REPORTABLE (1)

CHITUNGWIZA RESIDENTS TRUST (CHITREST)
v
(1) MINISTER OF LOCAL GOVERNMENT PUBLIC WORKS AND NATIONAL HOUSING (2) ATTORNEY GENERAL (3) MINISTER OF LEGAL AND PARLIAMENTARY AFFAIRS (4) CHITUNGWIZA MUNICIPALITY

CONSTITUTIONAL COURT OF ZIMBABWE
GWAUNZA DCJ, GARWE JCC, MAKARAU JCC, GOWORA JCC, HLATSHWAYO JCC, PATEL JCC & MATHONSI AJCC
HARARE: 23 OCTOBER 2024 & 5 FEBRUARY 2025



T.R Mafukidze and *T.S Chinopfukuta* for the applicant

L.T Muradzikwa for the respondents

PATEL JCC:

This is an application for the confirmation of an order of constitutional invalidity in terms of s 175(1) of the Constitution as read with rule 31 of the Constitutional Court Rules, 2016. The order of constitutional invalidity in question was made in the High Court ("the court *a quo*") sitting at Harare and was handed down by Katiyo J on 18 July 2024, under case No. HCH 6718/20 and judgment No. HH 475-24.

Factual Background

The applicant is a registered trust in terms of a Deed of Trust No. MA0000494/2013. In opposition as the first respondent is the Minister of Local Government, Public Works and National Housing, who is responsible for the administration of the Regional, Town and Country Planning Act [*Chapter 29:12*] ("the Act"). Cited as the second and third respondents respectively are the Attorney-General and the Minister of Justice, Legal and Parliamentary

Affairs. Lastly, the Chitungwiza Municipality, which is established in terms of the Urban Councils Act [*Chapter 29:15*], is cited as the fourth respondent in this application.

The matter before the court *a quo* was instigated by the publication of a demolition order by the fourth respondent in terms of ss 32 and 35 of the Act. The published notice contained a schedule of identified municipal areas in St Mary's, Zengeza, Seke, and Nyatsime, where illegal structures had been prefabricated without prior council approval. The residents in these areas were ordered to restore the land to its original state after demolishing all illegally erected structures and removing all their property. The notice stated that the failure to comply with the order within the prescribed period would entitle the municipality to proceed with the required demolitions without incurring any legal liability.

Following the demolition notice, the applicant's lawyers, acting on the instruction of the applicant, approached the fourth respondent through a letter dated 10 October 2024. In that letter, the lawyers reminded the fourth respondent that s74 of the Constitution proscribed any eviction or demolition of a home without a court order made after considering all the relevant circumstances. In the same letter, they requested the fourth respondent to furnish them with an order that gave it permission to evict and demolish houses in the areas mentioned in the demolition order. In turn, the fourth respondent wrote to the applicant's legal practitioners on 11 October 2020 and indicated that they had resolved, through a special full council meeting held on 9 October 2020, to put the demolition exercise in abeyance and that the demolitions would no longer be effected as per the order.

In any event, the applicant then approached the court *a quo* for an order of constitutional invalidity in respect of ss 32(2)(c), 32(2)(d) and 37(1)(a)(i) of the Act. Section 32(2)(c)-(d) of

the Act provides that an enforcement order may require the demolition or alteration of any building and/or the discontinuance of any operations on or any use of the land concerned or any use of any building thereon. Section 37(1)(a)(i) of the Act relates to non-compliance with enforcement orders. It stipulates that, if within the period specified in an enforcement order any steps required by such order have not been taken, the local planning authority may authorise any employee or agent to enter on the land with such vehicles and equipment as may be necessary for the purpose and take such steps as may be reasonably necessary to ensure compliance with the order.

Before the court *a quo*, the applicant asserted its *locus standi* in terms of s 85(1)(c) of the Constitution as it was acting in the interests of a class or group of persons. It submitted that its objective as a trust was to protect and promote the rights and welfare of the residents of Chitungwiza. The applicant further submitted that ss 32(2)(c) and (d) as well as s 37(1)(a)(i) of the Act infringe s 74 of the Constitution which confers the right not to be arbitrarily evicted from one's home. It contended that the impugned provisions give local authorities the right to arbitrarily evict and or demolish residents' homes without a court order, thereby infringing the constitutional guarantee against arbitrary eviction.

The applicant also contended that s 32 of the Act does not require local authorities to approach the courts and obtain a court order authorising the eviction of residents from their homes as is required by s 74 of the Constitution. Similarly, s 37 (a)(i) of the Act also infringes s 74 of the Constitution in that it does not require that a court order be obtained before any eviction or demolition takes place. The applicant's position was that the said provisions are unconstitutional since they shut the door for residents to have the circumstances of each

intended eviction or demolition judicially assessed. The impugned provisions do not give room for due process to be followed in accordance with 74 of the Constitution.

The applicant further argued that the nature of the right conferred by s 74 of the Constitution is substantive and that the provisions in question do not include any substantive safeguards against arbitrary eviction. Furthermore, these provisions are not saved by the limitation clauses set out in s 86 of the Constitution in that they are not fair, reasonable, and justifiable in a democratic society.

The applicant conceded that by virtue of s 38 of the Act, residents whose homes are the subject of a demolition order have a right to appeal to the Administrative Court. However, it reasoned that the right to appeal to the Administrative Court does not provide a sufficient safeguard for the constitutionally entrenched right against arbitrary eviction. This is because the appeal procedure under s 38 of the Act was limited to administrative issues and omitted prominent procedural and substantive issues that ought to be ventilated by a court in terms of s 74 of the Constitution. The need to regulate unapproved development could be addressed by amending the Act to require local authorities to approach a court of law for the confirmation of every enforcement order and the resultant eviction from or demolition of homes.

The respondents opposed the application before the court *a quo*, primarily on the basis that the provisions of ss 32 and 37 of the Act are reasonably necessary in accordance with s 86 of the Constitution. It was its considered position that if the impugned sections were to be removed, there would be no provision left to deal with illegal development in urban areas. Furthermore, it was intimated that the first respondent's Ministry was currently in the process

of aligning the Act to the Constitution. The relevant principles had already been approved by Cabinet and they included the protection of freedom from arbitrary eviction.

In the interim, the respondents' position was that the impugned legislation enjoyed a presumption of validity. They argued that the matter was one that required judicial restraint on the part of the court *a quo*. It was submitted that the administrative authority of the fourth respondent was sufficiently tempered by the right of appeal afforded to aggrieved persons in terms of s 38 of the Act. In order to buttress this point, specific reference was made to s 32(3) of the Act which operates to suspend the operation of an appealed enforcement order until the appeal in question is finally determined, withdrawn or abandoned.

On 18 July 2024, after due consideration, the court *a quo* granted the relief sought by the applicant. It declared s 32(2)(c) and (d) as well as s 37(1)(a)(i) of the Act to be inconsistent with s 74 of the Constitution. The court also declared the demolition order issued by the fourth respondent on 8 October 2020 to be invalid. In full, the order of invalidity is couched as follows:

"It is ordered that:

1. The application for an order of constitutional invalidity be and is hereby granted.
2. Section 32(2)(c) and (d) of the Regional, Town and Country Planning Act [*Chapter 29:12*] be and is hereby declared to be *ultra vires* section 74 of the Constitution of Zimbabwe and therefore unconstitutional.
3. Section 37(1)(a)(i) of the Regional Town and Country Planning Act [*Chapter 29:12*] be and is hereby declared to be *ultra vires* section 74 of the Constitution of Zimbabwe and therefore unconstitutional.
4. The demolition order issued by the fourth respondent on the 8th of October 2020 be and is hereby declared to be invalid.
5. The order of constitutional invalidity issued in terms of paragraphs 2 and 3 herein above, be and is hereby suspended for a period of 12 months from the date of confirmation by the Constitutional Court in order to enable the first, second and third

respondents to amend the impugned legislation so that it complies with section 74 of the Constitution."

The application *in casu*, which is made in terms of s 175(1) of the Constitution as read with rule 31 of the Constitutional Court Rules, is for the confirmation of the above order of constitutional invalidity.

Submissions by Counsel

Mr *Mafukidze*, for the applicant, noted that the impugned sections permit the fourth respondent, as a local authority, to demand that residents comply with a demolition order and, if they fail to do so, the local authority may authorise its agent to demolish any unapproved structures without the sanction of a court order. He submitted that the right enshrined under s 74 of the Constitution was defined in the case of *Zuze* v *Trustees for Mlambo* SC 69-19. As per that case, s 74 comprises two essential elements: (i) a basic procedural requirement to ensure that no person is evicted and that no dwelling is demolished without due process and (ii) to avoid any possible arbitrariness, the court seized with the matter must consider all the relevant circumstances before it grants an order of eviction or demolition.

Mr *Mafukidze* further submitted that the Act does not provide for these requirements of judicial supervision. Even though s 38 of the Act provides an avenue for an aggrieved party to approach the Administrative Court, the section does not require the local authority itself to first come to court to seek a demolition order and, therefore, it does not fulfil the requirements of s 74 of the Constitution. Nor does s 38 provide for consideration of all the relevant circumstances. It is implicit in s 74 that it is the person who seeks to evict or demolish who is obliged to obtain the necessary court order.

Mr *Mafukidze* also submitted that it may be necessary to amend the Act to extend the powers of the Administrative Court to enable that court to fully interrogate the questions of eviction or demolition and the relevant circumstances. Section 38 of the Act is not adequate for these purposes and does not offer the protection afforded by s 74 of the Constitution. It circumscribes what the Administrative Court can or cannot do in considering the matter. The Act would need to be amended in two respects: (i) to require the relevant local authority to first obtain the necessary order and (ii) to enable the Administrative Court to fully interrogate the propriety of the intended eviction or demolition.

In response, Mr *Muradzikwa*, for the respondents, submitted that where there is a presumption of constitutionality attached to any legislation, the legislation has to be set aside first before anything done under it is challenged. A reading of the record shows that the fourth respondent made an enforcement order in October 2023 in terms of s 32(2) of the Act. Since then, the applicant did nothing, except writing a letter through its legal practitioners to the fourth respondent. The applicant ought to have pursued the remedies available to it of either seeking an interdict from the High Court to stop the demolition or to appeal to the Administrative Court under s 38 of the Act. Mr *Muradzikwa* also referred the Court to his heads of argument in support of the proposition that, by virtue of the limitation clause elaborated in s 86(2) of the Constitution, the impugned provisions of the Act were necessary for the purposes of town planning and were also perfectly reasonable.

After closing his submissions, Mr *Muradzikwa* was referred by the Court to the averments in the respondents' opposing affidavit to the effect that there is a process underway of aligning the Act to the Constitution. He was unable to identify the specific provisions in question or the stage at which the process was pending. However, he eventually conceded that

the impugned ss 32 and 37 of the Act are inconsistent with s 74 of the Constitution and that they need to be amended and aligned with the Constitution. He also accepted that a period of 12 months might be sufficient for that purpose.

In response to the question by the Court whether he was prepared to consent to the order of invalidity being confirmed, Mr *Muradzikwa* quite correctly submitted that he could not consent without proper instructions from his client and that he needed some time to consult with the respondents before proceeding further. He requested that he be granted a period of one week to consult with the respondents and, if they were to agree, he would then write to the Court notifying them of their consent. In the event that they did not agree, the Court could then proceed to make its determination.

Turning to the record, I note that the following passage appears at para. 3 of the 1st respondent's opposing affidavit, which was deposed to by his Acting Permanent Secretary and is dated 1 June 2023. I quote:

> "The Ministry is in the process of aligning the Act to the Constitution and principles were already approved by Cabinet and it [*sic*] includes protection of freedom from arbitrary eviction rights."

In light of the foregoing, Mr *Mafukidze* stated that it would be possible to confirm the order of invalidity insofar as concerns the timeframe of 12 months to rectify the impugned provisions of the Act. He further indicated that the applicant was not opposed to Mr *Muradzikwa* being given a week to consult with his client and to file a notice as to whether or not the respondents consent to the order of invalidity.

In the event, the Court advised the parties that it would allow them 10 days to discuss and consider the filing of an order by consent. The Court then proceeded to reserve its judgment in the matter.

Deed of Settlement and Draft Order by Consent

On 31 October 2024, the parties filed a deed of settlement and a draft order by consent. The parties agreed that the order of constitutional invalidity issued by the court *a quo* be confirmed and that s 32(2)(c) and (d) and s 37(1)(a)(i) of the Act be declared to be *ultra vires* s 74 of the Constitution and therefore unconstitutional. The parties also agreed that the demolition order issued by the fourth respondent on 8 October 2020 be declared invalid. Furthermore, the parties also agreed that the order of constitutional invalidity be suspended for a period of 12 months to enable the first, second and third respondents to amend the impugned legislation so that it complies with s 74 of the Constitution.

Confirmation of Orders of Constitutional Invalidity

The law governing confirmation proceedings emanates from the Constitution. Despite the consent of the parties, this Court is still dutybound, by dint of s 167(3) and s 175(1) of the Constitution, to pronounce itself on the matter, as it is endowed with the sole jurisdiction to either confirm or decline the confirmation of an order of constitutional invalidity made by any subordinate court. Section 167(3) declares that the Constitutional Court makes the final decision as to whether an Act of Parliament is constitutional and must confirm any order of constitutional invalidity made by another court before that order has any force. By the same token, in terms of s 175(1), where a court makes an order concerning the constitutional invalidity of any law, the order has no force unless it is confirmed by the Constitutional Court. These constitutional provisions are supplemented by r 31 of the Constitutional Court Rules

which prescribes the procedure for initiating confirmation proceedings. In short, any declaration of constitutional invalidity is subject to the overarching jurisdiction and supervisory role of this Court. See *Mupungu* v *Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ 7-21, at p 18.

The requisite enquiry entails a two-stage process. The Court must first decide by way of review whether the challenge to the constitutional validity of the impugned law was properly before the court *a quo*. The second stage is to evaluate the constitutional matter to ensure that the order of constitutional invalidity was correctly made, to wit, to examine the correctness of the decision made by the lower court. See *S* v *C (A Juvenile)* 2019 (2) ZLR 12 (CC); the *Mupungu* case (*supra*); *Combined Harare Residents' Association & Ors* v *Minister of Local Government, Public Works and National Housing* CCZ-3-24, at p 6; *Stone & Anor* v *Central Africa Building Society & Ors* CCZ 5-24, at pp 9-10. The Court is empowered to confirm an order of constitutional invalidity only if it is satisfied that the impugned law is inconsistent with the Constitution. It must conduct a thorough investigation of the constitutionality of the law in question. It must do so irrespective of the finding of constitutional invalidity by the subordinate court and notwithstanding the attitude of the parties. See *S* v *Chokuramba* CCZ 10/19, at p 6; *Makamure* v *Minister of Public Service, Labour and Social Welfare & Anor* CCZ 21/20.

As regards to the first enquiry, I am unable to perceive any procedural irregularity in the manner in which the constitutional question was posited and subsequently determined by the court *a quo*. In any event, none of the parties has raised or queried the procedural propriety of that court's assumption of jurisdiction or its subsequent adjudication of the question before it. I will accordingly proceed to undertake a substantive determination of the matter, in

particular, as to whether or not s 32(2)(c)-(d), and s 37(1)(a)(i) of the Regional, Town and Country Planning Act are inconsistent with s 74 of the Constitution and therefore invalid.

The Constitutionality of the Impugned Provisions

In *Kawenda* v *Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ 3-22, at pp 9-10 and 16-17, the Court expounded the approach to be adopted in assessing the constitutionality of statutory provisions, as follows:

> "One begins with an interpretation of the relevant provisions of the Constitution. The purpose of interpreting the Constitution first is to set the framework, the backdrop, or the yardstick against which the impugned law will then be examined or measured. One starts with a discernment of the law. (See *Zimbabwe Township Developers (Pvt) Ltd* v *Lous' Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (SC) at 383 F; and *Democratic Assembly for Restoration and Empowerment & Ors* v *Saunyama* CCZ 9/18).
> ……
> ……
>
> After interpreting the appropriate provisions of the Constitution, one then presumes that the impugned law is constitutionally valid. The presumption of constitutional validity serves firstly to place the onus on whoever is alleging invalidity to prove such invalidity and, secondly and, equally important, to guide the court in interpreting the impugned law in favour of validity where the piece of legislation is capable of two meanings. The presumption holds that where a piece of legislation is capable of two meanings, one falling within and the other falling outside the provisions of the Constitution, the court must perforce uphold the one that falls within. The presumption in favour of constitutionality is entrenched in our law.
>
> As the next and final logical step, this Court must examine the effect of the impugned law on the fundamental right or freedom in question. If the effect of the impugned law is to abridge a fundamental right or freedom or is inconsistent with the provisions of the Constitution providing for the right or freedom, the object or subject matter of the impugned law will be less important or irrelevant. (See *In re Mhunhumeso* 1994 (1) ZLR 49 (S)). If the court finds the impugned law to infringe upon a fundamental right or freedom or to be inconsistent with the provisions of the Constitution on a fundamental right or freedom, the court must proceed to determine whether the infringement or inconsistency is permissible in terms of s 86 (2) of the Constitution."

The Rights Guaranteed by Section 74 of the Constitution

Section 74 of the Constitution guarantees freedom from arbitrary eviction in the following terms:

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

The import of s 74 and the protection afforded thereunder were explained in *Zuze* v *The Trustees of Bongayi Rushworth Mlambo* & Anor 2019 (3) ZLR 561 (S), at 571F-G, as follows:

> "The essential elements of the protection afforded by s 74 are twofold. The first is that no person may be evicted from his home or have his home demolished 'without an order of court'. This is a basic procedural requirement to ensure that the law is followed in conformity with due process. This was underscored in the *City of Harare* case (*supra*), at paras. 12 & 15, as a prerequisite to the lawful demolition of the respondents' homes. *In casu,* there was an order of court granted in Case No. HC 9554-16 and, therefore, it cannot be disputed that the appellant was evicted pursuant to an order of court.
>
> The second element relates to the possible arbitrariness of an eviction and necessitates that the court seized with the matter must consider 'all the relevant circumstances' before it grants an order of eviction or demolition. With respect to the South African equivalent of our s 74, *i.e.* s 26, the provision has been construed to confer not only a procedural right but also a substantive benefit to include the issue of whether or not the prospective evictee has access to alternative housing."

As regards what constitutes "all the relevant circumstances" for the purposes of s 74, the Court took the view that the legality or otherwise of occupation by the potential evictee was immaterial and did not detract from the scope and extent of the protection afforded by the section.

Commenting on the South African equivalent, *i.e.* s 26(3), which is *ad idem* with our s 74, Currie & De Waal: *The Bill of Rights Handbook* (6th ed. 2013), at p. 586, summarise the content of the provision in the broader context of housing rights:

> "…….. mass eviction is a retrogressive step on the road to the promotion of the right of access to adequate housing and needs to be justified, not just on its own terms as an eviction, but also within the bigger picture of progressive housing delivery.
> ……
> ……..
>
> The general right of access to housing can be negatively enforced against improper invasion in the form of arbitrary evictions. Section 26(3) puts the matter beyond doubt

by expressly entrenching a conventional negative right, unqualified by considerations relating to the state's available resources, against arbitrary evictions and demolitions."

The Constitutional Infringement

The provisions that the applicant impugns are contained in s 32(2) and s 37(1) of the Regional, Town and Country Planning Act. Section 32(2)(c)-(d) of the Act provides as follows:

> "(2) Without derogation from the generality of paragraph (b) of subsection (1), an enforcement order may require—
>
> ……
>
> (c) the demolition or alteration of any building;
>
> (d) the discontinuance of any operations on or of any use of the land concerned or of any use of any building thereon."

Section 37(1)(a)(i) of the Act deals with the consequences of non-compliance with enforcement orders. It stipulates as follows:

> "(1) If, within the period specified in an enforcement order or extension thereof granted in writing by the local planning authority, any steps required by such order to be taken, other than the discontinuance of any use of any land or building or of any operations, have not been taken, the local planning authority may—
>
> (a) authorise any employee or agent—
>
> (i) to enter on the land with such vehicles and equipment as may be necessary for the purpose and take such steps as may be reasonably necessary to ensure compliance with such order; and ……"

Also highly relevant in the present context is s 38 of the Act which provides for a right of appeal to the Administrative Court. In terms of s 38(1)(b)(iii), any person upon whom an enforcement order has been served or who is otherwise aggrieved by such order may, within one month from the serving of the order, appeal to the Administrative Court. Thereafter, the Administrative Court may make such order as it deems fit. However, by virtue of s 38(2)(a), the court shall not be required to entertain an appeal in terms of s 38(1) in specific circumstances. This limitation arises if it appears to the President of the court that, having regard to the provisions of any operative master plan or local plan or approved scheme, the appropriate development order, any regulations controlling development and any directions

given by the Minister, permission for the development could not have been granted or could only have been granted subject to the conditions imposed.

Where on an appeal the court makes an order which varies any enforcement order, s 38(3) stipulates that such order shall be treated as though it had been granted or made as so varied. In terms of s 38(4), a person who has lodged an appeal in terms of s 38(1) may apply to the President of the court for an order to suspend the operation of any enforcement order to which the appeal relates and the President may, if he or she thinks fit, order that the operation of such enforcement order shall be suspended. In that event, the enforcement order concerned shall not be of force or effect until such time as the appeal has been finally determined, withdrawn or abandoned or the court order has been revoked. Lastly, s 38(5) enables the President of the court to make an order in terms of s 38(4) subject to such terms and conditions as he or she thinks fit and, at any time after notice to the applicant, to revoke any such suspension order.

An analysis of the impugned provisions of the Act shows that they empower local authorities to order the demolition of any development that has been or is being carried out in contravention of the Act and/or its subsidiary instruments. They certainly do not require local authorities to first obtain a court order before carrying out the intended demolitions. All that is required is for the local authority in question to issue a notice of its intention to demolish any structure. Once the period specified in such notice has expired, the authority can forthwith and without further ado proceed with the demolition of that structure. It is patently clear that this process, without any rider or qualification, would invariably result in the occupants affected being arbitrarily evicted from their homes or having their homes demolished, without due process, in violation of s 74 of the Constitution. Additionally, as was aptly recognised in

Makani & Ors v *Epworth Local Board & Ors* HH 550-14, at p 6, such demolitions by local authorities "would render nugatory the socio-economic rights enshrined in the Constitution". Furthermore, I take the view that they would also render meaningless the national objective embodied in s 28 of the Constitution exhorting "the State and all institutions and agencies of government at every level [to] take reasonable legislative and other measures, within the limits of the resources available to them, to enable every person to have access to adequate shelter".

As was expounded in *Zimbabwe Homeless Peoples Federation & Ors* v *Minister of Local Government and National Housing & Ors* SC 94-20, at pp 13:

> "The meaning of the word "home", as used in s 74, is to be very broadly construed. The word embraces both permanent and temporary places of abode as well as shacks and informal dwellings. It has also been conceptually defined to mean a shelter against the elements providing some of the comforts of life with some degree of permanence. See *Ross* v *South Peninsula Municipality* 2001 (1) SA 589 (C); *Port Elizabeth Municipality* v *Various Occupiers* 2005 (1) SA 217 (CC), at 228; Currie & De Waal, *op. cit.* at p. 587; *City of Harare* v *Mukungurutse & Ors* SC 46-18, at p. 6; *Zuze* v *Trustees of Mlambo & Anor* SC 69-19, at p. 14."

The case authorities demonstrate that the essential elements of the protection afforded by s 74 are twofold. The first is that no person may be evicted from his home or have his home demolished "without an order of court". This is a basic procedural requirement to ensure that the intended eviction or demolition is carried out in conformity with due process. This requirement was emphasised in *City of Harare v Mukungurutse & Ors* 2018 (2) ZLR 146 (S), at 149, and reaffirmed in the *Zuze* case (*supra*), at 571F, as a prerequisite to the lawful eviction or demolition of the homes in question. The second element relates to the need to obviate the possible arbitrariness of an eviction or demolition. It necessitates that the court seized with adjudicating the matter must consider "all the relevant circumstances", including the availability or otherwise of alternative accommodation, before it grants an order of eviction or demolition. See the *Zuze* case (*supra*), at 571G.

In the present context, it would appear that the impugned s 32(2)(c)-(d) and s 37(1)(a)(i) of the Act fail to pass constitutional muster within the envisaged framework of s 74. Firstly, they do not accord any due process safeguard by way of a court order sanctioning the intended eviction or demolition. Secondly, they do not countenance any inquiry into all the relevant circumstances before any eviction or demolition eventuates. In both respects, they appear to fall foul of the procedural and substantive requirements of s 74 of the Constitution.

The question that arises at this juncture is whether the right to appeal under s 38 of Act affords adequate judicial protection against unprocedural and arbitrary eviction or demolition. Does that provision operate to palliate or negative the apparent infringement of the rights guaranteed by s 74 of the Constitution? I take the view that it does not, for the following cogent reasons.

To begin with, s 38(1)(b)(iii) places the onus to initiate the appeal process on the inhabitant concerned rather that on the local authority that has taken the decision to evict or demolish. I appreciate that this procedural shortcoming in itself may not constitute a conclusive objection to the provision taken as a whole. Of greater concern is the fact that the adjudicative process itself is heavily circumscribed by the factors that are to be taken into account by the court in the decision to allow or dismiss the appeal. In particular, by dint of s 38(2)(a), the Administrative Court is precluded from entertaining an appeal in terms of s 38(1) in the circumstances specified in s 38(2), to wit:

> "if … it appears to the President of the Administrative Court that, having regard to the provisions of … section *twenty-six* and any operative master plan or local plan or approved scheme; and … the appropriate development order; and … any regulations controlling development and any directions given by the Minister in terms of this Act in regard to development; … permission for the development could not have been granted or could only have been granted subject to the conditions imposed."

I note, firstly, that the decision under s 38(2) not to entertain an appeal is taken by the President of the court, in his sole discretion, without the assistance or concurrence of the assigned assessors. Secondly and, more critically, I understand this limitation to mean that the enforcement order concerned cannot be vacated on appeal if the relevant plan, scheme, development order, regulations or ministerial directions operate to prohibit the development in question. What this entails is that the court's jurisdiction to consider all the relevant circumstances is effectively ousted and the full remit of its adjudicative powers is thereby constricted. In my view, this limitation is patently incompatible with the comprehensive adjudicative process contemplated by s 74 of the Constitution.

Having regard to all of the foregoing, I am of the considered opinion that the impugned provisions of the Act, as interpreted on their own as well as within their immediate context, operate to contravene s 74 of the Constitution. They are therefore inconsistent with the Constitution.

Permissible Constitutional Derogations under Section 86

The next question that arises is whether or not the impugned provisions are capable of being saved as limitations that are permissible under s 86(2) of the Constitution. First and foremost, I should note that, in terms of s 86(3), certain fundamental rights and freedoms enshrined in Chapter 4 of the Constitution are non-derogable and are therefore inviolable. However, s 74 is not one of those rights. Section 86(2), which is of present concern, provides as follows:

> "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 interests of defence, public safety, public order, public morality, public health, regional or town planning or the general 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 freedom concerned than are necessary to achieve its purpose; and
(*f*) whether there are any less restrictive means of achieving the purpose of the limitation."

There can be no doubt that the Regional and Town and Country Planning Act is a law of general application. It is also clear that the purpose and design of the limitation imposed by the impugned provisions on the full breadth of the rights conferred by s 74 of the Constitution may be necessary in the interests of town planning. However, it is also critical that the limitation should be fair, reasonable, necessary and justifiable in an open and democratic society that is based on openness, justice, human dignity, equality and freedom.

Section 86(2) of the Constitution lists the six factors that must be taken into account in determining whether or not a limitation is reasonable and justifiable in a democratic society, to wit:

(1) The nature of the right or freedom concerned – to assess the importance of that particular right in the overall constitutional scheme *vis-a-vis* the justification for its infringement, so as to balance the right against the justification for its infringement.

(2) The purpose of the limitation – the limitation of the right must serve some worthwhile and important purpose in a constitutional democracy.

(3) The nature and extent of the limitation – to measure the way in which the limitation affects the right so that the law in question does no more damage to the right than is reasonable for achieving its purpose.

(4) The rights and freedoms of others – to ensure that the enjoyment of the right or freedom by any person does not prejudice the rights and freedoms of others – *cf.* s 86(1) of the Constitution.

(5) The relationship between the limitation and its purpose – to determine whether it imposes greater restrictions on the right or freedom than are necessary to achieve its intended purpose.

(6) Less restrictive means of achieving the purpose of the limitation – to evaluate whether the means used to restrict the right are the best possible means to achieve the purpose of the limitation or whether there are other means that can be used to achieve that purpose without restricting the right at all or restricting the right to a lesser extent.

In summarising the overall thrust of these factors, Currie & de Waal, *op. cit.*, at p 163, cogently opine that "…….. it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purpose of the law)." In the same vein, the decision in the South African case of *S* v *Makwanyane* 1995 (3) SA 391 (CC), at 436C, highlights the concept that "the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality". Thus, the proportionality principle may be regarded as being central to the functioning of a constitutional democracy.

In analysing the above criteria in the context of the facts *in casu*, it must be accepted that the power given to local authorities to demolish unapproved structures constitutes a valid and important purpose in every urban environment. However, the importance of freedom from arbitrary eviction or demolition guaranteed by s 74 of the Constitution cannot be overemphasised. It ensures that structures that have been constructed as homes are safeguarded against demolition and consequent eviction without a court order obtained after full consideration of all the relevant circumstances, in compliance with the strictures of the *audi alteram partem* rule. The justification for demolition, *i.e.* the interests of town planning, does not, in my view, suffice to override the requirements of due process and thereby warrant the infringement of s 74. In short, the modalities permitted by the impugned provisions of the Act to attain the legitimate purpose of town planning are unduly excessive and disproportionate in that they occasion greater harm to the rights entrenched in s 74 than is reasonable or necessary for achieving that purpose.

As was explained in the *Zuze* case, *supra*, it is necessary in every case to balance the rights infringed against the justification for their infringement. In the specific context of eviction proceedings, the Court observed as follows, at 572D-E:

> "In the final analysis, what is required in considering all the relevant circumstances is a balancing exercise between the rights and interests of all the parties involved in or affected by the eviction dispute. In the instant case, the relevant circumstances are relatively clear. The appellant was a *bona fide* occupier who was not aware that the subdivision that he occupied was illegal. He had been residing on the land in question for almost nine years. What is not apparent from the record is whether he had suitable alternative accommodation or land to occupy consequent upon his eviction from the property.
>
> What emerges from the foregoing factual conspectus is that the appellant had a direct and substantial interest in the matter notwithstanding that his occupation of the property might have been illegal. In terms of s 74 of the Constitution, he had a procedural right to be heard *apropos* all the relevant circumstances pertaining to his occupation of the property."

Furthermore, at 573F, the Court proceeded to emphasise the immateriality of the fact that the occupation or construction in question was illegal:

> "There is no doubt that the appellant has no substantive real rights in the property in question. Nevertheless, although s 74 of the Constitution does not confer any substantive real rights, it operates to guarantee the procedural rights that I have elaborated above on any person who stands to be evicted from his home. Moreover, the ambit of the protection accorded by s 74 is not confined to strictly legal occupants of land or property. Having regard to the plain and ordinary connotation of a 'home', that protection extends as well to unlawful occupiers of any property that can be characterised as constituting a home."

The actual and impending demolition of the homes *in casu* is a complete negation of the fundamental rights embodied in s 74 of the Constitution, irrespective of the legality or otherwise of the structures concerned. Moreover, the answer to the question whether such demolitions without the requisite court orders are justifiable in a democratic society, within the meaning and parameters of s 86(2) of the Constitution, must in my view be in the negative. In the final analysis, I am constrained to agree with the court *a quo* that ss 32(2)(c)-(d) and 37(1)(a)(i) of the Regional, Town and Country Planning Act fall foul of the provisions of s74 of the Constitution inasmuch as they authorise and enable the demolition of homes and the attendant eviction of residents without a court order granted after full consideration of all the relevant circumstances. The impugned provisions do not pass constitutional muster and must therefore be invalidated.

Accordingly, the order of the court *a quo* concerning the constitutional invalidity of those provisions must be confirmed in terms of s 175(1) of the Constitution. Additionally, by virtue of s 175(6)(b) of the Constitution, it is just and equitable to make an order suspending the declaration of invalidity for a specific period to allow the competent authorities to correct the defective legislation in question.

As regards costs, I do not perceive any justification for departing from the general rule against awarding costs in a constitutional matter.

Disposition

As alluded to earlier, the parties herein have filed a deed of settlement and a consent order to the effect that the impugned provisions of the Act are inconsistent with s 74 of the Constitution. In my view, the concessions made on behalf of the respondents were properly made and, therefore, the deed of settlement and draft order of consent by the parties were eminently appropriate in the circumstances of this case.

Accordingly, with a few minor but necessary emendations to the draft order, it is ordered by consent that:

1. The order of constitutional invalidity issued by the High Court under Case No. HCH 6718/20 be and is hereby confirmed.
2. Section 32(2)(c) and section 32(2)(d) of the Regional Town and Country Planning Act [*Chapter 29:12*] be and are hereby declared to be inconsistent with section 74 of the Constitution and therefore invalid.
3. Section 37(1)(a)(i) of the Regional Town and Country Planning Act [*Chapter 29:12*] be and is hereby declared to be inconsistent with section 74 of the Constitution of Zimbabwe and therefore invalid.
4. The declarations of invalidity in terms of paragraphs 2 and 3 hereinabove shall not be retrospective and shall not affect the validity of any action taken or anything done prior to the date of this order.

5. Notwithstanding paragraph 4 hereinabove, the demolition order issued by the 4th respondent on the 8th of October 2020 be and is hereby declared to be unconstitutional and therefore invalid.
6. The orders of constitutional invalidity, issued in terms of paragraphs 2 and 3 hereinabove, be and are hereby suspended for a period of 12 months from the date of this order to enable the first, second and third respondents to amend the impugned legislation so that it complies with section 74 of the Constitution.
7. There shall be no order as to costs.

GWAUNZA DCJ: I agree.

GARWE JCC: I agree.

MAKARAU JCC: I agree.

GOWORA JCC: I agree.

HLATSHWAYO JCC: I agree.

MATHONSI AJCC: I agree.

CONSTITUTIONAL COURT OF ZIMBABWE
ISSUED
CCZ32/24
05 Feb 2025
HARARE
JUDICIAL SERVICE COMMISSION

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners