

REPORTABLE (9)

ROBERT CHIITE & 7 ORS

v

**THE TRUSTEES OF THE LEONARD CHESHIRE HOMES
ZIMBABWE CENTRAL TRUST**

**CONSTITUTIONAL COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, GUVAVA JCC, MAVANGIRA JCC & BHUNU JCC
HARARE, NOVEMBER 23, 2016**

Z Chadambuka, for the appellants

T Magwaliba, for the respondent

MALABA DCJ: After perusing documents filed of record and hearing counsel, the unanimous decision of the Court was that the matter be dismissed with costs on a legal practitioner and client scale.

The appellants approached the Court on what they term an appeal from the Supreme Court. Section 167(1)(a) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 (“the Constitution”), establishes the Constitutional Court as the highest court in all constitutional matters. Section 167(1)(b) of the Constitution provides that the Constitutional Court decides only constitutional matters and issues connected with decisions on constitutional matters. A constitutional matter is defined under s 332 of the Constitution to mean a matter in which there is an issue involving the interpretation, protection

or enforcement of the Constitution. The issue raised before a court will be sufficient evidence of the existence of a constitutional matter to the extent that its determination requires the interpretation, protection or enforcement of the Constitution.

The appellants approached the Court in terms of s 167(5) of the Constitution which provides:

“(5) Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court –

- (a) to bring a constitutional matter directly to the Constitutional Court;
- (b) to appeal directly to the Constitutional Court from any other court;
- (c) to appear as a friend of the court.”

As the appellants approached the Court before the promulgation of the Constitutional Court Rules 2016 (S.I. 61 of 2016) it fell upon the Court to decide whether the Supreme Court arrived at the judgment purportedly appealed against upon determination of a constitutional matter as defined in s 332 of the Constitution. If the court finds that no constitutional issue was placed before the Supreme Court for it to determine in arriving at its decision, it would not be in the interests of justice to allow the appellants to appeal directly to the Constitutional Court from the judgment of the Supreme Court. Section 169(i) of the Constitution provides that the Supreme Court is the final court of appeal for Zimbabwe except in matters over which the Constitutional Court has jurisdiction.

The respondents are the Trustees of the Leonard Cheshire Homes Central Trust established by a Notarial Deed of Trust on 2 April 1981. The mandate of the Trust, as appears from the Deed of Trust, is to provide homes, shelter, care to and rehabilitation of persons with

permanent physical disabilities. The respondents administer, on behalf of the Trust, a property known as Number 85 Baines Avenue, Harare, commonly known as Masterson Cheshire Home.

The appellants, who are all persons with permanent physical disabilities, are occupants of the said property. They benefitted from the main objective of the Trust. They have been occupants of the property for a long period having been admitted into the home in the 1990s. Over the years relations between the appellants and the respondents soured to the extent that on 2 August 2004 the Trustees instituted proceedings in the High Court for an order for the eviction of the appellants. The allegations were that the appellants were illegally leasing out the home to third parties and pocketing the rentals. The actions of the appellants created conditions of significant wear and damage to the property. They prevented the respondents from accessing the property for inspection and carrying out of repairs.

The appellants opposed the action for an order for their eviction. The High Court ruled against the respondents on the ground that their terms of office had expired at the time the decisions to evict the appellants from the premises were made. The learned Judge took the view that the question of the expiry of the tenures of office of the Trustees had a bearing on the question of the validity of the decisions that were made in respect of the closure of the Home on 30 November 1999 and 26 July 2004. He held that the decision made by the Trustees on 26 July 2004 to evict the appellants was invalid. The respondents' case was dismissed with costs.

The respondents appealed to the Supreme Court, which overturned the High Court judgment on the basis that the High Court had erred in finding that the terms of the

Trustees had expired. As a result, the Supreme Court confirmed the legality of the eviction notices and upheld the eviction of the appellants from Number 85 Baines Avenue.

It must be noted that in all the proceedings before the High Court and the Supreme Court, no constitutional issue was raised by any of the parties. The matters that constituted the grounds of appeal which the Supreme Court had to determine and determined are set out at pp 7 to 8 of the cyclostyled judgment, No. SC 24/2015:

- “1. That the court *a quo* misdirected itself in finding that the issue whether the appellants had exceeded their five year terms in terms of Clause 5(c) of the Deed of Trust was a question of law as opposed to an issue of fact.
2. The court *a quo* further fundamentally misdirected itself in allowing the respondents to raise the new issue which was not pleaded in their pleadings with the first witness for the appellant. The court *a quo* therefore erred in over – ruling the appellant’s objection to the respondents’ raising of a new defence at the trial.
3. The court *a quo* further misdirected itself in finding that the appellant had the *onus* to prove that the Trustees had not exceeded their five year terms and were therefore entitled to make a resolution for the ejection of the respondents thereby making the appellant liable to prove the respondents’ new defence.
4. The court *a quo* further erred in making findings of fact on the question of whether the Trustees had exceeded the five-year term limit in terms of the Deed of Trust based on complete and inconclusive evidence led by the parties thereby contradicting an earlier finding that the issue was a point of law.
5. The court *a quo* further misdirected itself in failing to find that the respondents had abandoned and not proved their pleaded defence, that is that upon being accepted as beneficiaries to the trust, they were promised to live at the premises in issue, No. 85 Baines Avenue, Harare for life or for as long as they wished.
6. In the event therefore, the court *a quo* erred in dismissing the appellants’ claim.”

Aggrieved by the decision of the Supreme Court, the appellants approached this Court. The purported grounds of appeal were couched as follows:

- “1. The judgment of the court *a quo* is in breach of the provisions of s 56(1) of the Constitution of Zimbabwe, for the following reasons:

- a) It countenances the eviction of the appellants who are *personae miserales* at the suit of nameless and faceless individuals who have no connection to the Trust in whose effective names the proceedings were effectively brought.
- b) *A fortiori* the judgment has led to the total failure of justice.”

At the hearing of the matter, Mr *Chadambuka*, argued that the judgment of the Supreme Court was erroneous in that it was based on what he described as “suppositions”. It was his submission that the judgment was a violation of the appellants’ right to equal protection of the law enshrined in s 56(1) of the Constitution. Mr *Chadambuka*’s line of reasoning was difficult to follow. He persistently avoided answering the simple question whether the Supreme Court was faced with a constitutional issue when it determined the appeal against the judgment of the High Court.

Mr *Magwaliba*, who appeared for the respondents, argued that no constitutional issue had been raised before the Supreme Court. He argued that it would not be in the interest of justice for the Court to entertain argument on matters over which the Constitution has provided in clear and unambiguous language that the Supreme Court is the final court of appeal. The Court is in agreement with Mr *Magwaliba* that no constitutional issue was raised by the grounds of appeal determined by the Supreme Court. In *Nyamande & Anor v ZUVA Petroleum* CCZ 8/15, ZIYAMBI JCC, writing for the full Bench of the Constitutional Court, said at paras 11-12 of the cyclostyled judgment:

“... a right of appeal could only arise where the Supreme Court makes a decision on a constitutional matter

Since no constitutional issue was determined by the Supreme Court, no appeal can lie against its decision.”

What the Court has before it are disgruntled litigants who have attempted to try and obtain redress under the guise of an appeal on a constitutional matter. Their criticism of

the judgment of the Supreme Court set out in what purports to be grounds of appeal is no more than a raging discontent over the factual findings of the Supreme Court. The grievances of the losers in the Supreme Court have all the hall marks of a mere dissatisfaction with the factual findings by that Court. See *De Lacy & Anor v South African Post Office* 2011(a) BCLR 905(CC) MOSENEKE DCJ paras 28 and 57.

COSTS

In the *De Lacy case supra* MOSENEKE DCJ observed on the issue of costs thus at para 117:

“This may be the case where the unsuccessful litigant is shown to have acted with improper motive, or has abused court process; has conducted the case in a vexatious manner, has not properly adhered to the rules of court, has made sustained and unwarranted attacks on other litigants or witnesses or judicial officers concerned or has not pursued the claim in good faith. This limited catalogue is not intended to be exhaustive in as much as what may be an appropriate costs order, even in constitutional litigation, and may be conditioned by the circumstances of the case.”

These litigants must have known as it was clear from the grounds of appeal on which the decision by the Supreme Court was based that no constitutional issue had been raised for determination by the Supreme Court. Without any legal right to approach the Constitutional Court they nonetheless did so for ulterior motives of further delaying their eviction from the premises they occupied. Theirs was a deliberate move in abuse of court process. They went on to derogatively call the Trustees they knew by name and had accepted in the High Court that they had the right to act on behalf of the Trust in seeking the eviction order, “nameless and faceless individuals who have no connection to the Trust”.

For these reasons it was proper that they be ordered to pay costs on a legal practitioner and own client scale notwithstanding the fact that this was a case involving an attempt at constitutional litigation.

It was for these reasons that an order was made in the following terms:

- “1. The matter be and is hereby dismissed with costs on a legal practitioner and own client scale.”

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA JCC: I agree

BHUNU JCC: I agree

Lawman Chimuriwo Attorneys at Law, appellants' legal practitioners

Messrs Hove and Associates, respondent's legal practitioners