JOEL MAZIYANHANGA
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
TSANGA & CHIRAWU-MUGOMBA JJ
HARARE 10, 22, 24 September & 8 October 2020

CIVIL APPEAL

J Koto, for the appellant
R.C Muchenje, for the respondent

CHIRAWU-MUGOMBA J

(1) The appellant seeks an order that the decision of the Magistrate Court sitting at Harare on the 30th of December 2019 in which his application for an interdict was dismissed be set aside, and substituted with one granting the application.

(2) The brief facts of the matter are as follows. Applicant made an application with the respondent in August 2016 for a lease in respect of a piece of land on which to carry out a car sale business. In April 2019, upon advice, he visited the Mabelreign offices of respondent as a follow up and he obtained what he terms a verbal lease agreement to operate from a 500 square metres piece of land. This was through three unnamed officials of respondent who measured the piece of land.

(3) The appellant fenced the measured piece of land and engaged the services of a security guard. A rental of US$150 was agreed upon and he was allocated a vendor number being 590108351. Rentals in the stipulated amount were paid for May and June 2019. The receipts clearly show that payments made were for a vending site.

(4) On the 19th of June 2019, the appellant was served with a notice of eviction on the ground that he was illegally occupying land belonging to the respondent. He was given 48 hours to vacate the premises.

(5) Appellant averred that he had a clear right having been allocated the land by unnamed officials in the employee of the respondent. He had been allocated a vendor number

and had been paying rentals. He was therefore a legitimate tenant. If the eviction were to proceed he stood to face financial and reputational damages.

(6) In response, the respondent through an affidavit deposed to by its acting chamber secretary, denied that the appellant had made an application for a lease. The markets officer for the relevant location had denied that they had given the appellant consent to operate. Council officers are not allowed to enter into verbal agreements and such are approved by the relevant committees before being signed for by the Town Clerk.

(7) The respondent had noted that the appellant was benefitting from a reserved area for 12 years without paying and that is the reason why he was asked to make payment. The money paid by the appellant was not for a lease but for the 12 years of free occupation. The site in question is reserved for vending and a car sale business does not fit into the category.

(8) The appellant had no clear right since he was an illegal occupier. He had no lease agreement with the respondent.

(9) In his answering affidavit the appellant raised one point in-limine, that (1) the deponent to the opposing affidavit had not demonstrated her authority to represent the respondent and consequently there was no valid notice of opposition before the court a quo. He also submitted that the deponent's evidence was heresay as there were no supporting affidavits from the market officers.

(10) In its ruling the court *a quo* dismissed the point-in-limine and held that the deponent to the opposing affidavit had the requisite authority since she had asserted that she had been authorised. Further that the appellant had been using a piece of land illegally for twelve years without regularising it. Material disputes of facts were also apparent in the matter that cannot be resolved on paper. The appellant had failed to prove the existence of a verbal lease and its terms and accordingly he had no clear right. The schedule of payments by the appellant does not show that he was paying in terms of a lease agreement. In the absence of a clear right, the application for an interdict was dismissed with costs.

(11) The appellant took issue with the dismissal and noted an appeal based on the following grounds. (1) The court a quo erred at law in holding that the notice of

opposition was valid despite lack of resolution authorising the deponent to represent the respondent. (2) The court a quo erred at law in relying on averments contained in the opposing affidavit notwithstanding that the evidence was heresay. (3) The court a quo erred at law in failing to make a determination on the objection by the appellant that evidence on behalf of respondent was heresay and was inadmissible. (4) The court *a quo* erred in making a finding that there were material disputes of fact which could not be resolved on papers filed of record. (5) The court a quo erred at law in delving into the merits of the matter and making factual findings when it had already held that there were material disputes of facts in the matter and (6). The court *a quo* erred at law in holding that appellant had failed to satisfy the requirements of an interdict.

(12) At the hearing, Mr *Koto* abandoned ground one of the grounds of appeal and rightly so since appellant had not invoked the procedure in O4R (3) of the Magistrate Court (Civil Rules) of 2019 (the rules) on challenging of the authority of any person to act for a party. He also abandoned grounds 2 and 3. Therefore only grounds 4-6 remained for argument. He submitted in his heads of argument and orally that the appellant was not in illegal occupation. Between the time that the appellant submitted his application for a lease, i.e. between August 2016 and the time that he received a response, there was a legal process taking place. The appellant had been allocated a vendor number and he was therefore not an illegal occupier. There were no material disputes of fact and even if there were, the court *a quo* ought not to have dismissed the matter but referred to trial. It was contradictory to then delve into the merits after making a finding that disputes of fact existed.

(13) Ms *Muchenje*, in her heads of argument, and orally, submitted that the court a quo did not err since the appellant failed to prove that he had a lease agreement with the respondent. There were certain processes that needed to be undertaken before one can be said to be in legal occupation. These had not been done in respect of the appellant. The appellant therefore had not proved a clear right that entitled him to an interdict. If a court finds that there are disputes of fact it has two main courses, i.e. dismiss the application or refer it to trial. The court a quo was correct to hold that there were disputes of fact that could not be resolved on paper.

(14) Given the above, in our view the critical issue is whether or not the court *a quo* erred in not directing that the matter proceed by way of action after making a finding that there were disputes of facts.

(15) Order 22(5) of the Magistrates Court (Civil Rules) 2019 gives a court three options that a court may exercise upon hearing all parties. These are (1) refuse the application and give written reasons for such decision (2) grant the application as applied for or as varied and give reasons and (3) order that the issue shall be tried by way of action and give directions as it thinks just to enable such issue to be brought to trial and make such order as to costs as it thinks fit.

(16) We agree with Mr *Koto* that having found that there were material disputes of facts, the court a quo ought to have referred the matter to trial. Although a court has discretion, see *Barrows and Anor* v *Chimpondah*, 1999(1) ZLR 58 (S) which should not be interfered with lightly, an error was made in dismissing the matter outright. The appellant had been in operation for a long time and he had been allocated a vendor number and was making payments. All these issues needed to be delved into to establish what actually transpired. The respondent would also have an opportunity to defend itself through leading of oral evidence. The respondent submitted in its opposing affidavit that some market officers had denied that a verbal lease was entered into. This and other evidence needed to be led before the court *a quo*. The dismissal of the claim would mean as rightly pointed to by Mr *Koto* that the door to the claim would be shut.

(17) We therefore find merit in grounds 4 and 5 of the appeal. Ground 6 has no merit given the fact that after finding that there were material disputes of fact, a finding of whether or not requirements for the granting of an interdict were met was not legally competent. The ground is framed in a manner that suggests that the court *a quo* was correct to delve into the issue of requirements for the granting of an interdict.

(18) Having found that the court *a quo* erred in dismissing the application and not allowing oral evidence, it would not be competent to grant the order sought by the appellant, i.e. the dismissal of the claim. In terms of costs, given the fact that both parties did not fully address the critical legal issue, an order will be made that each

party bears its own costs. Accordingly the appeal partly succeeds and the following order is issued:-

DISPOSITION

1. The appeal partly succeeds with each party bearing its own costs.
2. The order of the court a quo is set aside and substituted with the following: - "The matter in case number 9466/19 is remitted to the Magistrates Court for hearing of oral evidence on the merits".

TSANGA J: agrees

Koto and Company, appellant's Legal Practitioners
Mbidzo, Muchadehama and Makoni, respondent's Legal Practitioners