

DISTRIBUTABLE (17)

LIFORT TORO
v
(1) VODGE INVESTMENTS (PRIVATE) LIMITED
(2) MANYAME RURAL DISTRICT COUNCIL
(3) MINISTER OF LANDS AND RURAL RESETTLEMENT

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, BHUNU JA & UCHENA JA
HARARE, NOVEMBER 7, 2016 (Released on 27 February 2017)

R Mabwe, for the appellant

R Makamure, for the first respondent

No appearance for the second respondent

M Chimombe, for the third respondent

UCHENA JA: On 7 November 2016 we, after reading documents filed of record and hearing counsel’s submissions upheld the appellant’s appeal and granted the following order:

- “1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:
“The application is dismissed with costs”.

We indicated that detailed reasons for granting that order would follow. These are they.

The appellant (Lifort Toro) is a beneficiary of the Land Reform programme. He was allocated an A2 Farm Subdivision 1 of Beatrice Central.

The first respondent Vodage Investments (Pvt) Ltd, is a company registered in terms of the laws of Zimbabwe. Despite several suspicious details in the agreement on which it relies, it claims to be a holder of a lease to buy agreement entered into between it and Manyame Rural District Council (the second respondent), in respect of the same piece of land allocated to the appellant.

The third respondent is the Minister of Lands and Rural Resettlement. He allocated the land in dispute to the appellant.

The land in dispute was by Proclamation 3 of 2012 S.I. 115 of 2012 incorporated into Beatrice Urban area which is administered by the second respondent. By letter dated 10 June 2013, the third respondent handed over the land in dispute to the Minister of Local Government, Rural and Urban Development. It is now urban land which cannot be allocated for agricultural purposes.

It is common cause that the third respondent conceded that he no longer has authority over the disputed land. It is obvious that the appellant will eventually have to leave that piece of land. The third respondent has, in view of the changed circumstances, offered him another piece of land.

The first respondent issued summons in the Magistrate's Court for the eviction of the appellant. The appellant entered appearance to defend. The first respondent applied for summary judgment which the appellant opposed. The appellant's opposition was premised on the first respondent's lack of locus standi to evict him. He argued that the first respondent being a lessee who had not taken occupation had no locus standi to evict him. In determining the application for summary judgment the magistrate at pp 4 to 5 of his judgment said:

“Based on that authority, I agree that the applicant does not have the *locus standi* to evict the second respondent but that it is the acquiring authority who (sic) does. I therefore feel that **the application, for Summary judgment, should not be granted, as applicant does not have the *locus standi* to institute these proceedings**”.
(emphasis added)

After the tag of incapacity to institute eviction proceedings had been placed on it, the first respondent made a subsequent application to the High Court for the eviction of the appellant. The appellant opposed the application on the basis that the dispute between them was *res judicata*, that there were material disputes of fact which could not be resolved through the application procedure and that the applicant did not have *locus standi* to institute eviction proceedings against him.

The High Court held that the issue of the appellant’s eviction by the first respondent was not *res judicata* and that the first respondent had *locus standi* to evict the appellant. It granted the first respondent’s application for eviction without determining whether or not there were material disputes of fact which could not be resolved through the application procedure.

The appellant appealed against that decision to this court. He in his grounds of appeal submitted that the court *a quo* erred in the following respects:

1. In holding that the issue of his eviction by the first respondent was not *res judicata*.
2. In holding that the first respondent had *locus standi* to evict him.
3. By not determining the issue of there being material disputes of fact which cannot be resolved through the application procedure.

I deal with each ground in turn.

1. *RES JUDICATA*

Mrs *Mabwe* for the appellant submitted, that the Magistrate's decision that the first respondent did not have *locus standi* to evict the appellant extinguished the first respondent's claim to evict the appellant. She relied on the cases of *Nyaguwa v Gwinyayi* 1981 ZLR 25 and *Chimponda & Anor v Muvami* 2007 ZLR (2) 326. Miss *Makamure* for the first respondent supported the court *a quo's* decision that the Magistrate's decision was "founded purely on adjectival law, regulating the manner in which the court is to be approached for the determination of the merits of the matter". I do not agree.

The tag of incompetence placed on the first respondent by the Magistrate is definitive and final until set aside by a competent court. The High Court had no authority to set it aside as it was not sitting as a review or an appellate court. In the *Nyaguwa* case (*supra*) PITMAN J at p 27 A to C said:

"I was of the opinion that in this country, each court is a creature of Statute, and its powers are created and defined by statute. The function of every civil court is to recognize what it believes to be the rights of the parties before it. Once a civil court has given such recognition, that recognition must be accepted by each of the other courts, whatever its relative position in the hierarchy of courts may be, unless authority to overrule such recognition has been conferred upon it by statute. If one court were to claim that it has some inherent power to overrule another court, instead of a power specifically created by statute, in effect it will be claiming the power to nullify the body of statute law which specifically relates to the establishment and powers of each of the civil courts in the country. As no power to overrule the decisions of magistrate's courts has been vested in the General Division of the High Court, I considered that this court could not grant the order sought by the petitioner".

The High Court, sitting as a court of first instance does not have authority to disregard or overrule extant decisions of the Magistrate's court. The court *a quo* should therefore have declined to determine the already determined issue of the first respondent's *locus standi* to evict the appellant, while the decision of the Magistrate remained extant.

The court *a quo* failed to appreciate that the first respondent's application was aimed at seeking a re determination of the first respondent's *locus standi* to evict the appellant or the avoidance of the magistrate's determination of that issue. The failure to appreciate the nature of the application led to its failure to realise that it had no authority to overrule the Magistrate's definitive finding that the first respondent had no *locus standi* to evict the appellant. In the case of Chimponda (*supra*) MAKARAU JP (as she then was) at pp 329G to 330 C said:

“The requirements for the plea of *res judicata* are settled. Our law recognizes that once a dispute between the same parties has been exhausted by a competent court it cannot be brought up for adjudication again as there is need for finality in litigation. To allow litigants to plough over the same ground hoping for a different result will have the effect of introducing uncertainty into court decisions and will bring the administration of justice into disrepute.

For the plea to be upheld, the matter must have been finally and definitively dealt with in the prior proceedings. In other words, **the judgment raised in the plea as having determined the matter must have put to rest the dispute between the parties, by making a finding in law and / or in fact against one of the parties on the substantive issues before the court or on the competence of the parties to bring or to defend the proceedings. The cause of action as between the parties must have been extinguished by the judgment.**

A judgment founded purely in adjectival law, regulating the manner in which the court is to be approached for the determination of the merits of the matter does not in my view constitute a final and definitive judgment in the matter. It appears to me that such a judgment is merely a simple interlocutory judgment directing the parties on how to approach the court if they wish to have their dispute resolved.” (emphasis added)

A determination by the Magistrate on the competence of the first respondent to institute eviction proceedings against the appellant is not a finding in adjectival law regulating the manner in which the court is to be approached for the determination of the merits of the matter. It is a final and definitive determination barring the first respondent from instituting proceedings on the same cause of action against the appellant. Such a finding finally and

definitively determines the capacity of a litigant to institute or defend the same cause of action before the courts.

The court *a quo* failed to distinguish between the Magistrate's dismissal of the application for summary judgment, which could be interlocutory, from the reason for the dismissal which is definitive and finally closes the door to the first respondent due to legal incompetence to litigate over the appellant's eviction. The Magistrate's judgment remains extant. The first respondent could not therefore be entertained by any court on this issue except on appeal or review against the Magistrate's decision that it had no *locus standi* to evict the appellant.

2. Whether the first respondent has *locus standi* to evict the appellant?

The issue of *locus standi* was improperly before the court *a quo* because it was *res judicata*. It had been finally and definitively determined by the Magistrate's court, and remains so determined until that decision is upset by a properly constituted review or appellate court. The court *a quo* should not have made a determination on that issue. This Court sitting as an appellate court over the High Court's decision cannot pronounce itself over a matter which is not properly before it and over which there is an extant judgment which has not been appealed against. The court *a quo* therefore erred when it determined an issue which was *res judicata*.

3. Whether or not the court *a quo* erred by not determining whether or not there were disputes of fact which could not be resolved through the application procedure?

The purpose of litigation is for the court to determine disputes placed before it by the parties. The court must therefore give reasons stating how it resolved all the disputes placed before it, unless the determination of one or some of the issues clearly renders the

determination of one or other issues unnecessary. The issue of whether or not there were disputes of fact was critical as to whether or not the respondent had used the correct procedure. It could have established that the application procedure was inappropriate. That in turn would have left the court *a quo* with the option of either dismissing the application or referring it to trial. There would in either of the two options have been no need to determine the other issues. Therefore the issue of whether or not there were material disputes of fact should have been determined before the court could determine other issues. The court *a quo* therefore erred when it failed to determine this critical issue. In the case of *Gwaradzimba v C. J. Petron and Company (Pvt) Ltd* SC 12/16 GARWE JA said:

“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” - *Longman Zimbabwe (Pvt) Ltd v Midzi & Ors* 2008 (1) 198, 203 D (S)

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. *Charles Kazingizi v Revesai Dzinoruma* HH 106/2006; *Muchapondwa v Madake & Ors* 2006 (1) ZLR 196 D—G 201A (H); *GMB v Muchero* 2008 (1) ZLR 216 at 221 C-D (S)”.

I therefore agree that the court *a quo* misdirected itself when it failed to determine the issue of whether or not there were material disputes of fact.

It was in view of these findings, that we upheld the appeal and granted the order set out on page 1 of this judgment.

ZIYAMBI JA:

I agree

BHUNU JA:

I agree

Messers Koto and Company, appellant's legal practitioners.

Messers Kantor & Immaman, respondent's legal practitioners