FIONA TONGAWASHE
versus
TAFARA ANDREW MUTINHIRI

HIGH COURT OF ZIMBABWE
TAGU & MUCHAWA JJ
HARARE, 26 October 2021 and 28 March 2022

Civil Appeal

K T Mukanganwi, for the appellant
C Kavhumbura, for the respondent

MUCHAWA J: This is an appeal against a judgment of the Magistrates Court which ordered the eviction of the appellant and all those claiming occupation through her from subdivision 2 of Solitude A of Alexander farm, Marondera. The respondent had filed a court application for an eviction order claiming that he was the holder of rights in respect of the land in question by virtue of an offer letter from the Ministry of Lands, Agriculture, Water, Climate and Rural Resettlement. He averred that despite his clearly defined rights, the now appellant had forcibly evicted him from the land, taking occupation thereof. Further, he stated that he was suffering severe social and economic prejudice as he had been rendered homeless and was unable to carry out his farming activities.

In opposition, the appellant had raised several points in *limine* as follows:

a. That the land in issue was private land held under title deed No. 6782/1985 by Dorothy Elizabeth Rosemary Marshall and that the respondent's offer letter was therefore fraudulent.
b. That the magistrates' court had no jurisdiction to give a declaratory order as there was a dispute as to who the real owner was and any finding would in essence be a declaratory order.
c. That the application for eviction was against the wrong person as the appellant was not the title holder to the land.

d. That there were material disputes of fact regarding the authenticity of the respondent's offer letter as it was not issued by the allocating authority.
e. That there was a material non joinder of the Minister of Lands.
f. That the matter was *lis pendens*
g. That the respondent's answering affidavit was wrongly before the court and should be expunged as it introduced new documents before the court.

The matter was also opposed on the merits on the grounds that the respondent was neither the owner nor holder of any rights in the land in issue, which land was private property and had never been gazetted for compulsory acquisition. It was also denied that the respondent had ever taken occupation of the farm and that he had been evicted therefore, as alleged.

The parties had also filed heads of argument and appeared for oral hearing on 31 March 2021. The record shows that such submissions canvassed the points *in limine* only and the magistrate concluded by saying that he would deliver his ruling on the application on 16 April 2021 at 1415hours. The ruling was then collected from the clerk of court. The appellant is disgruntled with the outcome.

Seven grounds of appeal have been placed before this court as follows;

1. The court a quo grossly misdirected itself when it granted an order for the eviction of the appellant before she was heard. The court a quo ought to have dealt with the points *in limine* raised by the appellant first then proceed to hear the parties on the merits.
2. The court a quo grossly misdirected itself when it disregarded the fact that the parties are currently before the High Court of Zimbabwe on the same dispute and ought to have stayed proceedings pending the finalization of the High Court matter under case No HC 502/21.
3. The court a quo grossly misdirected itself when it made a finding that the offer letter was authentic which on its own is a declaration which the magistrates' court has no jurisdiction over.
4. The court a quo grossly misdirected itself when it failed to appreciate that the respondent failed to rebut the opposing affidavit in his answering affidavit which left the appellant's defense unchallenged.
5. The court a quo grossly misdirected itself when it allowed the respondent to bring new evidence and attach documentary evidence in an answering affidavit.

6. The court a quo erred when it failed to realize that the respondent failed to demonstrate that the appellant was resident in a piece of land for which his purported offer letter relates to or not.
7. The court a quo erred when it failed to appreciate that the appellant has stayed at the piece of land at the instance of the owner of the real right, and whom the respondent ought to have evicted the principal and not the appellant.

It is prayed that the appeal succeeds with costs, the judgment of the court a quo be set aside and be substituted as follows;

> "It is ordered that the application for eviction of the respondent be and is hereby dismissed with costs on an attorney/client scale."

We heard the parties and reserved our judgment. This is it and I deal with the grounds of appeal in turn below.

Ground 1 of Appeal

Upon being quizzed by the court on the propriety of this ground as an appeal ground, Mr *Mukanganwi* conceded that as this was a ground concerned with the method of trial or the procedural proprieties of the proceedings, it should have been brought by way of an application for review. This concession was well made particularly if one has regard to the relief sought. The appellant should have been requesting an opportunity to be heard on the merits instead of praying for the setting aside of the judgment of the court a quo. Consequently, this ground of appeal is struck out for being improperly before the court.

Ground 2 of Appeal: Whether the court a quo ought to have stayed proceedings on account of the pending High Court case HC 502/21

In her opposing affidavit before the court a quo, the appellant did not raise the point that there was a matter pending before the High Court. It was in the heads of argument, that the appellant raised the point that there was an application for a declaratory order held under HC 502/21 pending at the High Court and requested that the proceedings before the court a quo be stayed until the High Court matter was finalized. In oral submissions before the court a quo, this point was not persisted with, however.

It was argued through the heads of argument that the matter is *lis alibi pendens* as it was being litigated at the High Court and that proceeding with the matter amounted to constructive contempt of court. Reference was made to the cases of *Nkululeko Mabhena v PG Industries (Zimbabwe) Limited &ORS* HB 156/15 and *Green Fuels Pvt Ltd v Harald Retbauer & Another* HH 805/15. It was averred that the court a quo should have stayed proceedings.

The respondent's counter argument is that though it is not disputed that there is a pending High Court matter, same was not drawn to the attention of the magistrate and there could have been no expectation that proceedings would be stayed. Further, it was averred that a proper application for stay of proceedings should have been made and since none was made, the decision to proceed to hear the matter cannot be impugned.

In the judgment of the court a quo, the magistrate opined that the respondent (now appellant), had objected to the jurisdiction of the court on account of the pending High Court matter in which a *declaratur* was sought. The court stated this was the only information at hand and there was no proof given to show that a matter was indeed pending which would influence the eviction matter before the court. It is then stated that if the stay was sought, then a separate application for stay should have been filed.

In the response to the appeal, the magistrate also states that the stay of proceedings was not prayed for in the hearing before her and she was not favoured with such an application and could not therefore have gone on a frolic of her own.

The application for eviction of the appellant was filed on 9 March 2021 and served on the appellant on the same date. A perusal of case HC 502/21 shows that it was on 10 March 2021 that the appellant filed a court application for *a declaratur* in which it was sought that the offer letter issued in favour of the respondent on 18 September 2015, in respect of subdivision 2 of Solitude A of Alexandra, Marondera, be declared unlawful and wrongful and consequently null and void. It was also sought that The Minister of Lands, Agriculture Climate, Water and Rural Resettlement, cited as second respondent, be ordered to withdraw the offer letter and that the land in issue be declared private property held under title deed 6782/85.

The case of *Green Fuels (Pvt) Ltd v Retbauer and Anor supra* castigates the practice by litigants, of mounting fresh litigation before a different forum in order to defeat the objects of earlier litigation already before the courts. MATHONSI J (as he then was), stated as follows;

> "There must be certainty in court proceedings and it is undesirable for parties to ignore pending litigation and proceed as if it does not exist and then create a situation of clumsiness which will be difficult to reverse. The administration of justice will suffer if that were to be allowed. There is always a need to keep the integrity of the judicial process and the court has a duty to control the processes in order that they comport with the proper functioning of the judicial system."

In casu, the appellant seems to have mounted the application for a *declaratur* in direct response to the application for eviction, acting as if there was nothing pending before the Magistrates' Court. That is the kind of conduct referred to as unacceptable. The reason the appellant did not attach a copy of the application for a *declaratur* might be precisely that she was aware that she had filed this after the application for eviction. Indeed, with the appellant's mere say so and no further proof of the application before the court a quo, the court was constrained to make a proper assessment of how the two matters influenced each other.

Though the issue of the pending High Court matter was raised in the heads of argument, it was not persisted with in oral arguments and the appellant opted to raise the issue that the matter was *lis pendens* on account of a criminal complaint having been raised by the respondent against appellant who was then arrested pursuant to section 3 of the Gazetted Lands Act.

I take a leaf from the matter of *Rolling River Enterprises (Pvt) Ltd & ORS v Minister of State for National Security, Land Reform and National Security & ORS* HH 68/06. GOWORA J (as she then was), stated as follows;

> "However a defence of *lis pendens* is not an absolute bar to an action or as in this case an application. The matter is in the discretion of the court which is guided invariably by considerations of convenience and fairness. The court has a discretion whether to stay the action or to refuse to uphold the defence of *lis pendens* on the grounds that it would be more just and equitable that the matter proceed."

The court *a quo's* exercise of discretion in favour of proceeding with the matter and not staying proceedings, cannot be faulted given the circumstances outlined above. Consequently, I find no merit in this ground of appeal.

Ground 3 of Appeal: Whether the Court a quo's factual findings on the authenticity of the offer letter amounted to a declaration and if so, whether it had jurisdiction

The appellant's case is that the court a quo erred by finding that the offer letter produced by the respondent was authentic and by so doing overstepped its boundaries as this amounted to making a declaration. The Court was referred to s 14 of the High Court Act to show that it is in

fact the High Court which has jurisdiction to make declaratory orders. It was then contended that the Magistrates Court as a creature of statute, has no such jurisdiction.

On the contrary, the respondent submitted that the court *a quo* simply made a factual finding as to whether the respondent had a clear right to the land which appellant was in occupation of without his consent. It was argued that the validity of the offer letter is a purely administrative issue which can only be challenged before the Administrative Court. Further it was contended that the appellant simply registered her disapproval of the offer letter in her opposing affidavit but failed to produce any proof to the effect of a challenge to the validity of the offer letter nor did she seriously apply for stay of proceedings pending such challenge.

On this issue this is what the court a quo had to say;

> "Respondent contended that the matter before the court is essentially an ownership dispute. That is to say the applicant is claiming to be the owner or holder of the right (sic) on the property in question. As such the order sought by this applicant has the effect of declaring the offer letter valid and this court does not have powers to grant declaratory orders. The applicant in his response stated that the matter before this court is eviction claim as opposed to *declaratur* and this court has jurisdiction. The applicant further averred that he is exercising his right to the property in the form eviction not *declaratur.*
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> I am of the view that the court has not been called upon to make a declaratory order. The application before the court has been and is that of eviction. As such the court is only called upon to determine the basis of the claim and whether it warrants a relief. I do not see what take away this court's jurisdiction to preside over an application of this nature. The point *in linime* (sic) therefore cannot succeed."

The court simply made factual findings on the evidence placed before it in relation to the issue at hand. Before it was an offer letter and the court a quo simply went with what was held in *CFU & ORS v Minister of Lands & Rural Resettlement & ORS* SC 31/10 that the holder of an offer letter has *locus standi* to sue for eviction of an illegal occupier of land allocated to him. The appellant's case was that the respondent had a fake offer letter because the land in issue was private property and had not been gazetted. Further it was also stated that the offer letter had not been issued by the allocating authority. Before the court was the offer letter, proof of compulsory acquisition of the land and a confirmation letter from the relevant ministry.

The issue of the validity or otherwise of the offer letter was not before the court a quo and it did not pronounce itself on that. It simply made factual findings that, on a balance of probabilities, the respondent had established that he was the holder of an offer letter and had the right to sue for the eviction of the appellant who was found to be an illegal occupier as she claimed

to occupy through the previous owner of compulsorily acquired land. There is no merit in this ground of appeal and I dismiss it.

Ground 4 of Appeal: Whether the appellant's opposing affidavit remains unchallenged through the answering affidavit

The appellant seems to be laboring under the mistaken impression that the respondent's case was laid out in the answering affidavit and whatever was not denied in the answering affidavit should be taken to have been admitted. The correct position is that the applicant's case stands or falls on his founding affidavit. In there he pleaded that he was the holder of rights in respect of the land in issue due to an offer letter awarded to him by the Ministry of Lands, Agriculture, Water, Climate and Rural Resettlement. He attached the offer letter and averred that the appellant had no lawful authority to occupy the land and he was seeking an order of eviction. In opposition, the appellant stated that she was in occupation through the private owner of the land which had not been compulsorily acquired. It was also questioned why the offer letter had been issued through the office of the President and Cabinet through the Minister of State for Mashonaland East and not through the Minister of Lands.

In the answering affidavit, the respondent explained that the offer letter originated from the Ministry of Lands but was only administratively handed over by the office of the Governor. A letter of confirmation was then attached from the Ministry of Lands. On the question of gazetting of the land, General Notice 330 A of 2001 was attached. It was reemphasized that the respondent was the holder of rights over the land in question and the appellant was in occupation without his consent and should therefore be evicted.

I am at a loss as to what the appellant means when she says her opposing affidavit remained unchallenged. She may have been looking for a particular form of rebuttal. What was before the court, in substance was a clear challenge to the opposing affidavit. There is no merit in this ground of appeal.

Ground 5 of Appeal: Whether the court erred in allowing the respondent to bring new documentary evidence through the answering affidavit

It was submitted that the court a quo should not have allowed the respondent to attach new documentary evidence in his answering affidavit as an application stands or falls on the founding

affidavit. The cases of *Muchini v Adams & ORS* SC 47/13, *Fuyana v Moyo* SC 54/06 and *Austerlands (Pvt) Ltd v Trade and Investment Bank Ltd & ORS.*

The respondent's case is that the documentary evidence only expounded on what had already been pleaded in the founding affidavit and was necessitated by what was in the opposing affidavit.

The case of *Moyo v Fuyana supra* is unhelpful in *casu* as it concerned a litigant who filed affidavits and other voluminous documents in total disregard of the Rules to the point of harassment of the court. That of *Austerlands supra* related to the raising of a point for the first time on appeal. The case which falls squarely with this one is that of *Muchini v Adams supra*. In that case a totally new averment which had not been made in the founding affidavit was raised later. It was correctly held that an application stands or falls on the founding affidavit. However, that position is the general rule. I quote from the *Muchini v Adams* case below;

> "It is trite that an application stands or falls on the averments made in the founding affidavit. See *Herbstein* & *van Winsen* the Civil Practice of the Superior Courts in South Africa 3rd ed p 80 where the authors state:
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> "The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out"

The clear position of the law is that the main foundation of an application should be set out in the founding affidavit and should not be a skeleton case. In *casu* the respondent set out that his rights to the land were based on an offer letter and attached same. Where as in *casu*, the appellant then questioned whether the land had been compulsorily acquired, attaching the General Notice No 330A of 2001 cannot be seriously impugned. This falls within the permissible supplementing of allegations as is the letter of confirmation from the Ministry. There was no error on the part of the court a quo and this ground of appeal is also dismissed.

Ground 6 of Appeal: Whether the court a quo should have realized that the respondent failed to demonstrate that the appellant was resident on the land in question

It is unclear to me how this came up as a ground of appeal. Nowhere in the record did the appellant put in issue that she was occupying a land different from the one she was being evicted from. This issue which is divorced from those which were before the court, should not detain me further and I dismiss it.

Ground 7 of Appeal: Whether the respondent should have evicted the owner of the land and not the occupier

The appellant submitted that the owner of the property should have been joined as she is staying at the property through an arrangement with the owner.
The court a quo cannot be impugned for finding that eviction relief is sought against the person in occupation of a property and not necessarily against the owner of a property and that since it was found that the appellant was in occupation without the consent of the holder of rights to the land, the relief sought was warranted.

I dismiss this ground of appeal too

The appeal is accordingly dismissed with costs, for lack of merit.

TAGU J AGREES ----------

Mugiya & Muvhami Law Chambers, appellant's legal practitioners
Legal Aid Directorate, respondent's legal practitioners