justifying interference with its decision. He relied on the case of *Gwaradzimba N O* v *C J Petron & Co (Pty) Ltd* 2016 (1) ZLR 28 (S), where this Court remitted a matter to the court *a quo* for determination of a preliminary point taken by the appellant after it held that it was improper for the lower court to determine substantial factual and legal issues without first disposing of the point *in limine*.

19. Mr *Dzvetero* also submitted that the first respondent did not give any reasons for disregarding or declining the representations made by the appellant. He argued that the first respondent proceeded to order the cancellation of the title deed without making a determination of the matter and without observing the appellant's right to be heard as encapsulated in the *audi alteram partem* rule. Further, that when asked whether a decision had been made, the first respondent did not respond to the query, which in itself constitutes justification for review as he did not fulfill his obligation to communicate his decision. It was his contention that due to the court *a quo*'s non-compliance with ss 3 and 4 of the AJA, its decision ought to be vacated.

THE FIRST RESPONDENT'S SUBMISSIONS

20. Mr *Machingauta*, for the first respondent, submitted that the appellant's objections were responded to but the response was not part of the appeal record. His unsuccessful attempt to produce from the bar a document supposedly to prove this averment was met with stiff resistance from Mr *Dzvetero* who challenged the procedural propriety of such a course. Mr *Machingauta* further submitted that there was partial compliance with the requirements of s 3 of the AJA by way of the invitation made by the first respondent to a round table conference. He also conceded that the first respondent breached the provisions of s 3 of the AJA after the cancellation had been effected. It was his further submission that the application for review was partially justified. He argued that the court *a quo* ought in the circumstances to have referred the matter to trial and that such a course would have cured the non-compliance with s 3 of the AJA as all the evidence would have been produced.

FIFTH RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

21. Mr *Bwanya*, for the fifth respondent submitted that the AJA was not applicable at all and cannot be relied on in this matter because the Deeds Registries Act is a specific statute that prescribes, in s 18, the procedure to be adopted, which the first respondent faithfully followed. He submitted that the notice given to the appellant outlined the reasons for the cancellation and that sufficed. He also submitted that although the first respondent was not required to do so by law, he invited the first appellant to a round table conference where the appellant would have made his representations if he had attended and the latter's officials would have answered them. He further submitted that the Deeds Registries Act does not require the first respondent to give reasons. He argued that there was substantial compliance by the first respondent to the process set by statute for him to follow.

APPELLANT'S SUBMISSIONS IN REPLY

22. Mr *Dzvetero*, in reply, submitted that the AJA is of general application and is applicable to the matter at hand.

ISSUES FOR DETERMINATION

23. Arising from the submissions made before this Court, the issue that must first be determined before any others that would arise from the grounds of appeal, is whether or not the court *a quo* failed to deal with or determine an issue or point of law that was raised before it.

24. The issue raised by Mr *Dzvetero* that the court *a quo* failed to deal with or determine an issue that was placed before it, is a point of law that needs to be determined first as it has the potential of charting the course of this matter in a manner that may obviate the need or even propriety of delving into any other issues.

25. On a perusal of the appellant's application *a quo*, it is self-evident from paras 8 and 41, amongst others, of his founding affidavit, and other documents, that he relied and founded his application, amongst other provisions, on ss 3 and 4 of the AJA. The pertinent averments/allegations in this regard were carried through in paras 10, 11, 16, 17, 18, 19 of the appellant's heads of argument before the court *a quo* where s 5 of the AJA was also referred to. On the other hand, a perusal of the judgment of the court *a quo* shows that the issues relating thereto were not dealt with or determined. Neither Mr *Machingauta* nor Mr *Bwanya* addressed the point or denied that the issue was raised by the appellant in his application *a quo.* Neither of the two counsel showed where, in its judgment, the court *a quo* determined the issue. As this was the crux of the appellant's preliminary point of law before this Court, it was incumbent upon both counsel to make specific responses thereto.

26. In the first respondent's opposing affidavit before the court *a quo*, the appellant's para 8 was purportedly responded to in a non-specific manner in para 4 which was a response "ad para 5-12." However, no part of the response addresses the non-compliance with the provisions of ss 3 and 4 of the AJA. Para 41 is not addressed at all. The fifth respondent's opposing affidavit also does not address the alleged non-compliance with ss 3 and 4 of the AJA.

27. In *Gwaradzimba N O* v *C J Petron & Co (Pvt) Ltd*, (*supra*), what was before this Court was an appeal that emanated from a review application in which the respondent objected that the application was not properly before the court *a quo*. The lower court had noted the objection and did not dispose of it but dealt with the merits. At 31H – 32E, GARWE JA (as he then was) stated as follows:

"In the present case, the substantive issue that was determined by the court *a quo* did not dispose of the matter. The question still remained whether the application was, in the first instance, properly before the court. This was not an issue that the court *a quo* could ignore or wish away. The court was obliged to consider it and decide whether the matter was properly before it. It was, in short, improper for the court to proceed to determine the substantive factual and legal issues without first determining the propriety or otherwise of the application itself. If the court, as it appears to have done, tacitly accepted that the matter was properly before it, then reasons for such tacit acceptance should have been given.

The position is well settled that a court must not make a determination on only one of the issues raised by the parties and say nothing about other equally important issues raised, "unless the issue so determined can put the whole matter to rest" see *Longman Zimbabwe (Pvt) Ltd* v *Midzi & Ors* 2008 (1) ZLR 198 (S) 203D.

The position is also settled that where there is a dispute on some question of law or fact, there must be a judicial decision or determination on the issue in dispute. Indeed the failure to resolve the dispute or give reasons for a determination is a misdirection, one that vitiates the order given at the end of the trial – see *Kazingizi* v *Dzinoruma* 2006 (2) ZLR 217 (H); *Muchapondwa* v *Madake & Ors* 2006 (1) ZLR 196 (H) 196G-G, 201A; *GMB* v *Muchero* 2008 (1) ZLR 216 (S) 221C-D.

Although it is apparent in this case that the judge in the court *a quo* may have considered the question whether the matter was properly before him when he considered the merits, a large portion of those considerations remained stored in his mind instead of being committed to paper. In the circumstances, this amounts to an omission to consider and give reasons, which is a gross irregularity – see *S* v *Makawa & Anor* 1991 (1) ZLR 142 (S).

Consequently the failure by the court *a quo* to specifically determine the question whether or not the application was properly before it, its tacit acceptance that it was the position and the consequent failure on its part to give reasons why it had proceeded to deal with the substantive issues in the light of the preliminary point taken, vitiated the proceedings.

In the light of the above conclusion, it becomes unnecessary to deal with the rest of the issues raised by the parties to this appeal."

The court thereafter determined that the most appropriate course would be for the matter to be remitted to the court *a quo* for a determination whether, in the first instance, the application was properly before it as well as consequential questions that were raised in that case.

28. In *casu*, the appellant has established that the court *a quo* did not determine the issues placed before it relating to the alleged non-compliance with provisions of the AJA. Such non-compliance, has the effect of vitiating its decision. This Court cannot transpose itself into the shoes of the court *a quo* and make the determination. It is trite that it is undesirable for this Court to place itself in a position where it effectively becomes the court of first and last instance. The decision of the court *a quo* will thus be vacated and the matter remitted to it for the determination of the issues raised to be made. This is a case where, in our view, the justice of the case warrants that each party bears its own costs.

29. Accordingly, it is ordered as follows:

1. The appeal be and is hereby allowed.
2. The judgment of the court *a quo* is hereby set aside.
3. The matter is remitted to the court *a quo* for determination firstly of the issue of non-compliance with the provisions of the Administrative Justice Act, [*Chapter 10:28*] and thereafter the rest of the issues, consequent upon the determination of the first issue.
4. Each party shall bear its own costs.

CHIWESHE JA : I agree

MUSAKWA JA : I agree

Antonio & Dzvetero, appellant's legal practitioners

Civil Division of the Attorney General's Office, 1st respondents' legal practitioners

Jiti Law Chambers, 5th respondents' legal practitioners