TAWANDA MUKUNGURUTSE
and
PATRICK CHIKOHORA
and
CLEDWYN MUTETE
versus
CITY OF HARARE
and
MINISTER OF LOCAL GOVERNMENT RURAL AND URBAN DEVELOPMENT

HIGH COURT OF ZIMBABWE
TAGU J
HARARE,18 July & 28 September 2016

**Opposed Matter**

*T Bhatasara*, for applicants
*L Uriri*, for first respondent

TAGU J: On the 19th August 2015 the Honourable Mr Justice BERE, sitting at Harare issued a Provisional Order in the following terms-

> "TERMS OF INTERIM RELIEF GRANTED
> It is hereby ordered that, pending the determination by this Honourable Court of the issues referred hereinabove, it is ordered that,
>
> 1. The 1st Respondent, be and is hereby barred from demolishing the Applicants' homes in Budiriro 4 in the absence of the order of a competent court."

The issue that lie for determination by this court at this stage is whether or not the demolition of the applicants' houses in Budiriro 4 by the first respondent in the absence of a Court Order is lawful or not.

The applicants contend that in the absence of a court order, any demolitions carried out by the first respondent amount to self-help and are unlawful in view of the provisions of s 74 of the Constitution of Zimbabwe.

On the other hand the first respondent strenuously argued that by operation of the Urban Councils (Model Use and Occupation of Land and Buildings) By Laws of 1979, herein after referred to as SI 109 of 1979, it is entitled to demolish structures it deems illegal in the absence of a court order. First respondent further argued that as SI 109 of 1979 has not been

declared unconstitutional, it is not necessary to seek a court order before any demolitions are carried out.

The applicants, however, argued that on the 17th March 2013, the majority of Zimbabweans voted for the overhaul of the 1979 Constitution, and the establishment of a new Constitutional order. In particular the applicants relied on the provisions of section 74 of the new Constitution. The section says-

> **"74 Freedom from arbitrary eviction**
> No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances."

Further, the applicants submitted that Clause 10 of Part 4 of the 6th Schedule to the Constitution provides that 'subject to this Schedule, all existing laws continue in force but must be construed in conformity with this Constitution'. They therefore argued that to the extent that SI 109 of 1979 is inconsistent with the Supreme law of the land, it is unconstitutional. In support of their contention the applicants relied on the case of *Kombayi & Others* v *Minister of Local Government & Another* HB-188-15 where MOYO J interpreted clause 10 in the following terms-

> "My understanding of this clause is that the current constitution did not repeal all existing laws, they are still in force but rather they should be construed in conformity with the constitution meaning that they should be applicable where they conform with the constitution and where they are inconsistent with the constitution obviously they should be amended and re –aligned to it. It is my considered view that the interpretation as submitted by counsel for the respondents would lead to an absurdity as this interpretation would fly in the face of the principle of legality in that Acts that are inconstant with the constitution and are therefore ultra vires are nonetheless construed to be in conformity with the constitution. How can an inconstancy be construed to be in conformity? Such an interpretation would result in an absurdity and an illegality for the simple reason that the constitution would seize to be the supreme law and will now be subservient to the non-conforming acts."

Simply put, it means that from the effective date of the new constitution, the first respondent was obliged to consider the constitutional implications of legislation passed before that date, such as SI 109 of 1979, and could not conduct business as usual. According to the applicants this view is cemented by a consideration of the views of KENTRIDGE JA in *Du Plessis* v *De Klerk* 1996 (3) SA 850 wherein he stated:

> "……there may be cases where the enforcement of previously acquired rights would in the light of our present constitutional values be so grossly unjust and abhorrent that it could not be countenanced, whether as being contrary to public policy or on some other basis."

Be that as it may, the first respondent submitted that a law which remains on the statute book remains enforceable unless declared unconstitutional by a court of competent

jurisdiction. The first respondent therefore submitted that SI 109 of 1979 which gives it power to demolish structures without a court order has not been declared unconstitutional. Among other things the first respondent argued that s 74 of the Constitution should not be read in isolation, but should be read with s 86 of the Constitution which provides that-

> "(1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard to rights and freedoms of other persons.
> (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable, in a democratic society based on openness, justice, human dignity, equality and freedom taking into account all relevant factors including:-
> (a) the nature of the right or freedom concerned;
> (b) the purpose of the limitation in particular whether it is necessary in the interest of defence, public safety, public order, public morality, public health, regional or town planning or the public interest;
> (c) the nature and extent of the limitation;
> (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
> (e) the relationship between the limitation and its purpose in particular whether it imposes greater restrictions on the right or freedoms concerned than are necessary to achieve its purpose; and
> (f) whether there are any less restrictive means of achieving the purpose of the limitation."

The first respondent therefore submitted that in light of the provisions of s 86, the right enshrined in s 74 is not absolute. Finally the first respondent argued that in any case s 74 is not applicable in this case because what the applicants illegally erected cannot be defined as home. It relied on the interpretation in the case of *Port Elizabeth Municipality* v *Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CCO at paragraph 17 where SACHIS J said:-

> "Section 26 (3) evinces special constitutional regard for a person's place of abode. It acknowledged that a home is more than just a shelter from the elements. It is a zone a personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world."

However, according to the papers filed of record the applicants are members of Tembwe Housing Cooperative, and have constructed houses of various sizes in Budiriro 4 on land acquired through the cooperative. Some have been staying on completed and uncompleted structures. In my view these people regarded some of these structures as their homes.

In my view the Constitution of Zimbabwe is the supreme law of the land. Any law that is inconsistent with the provisions of the constitution is ultra vires the constitution. The provisions of s 74 are clear and unambiguous. Before any person whatsoever can lawfully demolish the houses or homes of any person, that person has to first of all obtain a court

order. Consequently, it follows logically that before the first respondent can lawfully demolish the houses of the applicants, or any other illegal structures within its area of administration, it has to first approach a court and obtain a court order. Failure to do so renders the conduct of the first respondent unlawful and unconstitutional. Therefore the first respondent cannot rely on SI 109 of 1979 in as far as it is inconsistent with the provisions of the current Constitution of Zimbabwe.

It must be noted however, that the person who allocated the land on which the applicants illegally built their houses is not the City of Harare who is cited as the first respondent. The applicants were illegally allocated the said land by a cooperative. The said cooperative was served with notifications by the first respondent as per annexures "CI", "C2" and "C3" to stop allocating the said land to the applicants since the land was zoned for a school site and the cooperative was warned that its conduct amounted to depriving the majority of citizens whose children had a right to education but all these notifications were ignored. In a nutshell, this is no more than a case of outlaws who deliberately sought to disregard the law who now seek the protection of the same law. Had it not been for the provisions of s74 of the Constitution this court would not have granted the order being sought. To register its displeasure on the conduct of the cooperative and the applicants the court will not grant the applicants an award of costs despite the fact that they won. The first respondent cannot be burdened with costs when it genuinely believe albeit unconstitutionally, that they had the power to demolish the illegal structures in terms of the provisions of SI 109 of 1979.

In the result it is ordered that-

(a) The demolition of houses in Budiriro 4, in the absence of a court order be and is hereby declared unlawful.
(b) Each party is to bears its own costs.

*Mupanga Bhatasara Attorneys*, applicants' legal practitioners
*Chihambakwe, Mutizwa & Partners*, respondent's legal practitioners