VOEDSEL ENTERPRISES (PVT) LTD
and
VOEDSELTOBACCO ENTERPRISES (PVT) LTD
versus
AFC COMMERCIAL BANK
and
THE MINISTER OF LANDS, AGRICULTURE,
FISHERIES, WATER, CLIMATE AND RURAL DEVELOPMENT
and
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 6 & 8 December 2022

Urgent Chamber Application

Mr *T Magwaliba with S Mahuni,* for the applicants
Mr *JT Dondo,* for the 1st respondent
Ms *T Tembo,* for the 2nd and third respondents

TSANGA J: The applicant filed an urgent application for stay of execution having learnt, through an advertisement, of an intended auction sale of their immovable property at the instance of the first respondent the AFC Commercial Bank (sic). The auction is to be held on 9 December 2022. The applicant borrowed some money from the Bank under an agreement which in terms of s 38 (2) (3) (4) and (5) of the Agricultural Finance Act [*Chapter 18:02*] as read with the Second Schedule of the Act, allows the Bank in the event of default, to sell property used as security without further recourse to the defaulter, after having given the requisite notice to pay. The applicant avers the Bank's intended action to sell without further recourse are fundamentally unconstitutional as the action interferes with the right to access courts in terms of s 69(2) and (3) of the Constitution.

The urgent application for stay of execution is premised on pending litigation under HC 8241/22 which seeks to challenge in the High Court, the constitutionality of the provision under which the Bank seeks to act. Two points *in limine* were raised by Mr Dondo who appeared on behalf of the Bank. The first was that there is no such entity as AFC Bank but that what exists is AFC Bank (Private) Limited. Relying on cases such as *Gariya Safaris (Pvt) Ltd* v *Van Wyk* 1996 (2) ZLR 246 (H); *Fadzai John* v *Delta Beverages Limited* SC40/ 2017 and *K And G Mining Syndicate* v *Ronald Mugangavari & Ors* HB/ 159/2020, he argued that the failure to cite correctly was fatal and that the matter should accordingly be struck off on this basis.

This argument was challenged by Mr Magwaliba who pointed to documents in the application which showed that the Bank has used its abbreviated appellation. In particular, what was pointed to was the advert for the sale of the property as well as the letter of credit facility whose letter head read "Agribank" as it was then known without any "(Private) Limited" added. He argued that AFC Bank is its trade name. He also argued that the point *in limine* had been taken without leading evidence and presupposed that there is awareness of the letter of registration.

In response that the advert was not flighted by the Bank but was placed by the auctioneer. As for the letter of credit, whilst the letter head indeed read "AgriBank" he pointed out that at the foot of the letter on the last page, the Bank was resoundingly referred to Agricultural Bank (Private) Limited, as it was then known. It is now known as AFC Bank (Private) Limited.

I am inclined to agree with Mr Dondo stated that there is a difference between citing a party in an advert by an auctioneer and citing a party for purposes of court proceedings. It would appear from the Supreme Court case of *Fadzai John* that the approach of the Supreme Court is to insist on proper citation for purposes of legal proceedings. The Bank's name is AFC Bank (Private) Limited which is important in legal proceedings. Even in the example of the letter cited, the document shows firmly that (Private) Limited was put in the penultimate clause as to who the contract was with when referencing the Bank. I do not agree that the issue is one for which evidence would have had to be led as the Bank was already a "(Private) Limited" Bank at the time that the letter of credit was entered into. As such, there is merit in the first respondent's argument that there was improper citation and the point *in limine* is upheld.

I will, however, go on to address the second point *in limine* as it is the more critical to the essence of the application given that an improper citation can be rectified by refiling.

The second point *in limine* was that the constitutional issue which applicant wants determined under HC 8241/22, being the underlying basis for the quest for a provisional order for stay of execution until that matter is heard, is on an issue long since decided by the Constitutional Court, under the previous and the current constitution. Under the Lancaster House constitution, the right to sell under the provision which now constitutes s 38 of the Agricultural Finance Act was determined to be perfectly constitutional in the cases of *John Nyamukasa* v *Agricultural Finance Company* SC 174/94 and *Chizikani* v *Agricultural Finance Company*, SC 123/95.

Under the present constitution the case of *Glens Removal & Storage Zimbabwe (Private) Limited* v *Patricia Mandala* CCZ 06/17 was said to be dispositive of the constitutional point of whether the provision violates s 69 (2) and (3) of the constitution which deal with the right to a fair hearing and the right to access court respectively. Mr Dondo argued that the High Court being a lower court is bound by the decision of the Constitutional Court and would not be in a position to hear and make a contrary pronouncement to that which has already been done by the Constitutional Court. His argument was therefore that the urgent application premised as it is on a superfluous application should simply be struck off the roll.

Mr Magwaliba argued that procedurally, this second point *in limine* effectively seeks to determine an application which is not before me in that it preempts the pending constitutional application itself. He further argued that the Constitutional Court matter case cited related to a *parate executie* under common law as opposed to an execution specific to s 38 of the Agricultural Finance Act. In other words, the essence of his argument was that whether there is an applicable precedent barring the applicant has to be considered from a fact specific context as to what was before the court in that matter. He therefore argued that the remarks by the Constitutional Court as to non-violation of the Constitution were *obiter* in that case as far as s 38 is concerned. Another distinguishing aspect was said to be that the case referred to s 69 (3) where as this one seeks to challenge validity based on s 69 (2) of the constitution. He maintained therefore that the applicant had a *prima facie* arguable case on constitutionality.

The second and third respondents through their counsel Ms. Tembo indicated that they were not opposed to the order being sought and thus did not make any substantive submissions.

The doctrine of *stare decis* prevents courts from travestying decided issues. In addition, ensures that lawyers are in a position to advise their clients regarding specific issues with certainty and predictability thereby preventing parties from incurring unnecessary expenses by coming to court to seek legal redress where there is already a clear legal principle on the issue by the highest court. It further allows like cases to be treated alike.

Granted *stare decis* is not always a stifling phenomenon due to distinguishable elements in many cases. However, if precedent is fact specific, and, if there is already a precedent in plain sight from the Constitutional Court which attaches legal consequences to a similar set of facts, then a party would be perfectly in line in arguing that a lower court has no powers to deviate from a rule pronounced in such a judgment. To lodge a similar matter in a lower court, seeking a constitutional pronouncement on what has already been decided, would, in reality, have been done purely for the tactical purposes of delay. This is so given that it is trite that the lower court would be bound by what was decided in such a similar fact situation. There would be no need to file an urgent application seeking provisional stay of execution on the basis of awaiting constitutional pronouncement for similar facts that have already been decided upon at the highest level.

Since the doctrine of *stare decis* essentially ensures that that which is settled is not disturbed, it is thus imperative in terms of the court regulating its proceedings that a decision be made at this point as to whether the case alluded to has in fact addressed the issue in a manner which prevents the applicant from seeking to re-hash the matter as a constitutional issue. This can be done by looking at the factual matrix of the decided case and that *in casu.* Therefore the key issue at this point, where what is before me is a provisional order seeking stay of execution pending the determination of a lodged constitutional matter, and where a preliminary point has been raised that the issue has been decided, is whether the facts at hand speak similarly speak to what has already been pronounced upon by the Constitutional Court as alleged by the first respondent. If so, there would indeed be justification for striking this matter off the roll as sought by the first respondent since the balance of convenience would certainly not favour any stay.

The background facts in the *Glens Removal* case were as follows: The respondent in that matter had lodged her goods with the applicant in terms of a contract where she was to pay monthly storage fees. She did not. Their agreement included a clause that if storage fees were unpaid for three consecutive months the applicant could sell the goods by public auction to defray expenses, without notice. The respondent had successfully approached the High Court and had been awarded damages for the loss of her goods. The applicant appealed to the Supreme Court which referred the matter to the Constitutional Court for the determination of the question as to whether there had been a violation of the right to access court in the very nature of the contract.

There are clearly are common elements to the situation *in casu* which give reason to see the *Glen Removals* case as a binding precedent. The difference *in casu* is simply that the clause in question which allows the Bank to sell where a debt has not been repaid is contained in s 38 of the Agricultural Finance Act whereas in *Glens Removal* case the clause was a part for a contract. The import of s 38(2) in particular is that where security has been advanced for a debt, and demand has been made for payment, and, the requisite period stipulated has elapsed, then the Corporation can without further ado, dispose of the security advanced. Barring that aspect the *Glens Removal* case dealt with like factual situations where the contractually sales are permissible for breach without further recourse to the debtor where a debt has been claimed. Indeed what the applicant herein stated as the basis of the chamber application was that the applicants had approached the court under HC 8241/22 "seeking to declare the legal provisions in terms of which the first Respondent is acting as unconstitutional" and that the balance of convenience favoures its granting. In other words, it is the constitutionality of the conduct just as in *Glens Removals* case which they seek to impugn. This is the same issue which the *Glens Removal* case sought to address.

A reading of that *Glens Removal* case shows that what was placed before the constitutional court for decision was whether the law of *parate executie* violates the access to the courts provision, s 69(3) of the current Constitution of Zimbabwe. *Parate executie* is essentially a right of a creditor to use self- help if a debtor defaults in payment to dispose of a pledge article without the intervention of a court order. It is also in essence a foreclosure procedure permitting the sale of mortgaged properties without going through formal court proceedings.

Section 69 (3) states as follows:

> 69 (3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.

Given that the *Glens Removals* case preceded the coming into effect of the new constitution the Constitutional court then distilled the issues that called for determination as follows:

> "(1) Whether or not *parate executie* offended the "access to the courts" provision in the former Constitution of Zimbabwe ("the former Constitution), namely s 18(9), as read with s 16(7), of the former Constitution;
>
> (2) Whether or not *parate executie* offends the "access to the courts" provision in the Constitution, namely s 69(3) of the Constitution; and
>
> (3) If *parate executie* is compliant with the provisions of both the former Constitution and the Constitution, what is its extent and whether this Court, using its powers in terms of s 176 of the Constitution, should outlaw *parate executie* on the grounds that it has no place in modern jurisprudence, on the ground that it is against public policy."

What the court decided was that *parate executie* did not violate the former constitution. With regards to the s 69(3) of the constitution the court noted its similarities with s 34 of the South African Constitution. It also discussed the South African case of *Chief Lesapo* v *North West Agricultural Bank and Anor* 2000 (1) SA 409 (CC) in which *parate executie* was held to be both unlawful and unconstitutional. It equally discussed at length South African cases subsequent to that decision which held that *parate executie* was not in fact unconstitutional. See *SA Bank of Athens Ltd* v *May van Zyl* [2006] 1 All SA 118 (SCA).

With respect to s69 (3) the Chief Justice Chidyausiku as he was had this to say:

> "I respectfully associate myself with the authorities that have held that *parate executie* is not only lawful but constitutional for the simple reason that the debtor's right of access to the courts is not taken away by *parate executie*. The debtor has unlimited access to the courts to complain about the manner in which the creditor has performed the contract. To allow the debtor to escape liability freely and openly undertaken on the basis of *parate executie* smacks of duplicity and strikes at the heart of the time honoured principle of the sanctity of the freedom to contract. The courts should respect the parties' freedom to contract and not seek to rewrite contracts for the parties.

> In the result, it is declared that *parate executie* is part of our common law and that it does not contravene s 69(3) of the Constitution as being contrary to public policy in the context of the right of access to the courts."

Given that what is before me is essentially an urgent application which seeks stay of execution to argue in the High Court whether the Bank violated applicants constitutional rights to a fair hearing in terms of s 69(2) and (3), the conclusion is resoundingly that this ground has been traversed and it matters not that the applicant seeks to split hairs by arguing that the Constitutional court addressed only the right of access to court. Materially the court outlaid the entire s 69 which relates to the right to a fair hearing and access to court and concluded that there was nothing in the wording of the provision as a whole which explicitly or by necessary implication renders *parate executie* unconstitutional. This is the same principle captured in the Agricultural Finance Act.

The second point *in limine* raised by the first respondent holds merit that the High Court is bound by precedent and would be essentially travestying ground where the core principle at stake, which is essentially the legality of the nature of actions to be taken by the first respondent, has been clearly addressed by the Constitutional Court.

Accordingly the urgent application for a provisional is struck off the roll with costs.

Mahuni & Mutatu, applicants legal practitioners Attorney at Law
Dondo legal practitioners, first respondent's legal practitioners
Civil Division of Attorney General's Office, second & third respondent's legal practitioners