

REPORTABLE (62)

PATRICK MAKAVA
v
(1) ROSEMARY MUTINGWENDE (2) MINISTER OF LANDS
AND RURAL RESETTLEMENT

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GOWORA JA & MAKONI JA
HARARE: SEPTEMBER 14, 2018 & OCTOBER 30, 2018

T. Magwaliba, for the appellant

T. E. Mudambanuki, for the first respondent

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MAKONI JA: This is an appeal against the whole judgment of the High Court sitting at Harare in which the court granted a provisional order in favour of the respondent. The essence of the order was to interdict the appellant and his agents and all those occupying the farm through him, from interfering with farming activities at Plot 1 of Alpha of Sandringham in Mazowe District of Mashonaland Central Province. The matter was brought on a certificate of urgency.

The background to the matter is that the 1st respondent is a holder of an offer letter in respect of land described as subdivision 1 of the Remaining Extent of Sandringham in Mazowe

measuring 162.40 hectares in extent (the farm). The offer letter is dated 6 April 2017, and was produced as evidence by the respondent. Despite the date on the offer letter, the first respondent avers that she took occupation of the farm in 2000. She produced documents which establish her interactions with various service providers which date back to 2005.

The appellant occupies the same farm. He avers that he was offered the farm in 2013 and took occupancy. At the time, the farm was bush and he developed it to where it is today. He attached evidence of what he said were substantial improvements that he made at the farm. He avers that his offer letter was processed and at one point reflected in the second respondent's system but was later lost.

As they were co-existing on the farm, the first respondent averred that the appellant had on 15 July 2017 started tilling on first respondent's winter ploughed field where she intended to plant a cabbage crop on 1 August 2017. Despite warnings to stop such conduct, the appellant persisted.

The first respondent then approached the court *a quo* on a certificate of urgency seeking an interdict. She contended that she would suffer irreparable losses if she were unable to plant her cabbage seedlings which were ready.

The application was opposed by the appellant. He did not file opposing papers but made oral submissions before the court *a quo*. Having found merit in the respondent's case, the

court *a quo* granted the provisional order. Aggrieved by the decision, the appellant filed the present appeal.

His Grounds of Appeal are as follows:

1. The High Court erred in dismissing an objection to the validity of a special power of attorney given by the first respondent to Davie Fukwa Mutingwende authorizing him to institute the legal proceedings which was not notarized, it having been issued in the United Kingdom.
2. The High Court further grossly erred in finding that the matter before it was urgent when it was apparent that the appellant had been in occupation of subdivision 1 of the Constancia of Sandringham Farm for a long period of time carrying on activities known to the first respondent and any other persons.
3. The High Court further erred in granting an interdict without first determining whether subdivision 1 of the Constancia of Sandringham Farm occupied by the appellant was the same property as Lot 1 of Alpha of Sandringham Farm claimed by the first respondent.
4. The High Court further consequently erred in finding that the first respondent had established a final right entitling her to the grant of an interdict in the circumstances.

At the hearing of the matter, *Mr Mudambanuki* sought to argue that the appeal was not properly before the court for the reason that the appellant sought to appeal against an interlocutory order. He contended that the order did not have a final and definitive effect as the appellant had not fully exhausted the remedies in the court *a quo* namely filing its opposing papers to the final order sought.

He was directed by the court to s43 (2) (d) (iii) of the High Court Act [Chapter 7:06] which reads as follows: -

(2). No appeal shall lie

a.....

b.....

c.....

(d) from the interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases—

(i).....

(ii). where an interdict is granted or refused

(iii).....

After examining the section he correctly conceded that the appeal was properly before the court. The general rule is that a provisional order granted under r246 (2) of the High Court Rules 1971 is always subject to confirmation or discharge before it becomes final and therefore appealable.¹ This does not apply to an interlocutory order granting the relief of an interdict as is provided for in s43(2)(iii).

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I will now consider the grounds of appeal in turn.

GROUND NO. 1

Mr Magwaliba contended that the application before the High Court was improperly authorized and was therefore invalid. Accordingly, he contended there was no basis

¹ . *Nyikadzino v Asher & Others* 2009 (1) ZLR 174(H) at 177E.

upon which the court *a quo* could relate to it. He submits this was because the power of attorney purporting to authorize the deponent to the founding affidavit, Davie Fukwa Mutingwende, to act on behalf of the first respondent, was executed by her in the United Kingdom. It was not authenticated in terms of r 3 of the High Court (Authentication of documents) Rules, 1971.

From the above submission, it seems the appellant is seeking to raise a new issue before this Court, relating to the validity or otherwise of the power of attorney. In the absence of any other evidence to the contrary², it would appear from the judgment of the court *a quo*, that the only issue raised before the court *a quo* related to whether or not the power of attorney was granted to an entity called ZIMMART Trust or to the deponent to the founding affidavit. I can do no better than to quote how the court *a quo* dealt with the issue. At p 3 of the cyclostyled judgment the court had this to say;

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“Further, the 1st respondent sought to raise issue with the power of attorney that applicant had granted to her brother. It was argued on his behalf that it was not clear whether the power of attorney was granted to an entity called ZIMMART or to the deponent Davie Fukwa Mutingwende the Group Executive Officer. I dismissed this point as the special power of attorney clearly stated as follows: -

Therefore I hereby appoint Davie Fukwa Mutingwende ZIMMART Trust residing at 39-38 Crescent Warren Park 2...to be my special attorney and agent.”

The court *a quo* could not have “erred in dismissing an objection to the validity of a special power of attorney...” when there is no record that the issue was placed and ventilated before it. The ground of appeal therefore lacks merit.

GROUND 2

². Oral submissions made for the Appellant are not part of the record before this court.

Mr Magwaliba contended that the finding by the court *a quo* that the matter was urgent “boggles the mind”. The first respondent had on 28 April 2017 filed a Court Application in HC3759/17 seeking to interdict the appellant from conducting any activities on the farm and his eviction from the farm. The urgent application was filed on 17 July 2017, some two and a half months later. He further argued that the first respondent abused court processes by instituting the urgent chamber application when she had sought the same relief in an earlier application. According to the evidence in the Court Application the first respondent had been aware of the appellant’s occupation of the farm since 2016. The need for the first respondents to act arose then.

The circumstances that prompted the 1st respondent to file the urgent chamber application were clearly set out in the judgment of the court *a quo*. The appellant had started tilling through the 1st respondent’s winter ploughed field where she intended to transplant cabbage seedlings which were ready to be transplanted. She tried to stop the appellant without any success. She then approached the High Court. The fact that there was a pending court application wherein the 1st respondent sought *inter alia* an interdict was no bar for the 1st respondent to have brought the present application before the High Court. The court *a quo* was correct in its observation that the thrust in the Court Application was different from the present matter and that the relief being sought in the present matter was interim in nature and that no eviction was being sought.

In my view, there was no misdirection on the part of the court *a quo* on this point.

GROUND 3 AND 4

Mr Magwaliba argued that the primary question which the court *a quo* needed to resolve, but however failed to do, was whether the first respondent's offer letter related to the land which was occupied by the appellant. He contended that the High Court simply did not address its mind to this issue.

Contrary to this view, the court *a quo* addressed the issue and correctly so, at pages 3-4 where it made the following findings: -

“From the submission made on the matter the 1st respondent did not deny that he is occupying the same land allocated to the applicant. Neither did he deny locking the applicant's employees nor retilling the applicant's land. He has no offer letter, permit nor a lease to show viz the land he occupies”. (my own underlining).

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I find no fault in the above reasoning by the court *a quo*. The appellant conceded that he was on the same land as that allocated to the first respondent. The court then found and properly so that the first respondent had a clear right in the land in question and proceeded to grant the interdict. The above reasoning cannot be faulted.

In conclusion, I find that the appeal lacks merit and must be dismissed.

I therefore make the following order.

1. The appeal be and is hereby dismissed.
2. The appellant is to pay the first respondent's costs.

GWAUNZA, DCJ:

I agree

GOWORA, JA:

I agree

Chinawa Law Chambers, appellant's legal practitioners.

Jarvis Palframan, respondent's legal practitioners