Judgment No. SC 45/18
Civil Appeal No. SC. 474/17

(Not reportable)

MISHECK MUZA
v
(1) REGGIE SARUCHERA (2) PRICE TRUST (3) MASTER OF THE HIGH COURT (4) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAKARAU JA & BHUNU JA
HARARE 24 MAY 2018.

Appellant in Person
M. G. Hara, for the first respondent;
M. Mukandagumbo, for second respondent.

MAKARAU JA: - This is an appeal against the judgment of the High Court dismissing with costs, an application by the appellant seeking an order restraining the transfer of or in the event that the property had already been sold, an order reversing that sale and giving the appellant the right to purchase certain immovable property commonly known as no 8 Price Road, Emerald Hill, Harare.

The facts.

The facts giving rise to this appeal are largely common cause.

The appellant was employed as a senior executive by JW Jaggers Wholesalers (Private) Limited ("Jaggers Wholesalers"). In that capacity, he was allocated a residence, belonging to the employer situate at no 8 Price Road Emerald Hill Harare, ("the property"). The terms and conditions of the allocation of the property to the appellant, if any were specifically agreed upon, were not placed before the court *a quo* and are not on record.

In 2011, Jaggers Wholesalers was placed under liquidation. The first respondent was appointed liquidator.

In 2013, the property was put up for sale.

On 5 March 2013, an estate agent handling the sale of the property addressed a letter to the appellant advising him of the intended sale and offering him the property for the sum of US$140 000-00. The appellant entered into some correspondence with the estate agent and with the first respondent regarding the intended sale. In particular, the appellant intended to negotiate a set off of the purchase price against any benefits that were due to him. Notwithstanding such engagement, the property was sold to the second respondent who in due course took transfer of the property.

The appeal

The appellant approached the court *a quo* seeking an order in the terms set out above. He was unsuccessful. Aggrieved by the dismissal of his application, he noted an appeal to this Court, raising five grounds of appeal as follows:

"1. The court erred in holding that there was no right of first refusal in favour of appellant.

2. The court erred in creating a distinction between a right of first refusal and what it called the right of first offer.

3. The court erred in holding that presentation of an alternative competent mode of payment amounted to refusal of the offer.

4. The court erred in not giving due attention to the malpractices that went with the sale and the transfer as shown in the cases before the court.

5. The court erred in viewing reversal of the state of affairs as impossibility."

Interim interdict.

It is not in dispute that in the main, the appellant approached the court *a quo* for an interim interdict, seeking to restrain the transfer of the property in dispute, pending determination of his rights to the property. Clearly, in seeking the interim protection as he did, the appellant appreciated that the dispute relating to his rights in the property would be determined at some future date and in proceedings different from the application he had filed for an interim interdict. In this regard he was correct, for an interim interdict merely affords temporary protection pending the determination of the disputed rights of the parties. The grant or refusal of a temporary interdict is not intended to and does not in any way resolve the dispute between the parties. More importantly, the procedure for obtaining an interim interdict, including the averments that have to be made and the evidential threshold that has to be passed in such proceedings is different from the procedure and averments necessary for settling the substantive dispute. The two reliefs cannot therefore be co- joined and claimed in the same procedure.

It was therefore incompetent for the appellant, in his draft order, to seek an order reversing a sale to which he was not privy and for an order granting him the right to purchase the immovable property.

The court *a quo* correctly found that the appellant was not entitled to the interim interdict that he was seeking. This is so because at the date of the hearing of the application before the court *a quo*, the property in dispute had been transferred to the second respondent. This led the court *a quo* to find that the application before it had been overtaken by events and that the relief that the appellant had sought, based on the averments made in his founding affidavit, could no longer be granted.

Whilst it did not fully explain its decision, being content to make its finding in one terse sentence, the finding by the court *a quo* in this regard is sound and is based on a legal principle that is settled. An interim interdict is not a remedy for past invasions of rights and will not be granted to a person whose rights in a thing have already been taken from him by operation of law at the time he or she makes approaches the court for interim relief. (See *Mayor Logistics (Private) Limited v ZIMRA* SC 7/14 and *Airfield Investments (Private Limited v Minister of Lands, Agriculture and Rural Resettlement and Others* SC 36/04 and *Stauffer Chemicals v Monsato Company* 1988 (1) SA 805).

The legal position was put succinctly by MALABA DCJ (as he then was) in the Airfield case as follows:

> "The threshold the appellant had to cross was the production of evidence which established the existence in it of *prima facie* rights of ownership in the land at the time the application for interim relief was made. An interim interdict is not a remedy for past invasions of rights and will not be granted to a person whose rights in a thing have already been taken from him by operation of law at the time he or she makes an application for interim relief."

The learned judge proceeded to observe on the facts of the matter that was before him as follows:

> "The appellant was not in a position to show the existence of *prima facie* rights of ownership in the land which the first respondent was about to infringe because at the time it applied for the interim relief all the rights of ownership it had in the land had been taken by means of the order of acquisition and vested in the acquiring authority. When the appellant lodged the application for the interim relief before the court a quo the acquisition of the land by the State was a *fait accompli*, all rights of ownership having been extinguished on its part. The acquiring authority having done everything it was obliged by the law to do to acquire the land for resettlement purposes, there was no outstanding act against the performance of which the acquiring authority could be temporarily interdicted."

Similarly, and applying the above observations to the facts of this appeal, when the appellant's application was heard before the court *a quo*, the right of ownership in the property had been acquired by the second respondent and this was a *fait accompli*. The transfer to the second respondent had been done in terms of the law at a time when there was no legal impediment to such a transfer. It therefore passed good title to the second respondent which title is defensible against the world at large. There was therefore no outstanding juristic act whose performance could be temporarily restrained to enable the appellant to enjoy whatever rights he claimed to have against the first respondent. He could not seek to enforce the right to buy a property that the first respondent had lawfully disposed of.

The finding by the court *a quo* that the appellant's application had been overtaken by events in my view forms the *ratio decidendi* of its decision.

Before that court, the appellant correctly accepted the correctness of the finding by the court that it was no longer tenable for him to obtain the interdict that he was seeking. He was well advised to do so. The appellant then sought to amend his prayer to seek instead, an order cancelling and reversing the transfer to the second respondent. Again in fairly terse terms, the court *a quo* found that this was not tenable on the basis of the papers filed before it. I shall return to this point.

To conclude on the issue of interim interdict that the appellant unsuccessfully sought before the court *a quo*, I make the point that in his notice of appeal to this Court, the appellant did not seek to challenge the correctness of the finding by the court *a quo* that the interim interdict he had sought could not be granted in the circumstances of the matter. The

correctness of that decision remains unchallenged and must be upheld by dismissing this appeal.

Instead, the appellant seeks to attack the findings by the court *a quo* that he had no right to purchase the property ahead of the second respondent or any other purchaser, a finding based on *obiter,* a point to which I now turn.

Obiter dictum.

Accepting as I do that the *ratio decidend*i of the decision of the court *a quo* was its finding that the appellant was not entitled to the interim interdict, then, the other findings by the court were all *obiter dictum.* With respect, the court *a quo* ought not to have proceeded beyond its finding that the appellant was not entitled to the interim interdict. Its foray into the other issues not only creates the impression that these are now *res judicata* but it regrettably also misled the Appellant into filing an appeal against findings made by way of *obiter* remarks.

The court *a quo* appears to have overlooked the prudence of always minimising the basis of its decision to only those issues that are necessary to resolve the dispute before the court.

It is not clear from the record whether or not the court *a quo* granted the application by the appellant to amend his prayer from one seeking an interim interdict to one seeking to reverse the transfer of the property to the second respondent. The court *a quo* on page 2 of its judgment noted this was impossible as “all evidence on paper deal with sale and not transfer.” This finding is not followed by an order dismissing the application.

The confusion on whether or not the court *a quo* granted the application to amend is created by the fact that immediately after making the observation that it was impossible to amend the appellant's draft order, the court proceeded to deal with whether or not the appellant had made an offer for the property when he was invited to do so by the estate agent selling the property. This was an issue that could only have arisen for determination if the draft order had been amended or more properly, it is an issue that would arise in the determination of the substantive dispute between the parties. The court *a quo* nevertheless proceeded to find against the appellant in this regard giving rise to the perception that it had granted the application to amend the draft order.

Apart from dealing with the above issue which was not properly before it, the court *a quo* also commented on an earlier application which the appellant had brought on a certificate of urgency seeking to restrain the sale of the property. That application had been dismissed on the basis that the appellant had failed to prove that he had the right of first refusal to the property. After referring to this unsuccessful application, the court *a quo* proceeded to determine whether or not the appellant had the right of first refusal to the property and found, like the earlier court had found, that the appellant did not have such a right.

In view of the fact that the earlier court had already determined that issue, it was no longer open for the court *a quo* to revisit the same issue as it does not have review powers over a court of equal jurisdiction. It is however this finding by the court *a quo* that the appellant has no right of first refusal to the property that has given rise to this appeal.

I have set out in detail the judgment of the court *a quo* to demonstrate how the finding under appeal is *orbiter* and does not form the *ratio* of the judgment.

Once the court *a quo* had found that the application before it could not be granted as the harm that the appellant sought to pre-empt had already occurred, and the appellant had accepted that position by formally seeking to amend his draft order during the hearing of the matter, the court *a quo* ought to have made an order denying the application to amend the prayer with reasons. It ought not to have proceeded to deal with the issues raised by the amended draft order as if these were properly before it which only the court dealing with the substantive dispute between the parties could have properly dealt with.

I make these observations as they have a bearing on the question of costs. They do not affect the outcome of the appeal.

The appellant erred in noting an appeal against findings that were made by way of *orbiter* remarks. His error is however understandable in that he is a self-actor who could not discern between the *ratio* of the judgment and the other findings of the court *a quo* by way of *obiter.*

Disposition.

There has been no appeal against the *ratio decidendi* of the judgment of the court *a quo*. Accordingly, the appeal cannot succeed. Regarding costs, in view of the findings I have made above, it is appropriate that there be no order as to costs.

In the result, I make the following order:

The appeal is hereby dismissed with no order as to costs.

GWAUNZA DCJ: I agree.

BHUNU JA: I agree.

C Nhemwa & Associates, 1st respondent's legal Practitioners;

T. K Takaindisa, 2nd respondent's legal practitioners.