

REPORTABLE (35)

CITY OF HARARE

v

**(1) TAWANDA MUKUNGURUTSE (2) PATRICK CHIKOHORA (3)
CLEDWYN MUTETE (4) MINISTER OF LOCAL GOVERNMENT
PUBLIC WORKS AND NATIONAL HOUSING**

**SUPREME COURT OF ZIMBABWE
GARWE JA, GUVAVA JA & ZIYAMBI AJA
HARARE, SEPTEMBER 15, 2017 & JULY 26, 2018.**

L. Uriri, for the appellant

T. Mpofu with *B.R. Chinowawa*, for the first, second and third respondents

ZIYAMBI AJA:

[1] This is an appeal against a judgment of the High Court declaring unlawful the demolition of the respondents' houses in Budiro 4 in the absence of a court order.

[2] The matter turns on a determination of the question at what stage does the invalidity of existing legislation inconsistent with the Constitution of Zimbabwe occur. The appellants contend that an invalidity occurs when it is pronounced as such by a court. The respondents maintain that the invalidity occurred upon the coming into effect of the Constitution.

BACKGROUND

[3] On the 19 August 2015, the High Court, following an urgent application, granted a provisional order with interim relief in the following terms:

“It is hereby ordered that, pending the determination by this Honourable Court of the issues referred hereinabove, it is ordered that:

- (i) The first respondent (the appellant herein) be and is hereby barred from demolishing the Applicants’ homes in Budiro 4 in the absence of the order of a competent court....”
- (ii) ...

[4] In due course, the matter came before that court for a confirmation of the provisional order. In granting the order sought, the learned Judge remarked:

“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 [appellant] can lawfully demolish the houses of the applicants ... 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.”

Dissatisfied with the ruling of the High Court, the appellant has appealed to this Court.

[5] Briefly stated, the facts leading up to the application before the High Court are as follows. In 2008, Tembwe Housing Co-operative (“the Co-op”) operating under the chairmanship of one Caleb Kadye, was allocated land by the appellant for the development of 175 residential stands for the benefit of its members. The Co-op was directed to work in consultation with certain departments of the appellant in the development of the land. However, in about 2011, Kadye began allocating stands to members of the Co-op before the land was fully serviced. Having exhausted all the lawfully obtained stands, Kadye proceeded to allocate stands on land which had not been offered by the appellant to the Co-op and which was not reserved for residential purposes, including a site earmarked for a school. The first to third respondents are among those to whom the illegally obtained stands were allocated. These facts are common cause.

[6] In his founding affidavit the first respondent alleged that he was advised by the chairman of the Co-op that a certain lot of land had been acquired in Budiro 4, from the appellant, for allocation to members of the Co-op. Having ascertained that the Co-op was duly registered and had indeed acquired the land, he began paying monthly instalments which were meant for surveying fees and the costs and charges of other professionals who were to partition the stand. He was, in August 2011, advised that he could move onto the stand, which he did, and had built thereon a 3 roomed cottage where he lives with his wife and 3 children of school going age.

In July 2013, he was threatened with eviction by functionaries of another co-operative who claimed to have acquired the same lot of land. He sought assistance from the appellant and received a handwritten letter from one Tafireyi date stamped by the Department of Housing, Planning and Research unit of the appellant assuring him that no one would be moved until an amicable solution was found which would accommodate everyone. He was therefore surprised when the appellant began to evict his neighbours bulldozing their homes to the ground.

[7] The second and third respondents are also members of the Co-op and associated themselves with the first respondent's averments. They alleged that the appellant had acted in breach of their right enshrined in s 74 of the Constitution and sought a provisional order barring the demolition of their homes in the absence of an order of a competent court.

[8] The applicable Constitutional provisions are ss 2 and 74. They are set out below.

“2 Supremacy of Constitution

- 1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
- 2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial

institutions and agencies of government at every level, and must be fulfilled by them.”

“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.”

[9] The two constitutional provisions set out above are clear in their implications. The Constitution is the supreme law. Upon its promulgation every law inconsistent with it immediately became invalid. Therefore, no existing law can stand which is inconsistent with the Constitution. This is because the Constitution itself invalidates the inconsistency. That this is clearly the intention of the framers of the Constitution, is emphasized by the Sixth Schedule¹ which provides that all laws in existence at the time of coming into effect of the Constitution must be construed in conformity with the Constitution. In my view nothing can be clearer. An existing law inconsistent with the Constitution is invalid to the extent of the inconsistency. To the extent that the law on which the appellant relies is inconsistent with the Constitution, that inconsistent provision became invalid on the date the Constitution came into force.

[10] The above principle was lucidly enunciated by MALABA DCJ, as he then was, in *Loveness Mudzuru & Anor vs Minister of Justice, Legal & Parliamentary Affairs N.O. & 2 Ors* CCZ 12/15 at p47 of the judgment where he stated: -

“The invalidity of existing legislation inconsistent with a constitutional provision occurs at the time the constitutional provision comes into force and not at the time a fundamental right is said to be infringed or when an order of invalidity is pronounced by a court.” (My emphasis).

See also *Registrar General of Zimbabwe v Chirwa* 1993 (4) SA 272 (ZSC).

[11] The position is the same in South Africa. In *Ferreira v*

¹ Clause 10 of Part4

Levin; Vryenhoek v Powel 1996 (1) SA 984 (CC); 1996 (1)

BCLR1, ACKERMANN J put it thus:

“The court’s order does not invalidate the law; it merely declares it to be invalid. It is very seldom patent, and in most cases is disputed, that pre-constitutional laws, are inconsistent with the provisions of the Constitution. It is one of this court’s functions to determine and pronounce on the invalidity of laws, including Act [s] of Parliament. This does not detract from the reality that pre-existing laws either remain valid or became invalid upon the provisions of the Constitution coming into operation. In this sense laws are objectively valid or invalid depending on whether they are or are not inconsistent with the Constitution. The fact that a dispute concerning inconsistency may only be decided years afterwards, does not affect the objective nature of the invalidity. The issue of whether a law is valid or not does not in theory therefore depend on whether, at the moment when the issue is being considered, a particular person’s rights are threatened or infringed by the offending law or not.”

[12] The above, in my view, resolves the matter. Section 74 of the Constitution forbids, in clear and unambiguous terms, the demolition of homes without a court order. The law in terms of which the appellant acted, though valid in the past, became invalid when the Constitution came into effect.

[13] Much argument was advanced, by learned counsel for the appellant, on the issue of retroactivity of the Constitution² and the alleged misapplication by the court *a quo* of certain *dicta* in the South African case of *Du Plessis v De Klerk*.³ The gist of the argument advanced, as I understand it, is that the Constitution cannot be interpreted in a manner that would have the effect of depriving the appellant of a right which it lawfully possessed before the Constitution came into effect, namely, the right to demolish illegal structures on notice without a court order. For this argument counsel relied on the following passage from the judgment of KENTRIDGE AJ⁴.

“...The Constitution does not turn conduct which was unlawful before it came into force into lawful conduct. It does not enact that, as at a date prior to its coming into force, the law shall be taken to have been that which it was not. The consequences of that

² Appellant’s Heads of Argument pp48-53

³ 1996 (3) SA 850

⁴ *Du Plessis (supra)* p866E para 20

principle are, however, not necessarily invariable. I would therefore hold that the Defendants are not entitled to invoke s 15 as a defence to an action for damages for a defamation published before the Constitution came into operation”.

[14] In my view, the facts and circumstances of the instant case are different from those in *Du Plessis*. There, the issue was whether s 15 of the South African Constitution which guaranteed the right of freedom of expression could be used by a newspaper as a defence to a claim for defamation which arose before the promulgation of that constitution. Here, we have a by law which is inconsistent with the Constitution and which the Constitution has specifically declared to be invalid. The difference is obvious.

[15] I therefore agree with the learned Judge, that the appellant must comply with the dictates of the Constitution and follow the procedure prescribed therein. It must obtain a court order before it can lawfully demolish the homes of the respondents.

ALTERNATIVE ARGUMENT

[16] The appellant raised, in its heads of argument, the alternative argument that the structures sought to be demolished are not ‘homes’ in terms of s 74 of the Constitution. This argument, though advanced by the appellant in the court *a quo*, is not supported by its opposing affidavit in which it maintained that the structures erected by the respondents are illegal but made no denial of the averments made in the founding affidavit of the respondents that the houses and structures earmarked for demolition are their homes.

[17] More importantly, however, the Constitution gives no definition of ‘home’. The word must therefore be attributed its ordinary meaning, which is:

A “dwelling place; fixed residence of a family or household; dwelling-house”⁵;
“A house or apartment that is the usual place where one lives”⁶;

“The place in which one’s family life and affections are centred.”⁷

[18] Quite clearly, on the evidence presented in the papers, the respondents lived in those houses or structures with their families and regarded them as their homes. In the premises, no basis has been established for setting aside the judgment of the High Court as prayed by the appellant.

COSTS

[19] On the question of costs, the respondents’ success on appeal should normally carry with it an award of costs. However, for the reasons given by the court *a quo* and set out below, which sentiments I endorse, I will order each party to pay its own costs. The learned Judge said the following:

“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 s 74 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 believed, albeit unconstitutionally, that they [it] had the power to demolish the illegal structures in terms of the provisions of SI 109 of 1979.”

[20] It is accordingly ordered as follows:

1. The appeal is dismissed

⁵ Concise Oxford Dictionary of English 7th ed.

⁶ WordReference Random House Learner’s Dictionary of American English 2018

⁷ *Ibid.* See also *Port Elizabeth v Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC) at para 17.

2. Each party shall pay its own costs.

GARWE JA: I agree

GUVAVA JA: I agree

Chihambakwe, Mutizwa & Partners, appellant's legal practitioners

Zimbabwe Lawyers for Human Rights, 1st – 3rd respondents' legal practitioners.

Civil Division Attorney General, 4th respondent's legal practitioners