Case 1

RITA MARQUE MBATHA
versus
MESSENGER OF COURT, HARARE

Case 2

MESSENGER OF COURT
versus
RITA MARQUE MBATHA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 8 March 2023 & 13 March 2024

Opposed Applications-*Declaratur* and decree of perpetual silence

Applicant in person in both Case 1 and Case 2
Mr *E Moyo*, for the respondent in Case 1 and for the applicant in Case 2

MUSITHU J: This judgment deals with two applications that were heard at the same time. Case 1 is an application for a *declarator*. The applicant challenges the manner in which her property was handled by the respondent following an order for her eviction from a property that she was leasing from a third party. She prays for the following relief:

"**IT IS DECLARED THAT:**

1. It is hereby declared that, regard being had to the circumstances of this matter, Respondent had no authority to unlawfully seize Applicant's property.
2. Declaring that the decision of the Respondent to unlawfully seize Applicant's property was illegal, unconstitutional, irrational and invalid.
3. Directing that the electronic property should be inspected and tested jointly by the Applicant and the Respondent prior to return.
4. Directing the Respondent to return the following property unlawfully seized from the Applicant within 48 hours of the issuance of this order:
   - 1.1 Kiport KDE Toot Diesel Generator
   - 1.2 Capri Upright Refrigerator
   - 1.3 3 Grey Upright LG Televisions
   - 1.4 Hisence Plasma Colour Television

1.5 Hama Black Bag
1.6 Canon EOS Camera with FE 100-400mm
1.7 Hard drive Samsung SSD TS 2TB
1.8 2 USB Lightning Flash Sticks (32gb)
1.9 66 Annual Reports

5. Directing that the costs of this application be paid by the Respondent who will deliver the notice to oppose.
6. Alternatively directing the Respondent's Legal Practitioner to pay the said costs, in his personal capacity."

Case 2 is a counter application filed in terms of r 58(8) and (9) of the High Court rules, 2021 (the Rules). In the counter application, the respondent herein seeks an order of perpetual silence against the applicant. The respondent claims that the applicant has instituted endless and unmerited litigation calculated at causing harassment and annoyance to the respondent. The respondent therefore seeks the following order:

"IT IS ORDERED THAT: -
1. The Respondent be and is hereby restrained from instituting any proceedings in this court against the Applicant or relating to the Applicant without first obtaining the leave of this Honourable Court, where such proceedings relate directly or indirectly to the question of the attachment of her property which matter this court fully and finally determined under HC 7310/18, and the further question of the execution of the execution of the Magistrate's under case reference 39520/16 which again this court has fully and finally determined under HC 5701/21.
2. The respondent is to pay the costs of this application on a legal practitioner and client scale."

The counter application is an off shoot of Case 1 (the main application) and the relief sought therein. The relief sought in the main application therefore also has a bearing on the counter application.

Background to Case 1 and the applicant's case

On 1 October 2016, the applicant and one Vincent Ncube entered into a lease agreement in respect of a property known as number 126 Edgemore Road, Parkmeadowlands, Hatfield, Harare (the property), owned by Ncube. A dispute concerning rental payments arose between the two parties prompting Ncube to approach the Magistrates Court for the applicant's eviction. An eviction order was granted in default. The applicant claims that she approached the court for rescission of the default judgment when she became aware of the judgment. The applicant also approached this court for review under HC 7542/17, before the proceedings in the Magistrates Court were completed. To forestall her imminent eviction from the property, the applicant also

approached this court on an urgent basis for stay of execution in HC 9296/17, pending the determination of her application for review. The High Court dismissed her application for stay of execution prompting the applicant to approach the Supreme Court on appeal under SC 847/17. The applicant claims that the Supreme Court granted her appeal, and the High Court decision was set aside on 17 May 2018.

Despite the setting aside of the High Court order by the Supreme Court, the applicant claims that the respondent herein proceeded with her eviction and attachment of her property. The applicant approached this court on an urgent basis in HC 7310/18, for an order that she be restored into the property, as well as the return of her assets. This court, per KUDYA J (as he was then) granted the order which reads as follows:

> "TERMS OF FINAL ORDER SOUGHT
> That you show cause why to this Honourable Court why a final order should not be made in the following terms:-
> 1. The respondents be and are hereby ordered not to interfere with the applicant's control and occupation and possession of Edgemore Road, Park Meadowlands, Hatfield Harare.
> 2. The first respondent pays the costs of suit.
>
> INTERIM RELIEF GRANTED
> That pending determination of this matter, the applicant is granted the following relief:
> 1. The 1st and 2nd respondents and all those acting through them shall facilitate the applicant to take occupation and possession of 126 Edgmore Road, Park Meadowlands, Hatfield Harare without any let or hindrance.
> 2. The second respondent shall restore to the applicant's possession the Kipor KDE Toot Diesel Generator, Capri 2 – door Upright refrigerator, 3 Grey LG televisions and the Hisense plasms colour television that he disposed her of on 7 August 2018."

The respondents in the matter before KUDYA J were Vincent Hungwe and the respondent herein. The order was subsequently confirmed by MATHONSI J (as he was then) on 12 September 2018.

The applicant claims that she served the order on the respondent on 10 August 2018. She accuses the respondent of refusing to comply with the order. Officials of the respondent are also accused of having used unkind and derogatory words on the applicant when she sought to recover the property under attachment. The applicant asserts that the arbitrary seizure of her property was unlawful and infringed s 71(3)(d) of the Constitution.

The applicant also avers that the respondent has not bothered to explain his conduct concerning the attachment of her tools of trade, such as the bag containing her Canon EOS

Camera with EF100-400mm, Harddrive Samsung SSD TS 2TB (containing website), 2 USB Lightning flash sticks (32gb) scan discs and 60 annual reports. The only reasonable inference was that the property was damaged. She was deprived of her goods without just cause. She continued to suffer prejudice as some of the attached assets were tools of trade. Some of the items like the hard drive and camera were for personal use and the confiscation of such items constituted a violation of her right to privacy guaranteed under s 57 of the Constitution.

The applicant claims that on 15 August 2018, she delivered a letter to a Mr Kauswa an official of the respondent. She was making a follow up on the court order delivered on 10 August 2018, and seeking to know when that order was going to be complied with. Kauswa alleged that he had not seen the court order, and she availed another copy. Follow ups were made through whatsapp messages. On her way to visit a specialist doctor, she received a call from a Mr Banga an official of the respondent. He informed her that he wanted to make a delivery of the attached property. She requested him to deliver the bag containing her camera to the surgery as there was no one at home. Her temporary gardener did not have the keys to her house. In any event, the items needed to be tested before delivery.

The applicant claims to have written a follow up letter to the respondent on 17 August 2018, but did not receive a response. She drove to Ruby's Auctioneers where the property was stored, but found the place closed. She had been informed that her property would be tested and restored on 17 August 2018. When she arrived at the auctioneer's premises, she was told that the trucks moving the property were not available and the property could only be moved on 20 August 2018. On 20 August, the applicant wrote to the respondent, but was told that there was no transport to ferry the property. In the same letter she intimated to the respondent that if she did not hear from him by 22 August 2018, she would approach the High Court on an urgent basis. Her threats were ignored. On 22 August she called Mr Banga, whom she had been advised oversaw the movement of the property. She was advised that she would be contacted later in the day, but no one contacted her.

The applicant was thus seeking to vindicate her rights protected under s 71 of the Constitution. She believed that the respondent's conduct offended the rule of law and principles of good governance. It was on the basis of the foregoing that the applicant approached this court for a *declaratur*.

Respondent's Case

The opposing affidavit raised preliminary points. It was submitted that the order sought by the applicant required this court to revisit its order in HC 7310/18. The application raised the same issues that had already been dealt with in other matters pursuant to the order granted in HC 7310/18. The respondent cited HC 7809/18, HC 7946/18, HC 7997/18, HC 8800/18, SC 776/18 and SC 788/18. The court was already *functus officio* as far as those issues were concerned. The matter ought to be dismissed on that basis alone.

In the alternative it was averred that the applicant's cause of action had prescribed because her complaint was based on events that occurred more than three years back. It was further averred that the court order that the applicant sought to rely on had long superannuated. The order could not be enforced unless revived.

As regards the merits, it was averred that there was nothing stopping the applicant from collecting her property which had already been released through a release note. In addition, the respondent had also made efforts to return the applicant's property, but she resisted. The respondent therefore denied that the applicant had been deprived of her property. It was further averred that there was no live dispute in respect of which the court could be called upon to exercise its discretion in terms of s 14 of the High Court Act. Further, there was no constitutional matter that arose for determination herein. There was no violation of any fundamental rights. The applicant had a court order which she could simply enforce without the need to raise a constitutional complaint. The prejudice alleged was self-inflicted. The applicant had refused to collect her property and would also not allow the respondent to deliver her property to her.

The respondent denied that it failed to comply with the order granted in HC 7310/18. The respondent dismissed as irrelevant to the application, the remarks that were allegedly made by one of the deputy messengers of court.

The respondent denied attaching the items listed in the applicant's founding affidavit which include, the Canon EOS Camera with EF 100-400mm, Harddrive Samsung SSD TS 2TB (containing website), 2 USB Lightning flash sticks (32gb) scan discs and 60 annual reports. The respondent averred that he only attached the property listed in his notice of attachment, which is: the Kipor diesel generator, the capri upright fridge, 3xgrey LG colour televisions and a Hisense plasma colour television.

The respondent accused the applicant of attempting to vary the court order in HC 7310/18, by making provision for items that were never included in that order. For instance, that order did not provide for the inspection and testing of electrical goods. The respondent may have been well disposed to have the goods inspected and tested, but the applicant still refused to cooperate as confirmed by a memo from the respondent's deputy, one Farai Banga. The same memo also noted that save for the upright refrigerator, all the other goods were not on power at the time of the attachment. The goods were in storage since the time of their attachment and were in the same state and condition as at the time they were taken. Any depreciation would attributed to their storage for long periods.

The respondent argued that the applicant had not made a case for the granting of a *declaratur*. The relief sought was tantamount to an irregular variation of an order given by the court. It was also not the first time that the applicant was coming to court with the same issues. In a judgment by KWENDA J in HC 8800/18, (judgment HH 739/20), the court observed that it was not competent for it to revisit its own judgment. The court was therefore urged to dismiss the application with costs on the higher scale.

The Answering Affidavit

In her answering affidavit, the applicant denied that this court was *functus officio*. She insisted that the Supreme Court declined to hear her appeal because the matter was improperly before that court. The applicant also claims that she was advised to file an application for a *declaratur* before this court. The applicant insisted that there was a live dispute before the court. The respondent had refused to have the matter resolved amicably. In short, the applicant persisted with her averments as set out in the founding affidavit. She insisted that her fundamental rights were violated.

Submissions and analysis

The oral submissions were by and large a re-emphasis of what the parties had already stated in their pleadings. From my reading of the papers and after hearing the submissions by the parties, I found the preliminary points tied to the merits of the application. This position arises because of the nature of the relief sought by the applicant herein. The application is all convoluted as it pleads certain constitutional violations arising from the conduct of the respondent. The applicant also wants the property that was placed under seizure inspected and

tested and that the respondent be ordered to return that property within 48 hours of the order of this court. In short, the court cannot readily determine the preliminary points without interrogating the merits of the application. The application was clumsily prepared. It is for that reason that I will proceed to deal with the merits of the application.

The restoration of the applicant's property was dealt with by this court in HC 7310/18. Paragraph 2 of the interim relief granted by KUDYA J clearly directed the respondent herein to restore possession of the applicant's property. That provisional order was confirmed by MATHONSI J. The property identified in para 2 is the same property recorded in the notice of attachment in execution dated 7 August 2018. That property also appears in sub-para(s) 1.1 to 1.4 of para 4 of the draft order. The respondent denies attaching the rest of the property listed in sub-para(s) 1.5 to 1.9 of para 4 of the draft order. No evidence was placed before the court to confirm that the additional property in sub-para(s) 1.5 to 1.9 was indeed attached by the respondent.

It follows that the claim for the additional property cannot be grounded on the order granted by this court in HC 7310/18. The notice of attachment and the order granted in HC 7310/18 were specific on the property that had been attached. It is not clear from the papers when exactly the additional property was allegedly attached by the respondent. What is before the court is an application for a *declaratur*. The applicant cannot seek to recover her property through an application for a *declaratur* when the respondent denies ever attaching that property. The applicant ought to institute a separate action to pursue the additional property if she so desires.

In paragraph 4 of the draft order, the applicant wants an order directing that her electronic equipment be inspected and tested jointly by the parties before it is returned to her. What the applicant effectively seeks is a variation of the order granted by this court under HC 7310/18. It is that order that directed a restoration of the applicant's property. All the applicant needed to do was to pursue the return of her property. Any claim for damages to the property would have to be the subject of separate proceedings. The court cannot be asked to revisit its orders to make provision for relief that was never sought in the first place.

Has the applicant made a case for the granting of a *declaratur?* Section 14 of the High Court Act provides as follows:

> "**14 High Court may determine future or contingent rights**
> The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

The requirements of a *declaratur* were dealt with in the case of *Johnson* v *AFC*[1] as follows:

> "Firstly, the applicant must satisfy the court that he is a person interested in an existing future or contingent right or obligation. If satisfied on that point, the court then decides a further question of whether the case is a proper one for the exercise of the discretion conferred on it."

This court is reposed with discretion to grant relief by way of a *declaratur*, provided that an applicant has demonstrated the presence of an existing, future or contingent right that must be protected or preserved. But the mere existence of a right whether in the future or contingent does not automatically trigger the granting of *a declaratur*. The court must be satisfied that the circumstances of the case justify the exercise of discretion to grant such an order.

The applicant wants the court to grant certain *declaraturs* in para(s) 1 and 2 of her draft order. As correctly submitted by Mr *Moyo* for the respondent, this court has already pronounced itself on the same issues in which the *declaratur* is sought. For instance, in para 1 of the draft order, the applicant wants this court to declare that the respondent had no right to unlawfully seize her property. In HC 7310/18, the court directed that the respondent restores the applicant's possession of the property. The court would not have granted such an order had it not been satisfied that the attachment of the applicant's property was unlawful. The same goes for para 2 of the draft order where the court is being asked to declare that the decision by the respondent to seize the applicant's property was illegal, irrational and unconstitutional. In granting the order under HC 7310/18, this court effectively pronounced itself on the fate of the property as well as the position of the parties.

There was no specific relief sought relative to the alleged constitutional infringements by the respondent. One wonders why the alleged constitutional violations were even made in a matter in which no constitutional issues arose for determination. In *Meda* v *Sibanda & 3 Ors*[2], the Constitutional Court made the following pertinent observations:

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[1] 1995(1) ZLR 65(H) at p 77B
[2] CCZ 10/16 at p 6

> "In *State* v *Mhlungu* 1995 3 SA 867 (CC) at para. 59, a general principle is laid down to the effect that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

The applicant has several remedies at her disposal if her complaint is that the applicant refused to comply with the order of this court in HC 7310/18. The record of proceedings is replete with correspondence between the parties herein concerning the modalities of returning the applicant's attached property. The memorandum of 21 August 2018 from the second respondent's deputy, Farai Banga confirms that the applicant was invited to Ruby Auctions for purposes of reviewing and testing her attached property. The memorandum further states that it was the second time that the invitation was being extended to the applicant, but it was declined.

Further, on 21 August 2021, an official of the respondent, one IK Matekenya wrote to the applicant as follows:

> **"Re: <u>VINCENT NCUBE vs RITA MBATHA & ANOTHER: CASE No. 35920/</u>**
> **……**
> In response to the Restoration Order granted in your favour, the office of the Messenger of Court sought to deliver the attached goods back to your residence but you were not willing to cooperate and as indicated in Deputy Banga's reports attached, he was denied entry into the premises.
>
> In this regard please inform us when you will be present at your residence to allow for delivery of your property. Also note that the goods continue to be held in storage and the office of the Messenger of Court will not be held liable for any depreciation of the goods seeing you refuse to comply with the order to collect your property."

The respondent's conduct cannot be faulted. As I have already stated, there is nothing that stops the applicant from repossessing her property. Any claim for damages caused to the property can still be made after she has taken possession of the property.

It is for the foregoing reasons that the court determines that there is no merit in the application and it must be dismissed.

Case 2

In this counter application, the roles have changed. The applicant in the main matter is the respondent herein, while the respondent is the applicant. The factual background is set out in the affidavit of Indra Matekenya as follows. The applicant received instructions to execute a warrant of ejectment issued out of the Magistrates Court in case No 39520/16. The warrant was

for the ejectment of the respondent and one David Mbatha at the instance of Vincent Ncube from the property referred to in Case 1.

The applicant served the respondent with the requisite notice. The respondent approached the court on review under HC 7542/17. At some point when the applicant was instructed to proceed with the eviction, the respondent filed an urgent chamber application for stay of execution under HC 9296/17. That application was dismissed. The applicant was cited in that application, but it did not oppose it. The respondent appealed against the High Court decision to the Supreme Court under SC 847/17. She also applied to the same court for stay of execution pending the hearing of the appeal under SC 97/18. Having no substantial interest in the outcome of those proceedings, the applicant did not oppose them. The Supreme Court dismissed the application for stay of execution but directed that the registrar sets the appeal under SC 847/17 on the earliest available date.

The appeal under SC 847/17 was heard and the court altered the decision of the lower court from a dismissal of the urgent chamber application and substituted it with an order that the application be removed from the roll of urgent matters with no order as to costs.

In August of 2018, the applicant was instructed to eject the respondent from the property as well as attach some of her property to satisfy the costs of execution. The respondent filed an urgent application for spoliation and an interdict under HC 7310/18. The court granted the order referred to in Case 1. After obtaining that order, the respondent withdrew her application for the review of the Magistrate Court's decision under HC 7542/17. Thereafter, the parties haggled over the modalities of the restoration of the respondent's property following the court order in HC 7310/18. The respondent filed an urgent chamber application in HC 7809/18 claiming that the applicant was in contempt of court for failing to comply with the order in HC 7310/18. The application was dismissed by CHIKOWERO J on 30 August 2018.

The respondent filed another application for contempt of court under HC 7946/18. She also filed an application for directions under HC 7997/18, in which she sought to have her application under HC 7946/18 heard on urgent basis. The two matters were placed before MANGOTA J who dismissed the application for contempt of court.

The respondent approached the court with another urgent chamber application under HC 8800/18. The application was placed before CHATUKUTA J (as she was then). A reading of the

court's judgment shows that the respondent was seeking essentially the same relief as is being sought in Case 1. The judge deemed the matter not urgent and removed it from the roll of urgent matters. Dissatisfied with that outcome, the respondent appealed to the Supreme Court against the court's refusal to hear the matter on an urgent basis under SC 776/18. She also filed an urgent application before the same court under SC 788/18, seeking the same relief as the one she sought in the High Court. The appeal and the application were dismissed by the Supreme Court.

The respondent proceeded to prosecute her matter under HC 8800/18 on the ordinary roll. The matter was heard by KWENDA J who dismissed it under judgment HH 739/18. She appealed against that judgment to the Supreme Court under SC 544/20. The appeal was dismissed by the Supreme Court on 18 January 2022.

In the meantime, the judgment debtor sought to enforce the order for her eviction from the property. The respondent approached this court on an urgent basis for stay of execution under HC 5701/21. The court dismissed her application for a provisional order. The respondent appealed to the Supreme Court against that judgment under SC 443/21.

According to the applicant, the respondent also filed complaints with the Judicial Service Commission and the Zimbabwe Anti-Corruption Commission against officials of the applicant. The respondent made allegations of corruption and improper conduct against the applicant and its officials. This prompted the applicant to institute proceedings for defamation against the respondent under HC 7326/21.

The applicant contends that it has incurred substantial legal costs because of the respondent's relentless litigation. The applicant also contends that the relief sought in all the matters is essentially the same, and the courts have already pronounced themselves on the fate of the respondent's claims in all these cases.

Notice of Opposition

The opposing affidavit raised a point *in limine*. The respondent accused the respondent of lying under oath. He was never furnished with a bond of indemnity. The one furnished was intended for the High Court.

The respondent argued that the law permitted her as a citizen to assert her rights against the applicant. All the matters she instituted were within the law. She denied that the applicant was entitled to any costs for carrying out her eviction from the property. The respondent averred

that Vincent Ncube never paid for her eviction and accused the applicant of making a unilateral decision to unlawfully seize her property. If she indeed owed any costs, then the applicant would not have attempted to return her property.

The respondent did not deny that she instituted all the proceedings that the applicant alluded to. She however insisted that the applicant was properly cited as the official with the mandate to carry out her eviction. It was necessary that the applicant be cited so that he is aware of the developments on the ground. The respondent also justified her conduct on the basis that she had not breached the lease agreement with Ncube. She was up to date with her rental payments. The applicant had therefore unlawfully evicted her and deprived her of her property. The Magistrates Court had no jurisdiction to grant an order for her eviction.

The respondent admitted that following the granting of the order by KUDYA J directing the release of her property, several correspondences were exchanged between the parties. The applicant consented to the inspection and testing of her property before making an about turn and revoking that consent. The refusal by the applicant to consent to the testing and inspection of her property is what led to the delay in the finalization of this matter.

The respondent also admitted that her application in HC 7809/18 was indeed dismissed. In that matter the court urged the parties to resolve their dispute outside court. The application was dismissed because she sought an order of contempt of court on an urgent basis. She strongly believed that the respondent was in contempt of court. She approached the court again in HC 7997/18 and HC 7946/18. The two matters were heard by MANGOTA J. The respondent cited the remarks by MANGOTA J who applauded her for her perseverance in the pursuit of her rights, as well as for her appreciation of the law. That court also remarked that the respondent would not have refused to accept her goods back for no reason. The respondent argued that the court would not have made those remarks had she been abusing the court process as alleged by the applicant.

As regards the urgent chamber application that she filed in HC 8800/18, the respondent justified it on the basis that the applicant unlawfully seized her property. She was not satisfied with the court's decision that the matter was not urgent and approached the Supreme Court. The Supreme Court advised her that she was better off prosecuting her matter on the merits at the High Court than pursuing the question of urgency on appeal. She prosecuted HC 8800/18 on the

merits, but the matter was dismissed by the court on the basis that r 449 was not applicable in the matter.

The respondent justified her complaint to the Zimbabwe Anti-Corruption Commission on the basis that the allegations she made against the respondent were truthful. The defamatory suit against her was just initiated to intimidate her and to discourage her from pursuing her property. The instant application was dismissed as a cunning and distasteful attempt to silence her. Any person would be relentless in following up on their property that was unlawfully seized. The applicant had therefore dismally failed to prove that she was abusing any court process. The court was urged to dismiss the application with costs.

The Answering Affidavit

In his answering affidavit, the applicant persisted with the averments made in the founding affidavit. The respondent had approached the court and obtained the relief that she craved for before KUDYA J, unopposed. The applicant was prepared to comply with the order. The respondent was setting her own conditions on how the court order must be complied with. What she was demanding was at variance with what the court had ordered.

Submissions and the analysis

At the commencement of oral submissions, the respondent did not pursue the preliminary point raised in her opposing affidavit. Instead, she raised a new preliminary point, which was that the applicant's answering affidavit was not properly before the court as it was unsigned and had also been filed out of time. Mr *Moyo* readily conceded that the answering affidavit was not properly before the court and could therefore be expunged from the record. The applicant would still abide by the averments made in the founding affidavit.

As regards the merits, counsel persisted with the applicant's case as set out in the founding affidavit. The respondent had filed numerous court cases all bearing on the same complaint. The respondent remained resolute and would return to the High Court even after the Supreme Court had pronounced itself on the same issues.

In her brief response, the respondent submitted that the applications she made would not have been filed if the applicant had not unlawfully seized her property. She further submitted that no other matters were pending save for the two matters that concerned her eviction.

A decree of perpetual silence is the kind of relief that will be granted in very exceptional circumstances. This is because by its nature, a decree of perpetual silence seeks to curtail a litigant's right to justice. The right of access to the courts is one of the fundamental rights that are protected under the Constitution. Section 69 (3)[3] of the Constitution states as follows:

> **"69 Right to a fair hearing**
> (1) ……...
> (2) ……
> (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." (Underlining for emphasis)

The right of litigants to approach the courts for resolution of their disputes can only be taken away or subjected to certain limitations, in limited circumstances. One such exception permitted by the common law is the decree of perpetual silence which is the subject of the present lawsuit. Section 86(1) of the constitution requires that fundamental rights and freedoms be exercised reasonably with due regard for the rights and freedoms of other persons. Authors *Herbstein & van Winsen*[4] explained the significance of a decree of perpetual silence as follows:

> "After a very full careful consideration of the Roman-Dutch writers a full bench of the Transvaal Supreme Court in *Brown v Simon*[5] came to the conclusion that the remedy of perpetual silence:
> Recognised as it is by our law, affords a useful means of bringing to a conclusion all threatened actions, and in our opinion it is applicable under due safeguards, not only to cases where a claim has been made or an action threatened publicly, but to every case where by demand or threatened action there has been a disturbance of, or interference with, the quiet enjoyment of another's rights……." (Underlining for emphasis)

The authors go on to state:

> 'It was laid down in the case of *Brown v Simon* that the remedy must be applied with great discretion and with due regard to the circumstances of the parties. Its application is a matter for the exercise of a judicial discretion on the part of the court."[6]

The genesis of this protracted legal wrangle herein is an order of the Magistrates Court in MC 39520/16, which paved the way for the eviction of the respondent from the property. Attempts made to enforce that order were resisted through the several applications whose chronology has been summarised as part of the factual background to both Case 1 and Case 2. Between 2017 and 2022, the same parties were involved in litigation in the superior courts on 12

[3] Constitution of Zimbabwe Amendment (No.20) Act, 2013
[4] The Civil Practice of the High Courts of South Africa, Fifth Edition, Volume 2 page 1525
[5] 1905 TS 311 at 322.
[6] *Supra* at page 1526.

occasions. Eight of those occasions were in the High Court and four of those occasions were in the Supreme Court. The theme that permeates across these cases was either the stay of the respondent's eviction from the property or an attempt to enforce the order granted in the respondent's favour in HC 7310/18.

As already noted from her opposing affidavit in the present application, the applicant does not dispute that she approached the court on those several occasions as highlighted in the applicant's founding papers. She justifies her conduct on her quest to recover her property which she claims was unlawfully attached by the applicant.

The critical issue is whether the respondent's conduct is justifiable as she claims, or it is tantamount to an abuse of the court and its processes as submitted on behalf of the applicant. As I highlighted in Case 1, the order by KUDYA J in HC 7310/18, which was later confirmed by MATHONSI J, effectively resolved the issue of the respondent's possession of the property and her household goods that were attached by the applicant. From my reading of the record as well as listening to the submissions by the parties, the applicant did not refuse to return the applicant's property that he had placed under attachment.

The applicant set out certain conditions for the return of her property, which again from a consideration of the evidence before the court, the applicant was keen to comply with. It appears the main reason why the arrangement for the inspection and the testing of the goods before their return to the respondent did not work was because the parties failed to agree on the specific times that they were supposed to meet for that purpose. It must be recalled that the order under HC 7310/18, did not direct that the property be inspected and tested before its return to the respondent. For that reason, nothing stood in the way of the respondent to recover her property from the applicant.

All the proceedings that were instituted by the respondent post the order granted in HC 7310/18 were unsuccessful. A perusal of the judgments disposing of her applications shows that the courts were alive to the reality that the respondent was recycling the same issues through different forms of applications. In HC 8800/18 (judgment HH 712/18), CHATUKUTA J remarked as follows:

> "The applicant has filed five applications between 8 August 2018 and 27 September 2018 all related to the attachment of her property by the respondent and her quest to recover same."[7]

In his judgment in HC 8800/18, (judgment number HH712/18), KWENDA J made the following pertinent observations:

> "The applicant has her order with respect to items mentioned in paras 21 to 24 of the draft order granted in Case No. 7318/18. The dispute with respect to those items is *res judicata*. Paragraph 1 of the draft order now sought introduces a declaratory which was not sought in case No. 7310/18. It is common cause that the items mentioned in paras 2.5 to 2.9 of the draft order were not part of the draft order which the applicant submitted with her application in case No. HC 7310/18."

The same items referred to by KWENDA J have again been included in Case 1. I have already dealt with the impropriety of attempting to include those items in her current application in Case 1. In SC 441/21, the Supreme Court dismissed the respondent's appeal with costs, and in doing so the court referred to *"the stream of applications that have kept the parties in court for several years."*[8]

It is foregoing reasons that the court determines that there is merit in the counter application. The respondent must be restrained. She cannot be permitted to recycle the same issues before the same courts repeatedly. I find this to be a fitting case to grant the relief sought in the counterapplication.

Costs of suit

The general rule is that costs follow the cause. In Case 1, the respondent sought the dismissal of the application with costs on an attorney and client scale. An order of costs against the applicant is justified. The applicant was fore warned in the various rulings made by this court that her continuous attempt to enforce the order in HC 7310/18 in the manner she sought to do was ill-fated. The decisions of this court were confirmed on appeal to the Supreme Court. The applicant remained unfazed. She cannot therefore escape an order of costs against her. I find an order of costs on the ordinary scale appropriate. As regards Case 2, while I found the respondent's explanation for the incessant litigation unconvincing, I considered it inappropriate to penalize her with an order of costs. This was a unique application whose significance she may not have appreciated as a self-actor.

[7] At p 4 of the judgment
[8] At p 12 of the judgment SC 109/22

DISPOSITION

Resultantly it is ordered that:

In respect of Case 1:

1. The application for a *declaratur* be and is hereby dismissed,
2. The applicant shall bear the respondent's costs of suit.

In respect of Case 2:

1. The respondent be and is hereby restrained from instituting any proceedings in this court against the applicant or relating to the applicant without first obtaining the leave of this Honourable Court, where such proceedings relate directly or indirectly to the question of the attachment of her property which matter this court fully and finally determined under HC 7310/18, and the further question of the execution of the Magistrate's Court order under case reference 39520/16 which again this court has fully and finally determined under HC 5701/21.
2. Each party shall bear its own costs of suit.

Scalen & Holderness, legal practitioners for the respondent in Case 1 and for the applicant in Case 2