

**REPORTABLE (65)**

**TENDAI MASHAMHANDA**  
**v**  
**BARIADE INVESTMENTS (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE**  
**UCHENA JA, CHIWESHE JA, MWAYERA JA**  
**HARARE: 29 FEBRUARY 2024 & 18 JULY 2024**

*L. Madhuku with K. Rangarirai, for the appellant*

*T. L. Mapuranga, for the respondent*

**UCHENA JA:** This is an appeal against the whole judgment of the High Court (the court *a quo*) dated 29 November 2023 in which it granted the respondent's application for the eviction of the appellant from a property known as subdivision C of Lot 6 of Lots 190,191,193,194 and 195 Highlands Estates of Welmoed also known as No 41 Ridgeway North Highlands, Harare, hereinafter referred to as the property.

**BACKGROUND FACTS**

[1] The property in dispute belonged to Puwai Chiutsi (the former owner) before it was sold by the Sheriff to the respondent. It was in September 2017 sold to the respondent by the Sheriff in a judicial sale, in execution of a judgment debt owed by the former owner. The sale was subsequently confirmed by the High Court. In February 2019, after the confirmation of the

sale and before the property could be transferred to the respondent, the former owner fraudulently sold it to the appellant.

- [2] In September 2019 the respondent noticed that the appellant was making demolitions and renovations on the disputed property. It applied for an interdict in the High Court. A provisional order was granted by CHAREHWA J interdicting the appellant from continuing to make any developments on the disputed property.
- [3] In defiance of the order issued by the High Court the appellant continued to make developments on the property.
- [4] In a judgment handed down by the Supreme Court on 16 February 2022, under SC 24/22, this Court directed that title be registered in respondent's name due to the fact that the property had been fraudulently sold to the appellant. It is important to note that that judgment is still extant. The property was transferred to the respondent on 5 May 2022. Despite the fact that the respondent is the owner of the property, the appellant refused, failed and or neglected to vacate the property.
- [5] The appellant's challenge against this court's judgment in SC 24/22 in the Constitutional Court under CCZ 12/22 was dismissed for lack of merit
- [6] After protracted litigation in the Superior Courts of this country in which the respondent successfully defended its ownership of the property, it filed an application in the court *a quo* for the *rei vindicatio* to recover possession of the property from the appellant.

- [7] The appellant opposed the application for eviction on the grounds that: there was a pending Constitutional Court application which sought to set aside the Supreme Court's judgment under SC 24/22 referred to *supra*, there were pending criminal investigations raising fraud allegations impacting on the respondent's title to the property and that the respondent was depriving the appellant of his property contrary to the provisions of s 71 of the Constitution of Zimbabwe Amendment (No.20) Act 2013.
- [8] He, without specifically setting out the defense of an improvements lien nor specifying the exact value of the improvements sought to rely on the improvements made in defiance of a court order as an improvement lien to resist the respondent's application for the *rei vindicatio*.

#### **DETERMINATION BY THE COURT A QUO**

- [9] The court *a quo* granted the respondent's application and ordered the eviction of the appellant from the property. In arriving at its decision the court *a quo* took into consideration that the appellant continued developing the property in defiance of the order issued by the High Court. It also took into consideration findings made by this court in judgment No SC 24/22 and findings of the Constitutional Court in CCZ 12/22.
- [10] The court *a quo* found that the Constitutional challenge against SC 24/22 under CCZ 12/22 was dismissed for lack of merit. It held that since there is no pending case and no stay of execution of the Supreme Court's judgment, the appellant had no genuine defense to the respondent's claim for eviction. It ruled that the 2<sup>nd</sup> and 3<sup>rd</sup> grounds for contesting the eviction claim required an examination of legal principles governing the *rei vindicatio*. It ruled that the law requires that the respondent raise a valid right to possess as against the

owner. It found the appellant did not have such a right. With regards to the fraud allegations, the court found that they were not substantiated and could therefore not justify granting the appellant the right to possess the respondent's property. It ruled that the legal practitioner who represented the appellant could not explain fully how the respondent was linked to the fraud. The court further found there was no evidence on record to substantiate the fraud allegations.

[11] The court *a quo* also commented on the need for courts to protect sales in execution done in terms of the rules of court from being discredited by persons who, in hopeless attempts to challenge them, render it unattractive for prospective purchasers to attend and make bids at such sales.

[12] The court *a quo* also ruled that the appellant's defenses were more of pleas for mercy than valid defenses against an application for *rei vindicatio*. It stated that the argument that failure to compensate the appellant amounts to compulsorily depriving him of his property contrary to the provisions of s 71 (3) of the Constitution was meritless due to the fact that any improvements made were actions done in violation of the court order by CHAREWA J. Therefore the court *a quo* held that the appellant's improvements were based on a nullity. In the result, it ordered the appellant and all those claiming occupation through him to vacate the property.

[13] Aggrieved by the decision of the court *a quo* the appellant appealed to this court on the following grounds.

### **GROUND OF APPEAL**

1. The court *a quo* erred in law and misdirected itself in finding that the appellant's defense in respect of improvements on the property is a question based on a nullity, yet the defense, properly construed, was founded on an improvement lien in favour of the appellant.
2. In ordering the eviction of the appellant by the respondent before the respondent had compensated the appellant for improvements on the property in question, the court *a quo* erred in law and misdirected itself in that the order violated s 71 (3) of the Constitution of Zimbabwe in being a compulsory deprivation of property without compensation.
3. The court *a quo* erred in law and misdirected itself in not finding that the appellant's defense based on fraud was an attack on the respondent's claim to ownership of the property in question, with the consequence that the court *a quo* failed to apply its mind to the issue of whether or not the requirement in respect of ownership of the property by the respondent had not been met.
4. The court *a quo* erred in law and misdirected itself in making the order in para 4 of the operative part of its judgment in that it had no power to make such an order simultaneously with its judgment on the merits and without hearing and determining a separate application for execution pending appeal.

### **RELIEF SOUGHT**

Wherefore the appellant prays as follows:

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

“The application is dismissed with costs.”

### SUBMISSIONS BEFORE THIS COURT

[14] Mr *Madhuku*, counsel for the appellant submitted that the disputes between the parties have for a very long time been in and out of courts. He conceded that the respondent is the owner of the property in dispute. He abandoned the appellant's third ground of appeal which related to the alleged fraud the appellant alleged vitiated the respondent's ownership of the property, but persisted with the appeal in respect of grounds 1, 2 and 4. He argued that the appellant is resisting eviction on the basis of an improvement *lien*. He averred that the respondent does not dispute the fact that the appellant effected improvements on the disputed property. Counsel further argued that the eviction proceedings before the court *a quo* ought to have failed since the appellant is a *bona fide* possessor in respect of improvements made before the interdict granted by CHAREWA J. He submitted that the appellant's case will be mainly based on improvements effected before CHAREWA J's order. He submitted that even though the appellant can be classified as a *mala fide* possessor in respect of improvements made after the order granted by CHAREWA J, according to Silberberg and Schoeman's "The Law of Property" Fifth Edition a *mala fide* possessor can be availed the defense of an improvement lien. He urged the court to separate lawful development from unlawful development. He further argued that ordering the eviction of the appellant despite his having made improvements on the property is contrary to the provisions of s 71 (3) of the Constitution. On the issue of the court *a quo* ordering execution despite an appeal against its order Mr *Madhuku* did not make oral submissions but indicated that he was abiding by his heads of argument in which he relied on the case of *Zimbabwe Mining Development Corporation & Anor v African Consolidated Resources PIC & Ors*

2010 (1) ZLR 34 (S) at p 39 E-G in which CHIDYAUSIKU CJ commented on it being undesirable to make such an order except:

**“In exceptional circumstances” and that, “In the absence of exceptional circumstances, due process must be observed before issuing such an order.”**

[15] Mr *Mapuranga* for the respondent, submitted that the appellant effected improvements on the property in defiance of a court order. He stated that the defense of an improvement lien exists to protect a lawful claim. He argued that since the appellant acted against an extant court order, he could not be granted an improvement lien which is a discretionary remedy. He argued that the appellant ought to have specifically pleaded the value of the improvements effected and not the value of the property. He also argued that s 71 (3) of the Constitution does not entitle the appellant to remain on the respondent’s property as it does not apply to the appellant’s circumstances. In respect of the court *a quo*’s order that its order shall be executed despite any appeal, counsel did not make any oral submissions on this issue nor deal with it in his heads of argument.

### **ISSUES FOR DETERMINATION**

[16] The following issues arise for determination by this Court.

- (i) Whether or not the court *a quo* erred in not recognizing the defense of an improvement lien raised by the appellant.
- (ii) What is the effect of s 71 of the Constitution on the appellant’s eviction? and
- (iii) Whether or not it was competent for the court *a quo* to order that no appeal shall stay the execution of its order.

### **APPLICATION OF THE LAW TO THE FACTS**

**Whether or not the court *a quo* erred in not recognizing the defense of an improvement lien raised by the appellant.**

[17] In the court *a quo*, the respondent sought to vindicate its rights by seeking an order evicting the appellant. It is not in dispute that the respondent is the registered owner of the property in dispute. In the case of *Savanhu v Hwange Colliery Company* SC 8/2015, this Court held as follows:

“The *actio rei vindicatio* is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent.”

[18] Further in *Chetty v Naidoo* 1974 3 SA 13 (A) it was stated as follows:

“It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right).

The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the onus being on the defendant to allege and establish any right to continue to hold against the owner...”

[19] In terms of the above authorities, the appellant cannot withhold the respondent’s property unless he is vested with some right enforceable against the owner. Before the court *a quo*, the onus was therefore on the appellant to prove a legally recognized right of retention of the property. A reading of the appellant’s opposing affidavit in the court *a quo* establishes that the appellant did not specifically plead a right of retention or a contractual right. He did not specifically plead the defense of an improvement lien, rather he continually relied on the fact that he had filed a Constitutional Court application which challenged the respondent’s ownership of the property.<sup>1</sup> Further, the appellant’s defense was also to the effect that there were fraud allegations surrounding the case hence he could not be evicted

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<sup>1</sup> Page 57-60 of the record



from the property. The appellant just mentioned that he had effected improvements in passing and did not specifically plead the improvement lien. The appellant ought to have relied heavily on the improvement lien but he did not hence he cannot be heard to cry foul before this Court because the respondent has real rights over the property which are enforceable against the whole world.

[20] The improvements made before CHAREWA J's order were improvements made by a purchaser whose purchase of the property was tainted by his not being an innocent purchaser. This Court in judgment SC 24/22 specifically found that he was not an innocent purchaser.

[21] A person who colludes with a fraudulent seller to snatch a property lawfully sold by the Sheriff cannot be heard to say that he made lawful improvements on such property which entitle him to possess it against the will of the owner. The improvements are tainted by his having illegally acquired ownership of the property.

[22] The argument that Silberberg suggests that a *mala fide* possessor can be availed an improvement lien cannot be said to be a correct statement of the law. It was made in circumstances where the author said:

“The right of a mala fide occupier to compensation for necessary and useful expenses **has not yet been settled. It has been suggested that** in view of the extension of the *bona fide* possessor's action to a *bona fide* occupier, the *mala fide* possessor's action **must by analogy be taken to have been extended** to a *mala fide* occupier. **Several cases in which the position of a mala fide occupier was considered are of little assistance.** As the occupier was regarded as a *mala fide* possessor. **However in a case decided in the Orange Free State, Peens v Botha Odendaal, the view was taken that a mala fide occupier does not have a right of retention in respect of useful expenses and apparently also has no right to compensation in respect of such expenses.** It is respectfully submitted that the

former view is preferable; particularly in light of the fact that the court in any case has a discretion to order the removal of the improvement in lieu of compensation or to disallow a claim of compensation even where separation is impossible, if the improvement is not useful to the owner of the property and the expenditure excessive, regard being had to the occupier's means and position" (Emphasis added)

[23] It is apparent from the author's own words that this issue has not yet been settled and is a mere suggestion based on an analogical proposition. The author further states that cases in which this issue arose did not help in establishing the correct position. He cites a South African case in which the proposal was rejected and states why that view was taken. This justifies BHUNU JA'S comments in *Tendai Mashamhanda v Barriade (Pvt) Ltd* SC 17/24 where he said:

"With respect, Mr *Madhuku*'s stance that a *mala fide* let alone an unlawful occupier in defiance of a court order may have a right of retention or compensation is based on an untested flimsy speculative opinion of the authors which does not set any precedent".

[24] This Court agrees with BHUNU JA'S observation and finds that in the circumstances of this case the appellant being an illegal purchaser and developer in defiance of a court order, could not have fitted in the shoes of the *mala fide* occupier speculated on by Silberberg.

[25] In determining the appellant's application the court *a quo* said:

"From the opposing affidavit to the heads of argument the respondent's defenses are more of pleas for mercy than defenses to the *rei vindicatio*. It has been said that the court should pay no regard to such rants. In *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 236 it was held that;

'There are no equities in the application of the *rei vindicatio*. Thus in applying the principle' the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an owner for the convenience or comfort of the possessor once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of the law that admits no discretion on the

part of the court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used ruthlessly to protect ownership’

Therefore no equitable considerations should be put in the scales. In an attempt to justify his claim to ownership of the property, the respondent alleged that he was an innocent purchaser of the property. Clearly, this is unavailing for the simple reason that the Supreme Court in *Barriade Investments (Pvt) Ltd v Chiutsi & Ors* SC 24/22 held that:

‘The court *a quo* therefore erred in finding that the second respondent was an innocent purchaser who had no knowledge of any irregularities attaching to the purchase and registration of the property into his name’

The second respondent referred to above is the respondent in *casu*.”

[26] In its determination the court *a quo* correctly observed that the issues of unlawful improvements, and unlawful acquisition of title to the property had already been determined by the courts. The issues were therefore *res judicata*. The court *a quo* therefore correctly merely relied on those findings in arriving at its decision to order the eviction of the appellant from the respondent’s property. An unlawful acquisition of title followed by improvements in defiance of an order of court cannot be sanctioned by the courts. Courts cannot use their discretion to grant orders in favour of a party who has clearly demonstrated that he has no respect for the law and court orders. The courts cannot assist a litigant to continue in his defiance of the law and court orders.

[27] The court *a quo* correctly exercised its discretion in determining the application. The learned authors AJ van Waalt and GJ Pienaar in their book “*Introduction to the Law of Property*” 7<sup>th</sup> ed Juta 2016 opined that:

“In principle anybody can rely on a lien if the requirements are met, but it is important to note that a lien is always a discretionary remedy which means that the court has a discretion in allowing it or not. The court will exercise its discretion in recognizing a lien by looking at all the circumstances of each case and deciding

whether it would be just to enforce the lien. The requirements for the lien must, therefore include proof of reasons why the court should exercise its discretion by awarding the lien. The courts have already indicated a general unwillingness to grant a lien to a holder in bad faith and to holders who improved the property against the direct and explicit wishes of the owner”.

[28] The court *a quo* therefore correctly considered the circumstances in which the appellant acquired the property and developed it against the wish of the owner who had obtained an interdict which the appellant defied. It therefore correctly ordered the eviction of the appellant from the respondent’s property.

**The effect of s 71(3) of the Constitution on the appellant’s eviction.**

[29] The court *a quo* commented on the appellant’s reliance on s 71(3) of the Constitution as follows:

“In a futile attempt to rope in s 71 of the Constitution of Zimbabwe, it was argued on respondent’s behalf that failure to compensate him for the “massive improvements” amounts to compulsorily depriving the respondent of his property contrary to s 71 of the Constitution. This argument has no merit in that, on the evidence, any improvements made were actions done in violation of the order by CHAREWA J.

In *Cecil Enterprises v Sithole SC 87/10*, it was held that:

‘There is cogent authority to the effect that where the transfer of property is done in defiance of an order of court the transferee obtains defective title thereto ...’

[30] Section 71 (3) of the 2013 Constitution reads as follows:

**“71 Property rights.**

(3) Subject to this section and to section 72, no person may be compulsorily deprived of their property except where the following conditions are satisfied –

- (a) the deprivation is in terms of a law of general application;
- (b) the deprivation is necessary for any of the following reasons –

- (i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or
  - (ii) in order to develop or use that or any other property for a purpose beneficial to the community;
- (c) the law requires the acquiring authority-
- (i) to give reasonable notice of the intention to acquire the property to everyone whose interest or right in the property would be affected by the acquisition;
  - (ii) to pay fair and adequate compensation for the acquisition before acquiring the property or within a reasonable time after the acquisition; and
  - (iii) if the acquisition is contested, to apply to a competent court before acquiring the property, or not later than thirty days after the acquisition, for an order confirming the acquisition;
- (d) the law entitles any person whose property has been acquired to apply to a competent court for the prompt return of the property if the court does not confirm the acquisition; and
- (e) the law entitles any claimant for compensation to apply to a competent court for the determination of –
- (i) the existence, nature and value of their interest in the property concerned;
  - (ii) the legality of the deprivation; and
  - (iii) the amount of compensation to which they are entitled and to apply to the court for an order directing the prompt payment of any compensation.”

[31] It is apparent from the wording of s 71 (3) of the Constitution that the acquisition being referred to is by the State. This is made clear by the procedures to be followed in contesting the compulsory acquisition and the purpose for which acquisition is sought. See subsections (3) b) (c) (d) and (e). Reference to the acquiring authority cannot by any stretch of the meaning of that term be construed to refer to an owner evicting an unlawful possessor of his property from it. The use of the words “their property” excludes the appellant’s circumstances from the ambit of this section. The persons affected must be owners of the

property, or have legitimate rights in the property and the acquisition must be by the acquiring authority.

[32] Further, the allegation that s 71 (3) of the Constitution was violated when the appellant was evicted without having been compensated is meritless since the appellant seeks to rely on a *mala fide* defense. The finding of the court *a quo* that the appellant tried to rope in the Constitution where it is inapplicable is correct.

[33] In SC 17/24 BHUNU JA commenting on the applicability of s 71 (3) of the Constitution to the appellant's circumstances said:

“[35] I observe in passing that s 71 (3) does not seem to protect persons in unlawful possession or occupation of other people's property. It is instead a shield which protects people against compulsory deprivation of their property without compensation, the section reads:

‘(3) Subject to this section and to s 72, no person may be compulsorily deprived of their property except where the following conditions are satisfied ...

[36] The use of the phrase ‘their property’ connotes that one must own the property subject to compulsory acquisition in the sense that it must be his/her property, failure of which the applicant falls outside the protection of the section. The applicant having openly confessed that he does not own the property, it follows that he falls outside the ambit of the law under which he seeks protection. That law instead protects the respondent against compulsory deprivation of its ownership rights without compensation because it is admittedly the owner of the property in dispute,”

[34] We agree with BHUNU JA's observations. The appellant having participated in the fraudulent and unlawful sale and purchase of the respondent's property cannot be protected by the law intended to protect owners of property from compulsory deprivation of their properties. We also agree with Mr Mapuranga's submission that the eviction does not take away the appellant's right to claim compensation. This means even if the eviction extends to the

appellant's right to compensation for improvements his eviction does not constitute compulsory acquisition without compensation as the appellant's right to claim compensation will not be affected by it.

[35] This Court, as an appellate court, will not readily interfere with factual findings made by a lower court and will do so only in limited circumstances none of which have been alleged or shown by the appellant to exist in this case. See the cases of *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 at 670 and *Vengai v Chuma* SC 3/13.

[36] Having found that there was no misdirection, this Court cannot interfere with the decision of the court *a quo*. In the case of *ZINWA v Mwoyounotsva* 2015 (1) ZLR 935 (S) at 940F this position was explained as follows:

“It is settled that an appellate court will not interfere with factual findings made by a lower court unless those findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it or that the decision was clearly wrong.”

[37] In *casu*, the appellant has no lawful property which has been compulsorily acquired from him. He simply does not agree with the findings of the court *a quo*. He does not have a valid defense to resist the *rei vindicatio*. His appeal has no merit and cannot succeed.

**Whether or not it was competent for the court *a quo* to order that no appeal shall stay the execution of its order.**

[38] This issue was not adequately ventilated by the parties before this court and is not relevant to the determination of the real issues before this court. Mr *Madhuku* for the appellant did not orally address the court on it but merely said he abides by his heads of argument where

he had referred the court to the case of *Zimbabwe Mining Development Corporation & Anor v African Consolidated Resources PIC & Ors* 2010 (1) ZLR 34 (S) at p 39 E-G where CHIDYAUSIKU CJ said:

“I have serious reservations on the propriety of a judge including in his main judgment an order authorizing execution despite the noting of an appeal against that judgment. **It is only in exceptional circumstances that such an order should be made part of the main judgment----**. **In the absence of exceptional circumstances, due process must be observed before issuing such an order.** I hold this view because the litigant’s right to appeal should not be abrogated lightly without due process.” (Emphasis added)

The court agrees with the observations of the Chief Justice, that the order granted by the court a *quo* can only be granted in exceptional circumstances, but cannot go further than he did in the absence of adequate ventilation of the issue of special circumstances before us and the fact that this issue has become moot after the order by BHUNU JA in SC 17/24 authorizing execution before the hearing of this appeal. This means whatever decision this court could have made, the issue of execution in this case is now *res judicata* and need not be determined after execution has already been authorized by a judge of this Court.

## **DISPOSITION**

[39] In view of the manner the appellant purported to have acquired ownership of the property in dispute, which ownership was awarded to the respondent in SC 24/22 and proceeded to make developments to the property in defiance of a court order and against the wishes of the respondent, the appeal has no merit and should be dismissed. Costs should, as is the norm follow the result

[40] It is accordingly ordered as follows:

“The appeal be and is hereby dismissed with costs.”



**CHIWESHE JA** : I agree

**MWAYERA JA** : I agree

*Rangarirai & Co Legal Practitioners*, appellant's legal practitioners.

*Gill, Godlonton & Gerrans*, respondent's legal practitioners.