

DISTRIBUTABLE (18)

(1) A. ADAM AND COMPANY (PRIVATE) LIMITED
(2) SGI PROPERTIES (PRIVATE) LIMITED
(3) GARABGA NCUBE AND PARTNERS
v
GOODLIVING REAL ESTATE (PRIVATE) LIMITED

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA JA & BHUNU JA
HARARE, 29 MAY 2020 & 29 MARCH 2021**

F. Mahere, for the appellants

S. M. Hashiti, for the respondent

Judgment No. SC 18/21
Civil Appeal No. SC 444/19¹

GUVAVA JA:

INTRODUCTION

[1] This is an appeal against the whole judgment of the High Court sitting at Harare dated 10 July 2019 in favour of the respondent. The court *a quo* in this case granted an interdict against the first and second appellants ordering them to share the money collected between 2014 and 2018 in accordance with the partnership agreement and stopping them from interfering with the management of stands 147 and 151 Mbuya Nehanda Street Harare.

BACKGROUND FACTS

[2] In order to understand the basis of this appeal it is necessary to set out in some detail the background of this matter. The first and second appellants ('the appellants') are the owners of commercial properties known as Stand 147 and 151 Mbuya Nehanda Street,

Harare ('the properties'). The third appellant is a law firm representing the appellants. The respondent is a real estate company, registered in terms of the laws of Zimbabwe.

[3] The first and second appellants and respondent entered into a partnership agreement wherein the respondent would develop and build shops on the appellant's stands. In terms of this agreement, it would be valid for a period of 3 years and subject to renewal by both parties. The parties also agreed that the respondent would develop and effect certain improvements on the two properties at its own expense. It was further agreed that upon completion of the development of the properties, the parties would lease them out with the appellants being entitled to 67 per cent of the rentals and the respondent to 33 per cent.

[4] Subsequent to this agreement, the parties entered into a commercial lease agreement dated 26 August 2010, which resulted in a joint venture agreement. Following the creation of the lease agreement, a dispute arose between the parties. The first and second appellants alleged that the contract between the parties was to operate for a period of 3 years only whereas the respondent alleged that it was for a period of at least 15 years. The averment by the respondent was made on the basis of purported terms of a prior verbal agreement which the parties made before the creation and signing of the partnership agreement on 10 January 2010.

[5] The dispute between the parties resulted in numerous litigation between the parties. On 4 September 2013 the respondent approached the High Court under case number HC 7215/13 seeking an interdict stopping the appellants from interfering with the respondent's management of the properties as agreed in the partnership agreement. The application resulted in a consent order which was granted by TAKUVA J and whose operative part reads as follows:

- “1. Pending final disposition of the substantive dispute between the parties through arbitration proceedings, the status *quo* obtaining at the premises in question shall continue to subsist and the parties’ relations shall continue to be regulated by the existing agreements.
2. The parties shall proceed with due expedition to refer the dispute between them to the Commercial Arbitration Centre for resolution by an Arbitrator who shall dispose of the substantive dispute in accordance with the provisions of the Arbitration Act.
3. Each party shall bear its own costs.”

[6] The dispute was referred to arbitration on 13 October 2013. The respondent sought a determination regarding whether the joint venture agreement had ceased to exist, whether it was entitled to take over the management and control of the developed premises and alternatively whether the appellants had lawfully cancelled the agreements.

[7] The respondent further filed an application for rectification before the High Court which sought the rectification of the partnership contracts so as to reflect the true intention of the parties in relation to the duration period to be covered by the agreement. The respondent alleged that the arbitrator, retired SMITH J, then wrongly advised it to withdraw its application for rectification before the High Court so that he would deal with it himself. The respondent further alleges that it cooperated without knowing that the arbitrator was an interested party and he went on to dismiss the rectification application.

[8] On 29 May 2014, the arbitrator granted an interlocutory award in favour of the first and second appellants which ordered the respondent to remit all the rentals collected into the third appellant’s trust account. On 6 December 2016, the arbitrator issued a final award.

The appellants sought to register the arbitral award under case number HC 1054/17.

[9] On the other hand the respondent made an application for the setting aside of the arbitral award under HC 1347/17. The applications were heard together by Phiri J who set aside the arbitral award and dismissed the appellants' application for registration of the award. The appellants noted an appeal against this decision before the Supreme Court under case number SC 351/19. Following the setting aside of the arbitral award by Phiri J, the respondent filed an application for an interdict against the appellants. The respondent sought to interdict the appellants from interfering with the management of the properties and a mandatory interdict ordering that rentals collected should be shared in terms of the partnership agreement.

SUBMISSIONS A QUO

[10] In making the application, the respondent averred that the written agreement between the parties did not correctly reflect the intention of the parties. Judgment No. SC 107/21 Civil Appeal No. SC 444/194 intention that the agreement would operate for a period of 15 years to enable the respondent to recover its capital and make a reasonable profit. The respondent further averred that to prove the agreement was meant to exist for 15 years, some of the tenants were made to enter into lease agreements of 15 years whereby both parties appended their signatures confirming the partnership would subsist for 15 years. Further the respondent averred that it had invested about one million dollars into the project and by the time when the application was made, it had only recovered about US\$250 000.00.

[11] The appellants opposed the application and argued that the partnership agreement between the parties was never set aside and was to operate for 3 years only. The appellants also submitted that the respondent had no lawful right to collect rentals from the occupants of the premises in dispute.

[12] The court *a quo* in dealing with the application found that the respondent had managed to satisfy the requirements of a temporary interdict which it sought. The court further found that the arbitral award having been set aside and that decision having been appealed against, the consent order by TAKUVA J was in operation in determining how the parties would interact pending the appeal. The court found that the interim award changed the *status quo* which had been determined by the order of TAKUVA J and that, the interim award thus contradicted the consent order. The court held that the consent order granted by TAKUVA J was an order of a superior jurisdiction compared to arbitration proceedings. Thus, the only courts which could interfere with the order are the High Court itself or other superior courts. As such, the court found that the arbitrator misdirected himself by varying an order of the High Court. Thus, the order governing the parties was the consent order and not the interim order.

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[13] On that basis the court granted the application for an interdict against the respondent and made the following order:

- “1. The money collected since 2014 to 2018 and remitted in the 3rd respondent’s trust account, all arrear rentals the respondent’s collected in form of cash or through their personal accounts and money sitting in the trust account of the Law Society of Zimbabwe be shared in accordance to the partnership agreement in proportion of 33% and 67% respectively.
2. 1st and 2nd respondents be and are hereby ordered to stop interfering in the management of both stand 147 and 151 Mbuya Nehanda Street, and collection of rentals on stand Mbuya Nehanda Street, Harare as dictated by the partnership agreement pending the outcome of an appeal filed under SC 351/19.
3. The 1st, 2nd & 3rd respondents jointly and severally each paying the other to be absolved pay the costs of this application.”

[14] Dissatisfied with the decision of the court *a quo* the appellant noted this present appeal under the following grounds:

1. “The court *a quo* erred at law and grossly misdirected itself on the facts relating to an interim interdict application and affording such relief in circumstances where no such application was before it.
2. The court *a quo* erred and misdirected itself in finding as it did that Mr Justice Takuva’s order was negated by the interim arbitration award of 29 May 2014. This ignored the common cause position that the consent order of Mr Justice Takuva contemplated resolution of the dispute in terms of the relevant law, which law, provides for the relief of an interim award.
3. In any event, the court *a quo* grossly erred and misdirected itself in affording interdictory relief in light of the extant arbitration award of 8 September 2014 dismissing respondent’s rectification claim.
4. The court *a quo* erred and grossly misdirected itself in resuscitating a partnership agreement whose fate had been sealed by the dismissal of the rectification claim by the arbitrator, retired Justice Smith and therefore no basis existed for the court to order any sharing of rentals and/or management of 1st appellant’s property.
5. The court *a quo* grossly erred and misdirected itself in granting interdictory relief where the respondent had not met the requirements of such relief.”

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ISSUES FOR DETERMINATION

[15] It appears to me that from the five grounds of appeal the determination of one issue will resolve the dispute. The issue for determination is whether or not the court *a quo* correctly granted the interdict sought by the respondent.

SUBMISSIONS ON APPEAL

[16] At the hearing, Ms. *Mahere* for the appellants, argued that the application made before the court *a quo* by the respondent was an application for a final interdict. It was counsel’s argument that the draft order sought by the respondent clearly showed that paragraph 1 was for a final mandatory interdict whereas paragraph 2 sought a prohibitory interdict of interference. With that counsel argued that the court misdirected

itself when it considered the requirements of an interim interdict as no such application was before it.

[17] Counsel further argued that the court *a quo* failed to correctly apply the requirements of a final interdict as had been sought by the respondent. It was argued that the respondent had no clear right to claim as the dispute between the parties pertaining to the partnership agreement was ongoing and as such no clear right could be deduced from the ongoing dispute. Also, it was counsel's argument that the respondent failed to satisfy the requirement that it did not have alternative remedies as it could still claim damages, specific performance or an order of contempt of court against the appellants.

[18] Per *contra*, Mr. Hashiti, counsel for the respondent, argued that the court *a quo* correctly granted the draft order which was sought by the respondent as the respondent had satisfied all the requirements in making its application. Counsel further argued that the only remedy the respondent had in the face of the appellants continued disturbance of its management of the properties, was for the respondent to seek for an interdict which was correctly granted by the court.

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APPLICATION OF THE LAW TO THE FACTS

[19] The respondent made an application for a final interdict before the court *a quo*. In its founding affidavit it listed the requirements it had to satisfy in making the application, being: existence of a clear right, imminent danger, irreparable harm and absence of other remedies. The respondent's draft order reads as follows:

"1. The money collected since 2014 to 2018 and remitted in the 3rd respondent's trust account, all arrear rentals the respondent's collected in form of cash or through

their personal accounts and money's sitting in the trust account of the Law Society of Zimbabwe be shared in accordance to the partnership agreement in proportion of 33% and 67% respectively.

2. 1st and 2nd respondents be and are hereby ordered to stop interfering in the management of both stand 147 and 151 Mbuya Nehanda Street, and collection of rentals on stand 151 Mbuya Nehanda Street, Harare as dictated by the partnership agreement.
3. The 1st, 2nd & 3rd respondents jointly and severally each paying the other to be absolved pay the costs of this application on an attorney and client scale.”

[20] The court *a quo* in determining the application made by the respondent however went on to consider the requirements of an interim interdict. The court noted as follows:

“The applicant seeks both a mandatory and prohibitory interdict. The requirements of a temporary interdict are trite. They are,

1. a *prima facie* right, though it may be open to doubt
2. a well-grounded apprehension of irreparable harm
3. the balance of convenience must favour the granting of the interdict
4. absence of any other satisfactory remedy.

....

I will proceed to consider whether the applicant satisfied the requirements of the temporary interdicts sought.”

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[21] From the above remarks made by the court *a quo* it is clear that the court fell into error when it considered the application before it as an application for an interim interdict when in fact it was an application for a final interdict.

[22] The requirements that must be established in an application for a final interdict have been set out in a long line of cases in this jurisdiction. In the case of *Econet Wireless Holdings & Ors v Min of Finance & Others* 2001 (1) ZLR 373 (S) at 374 B this Court had occasion to once again succinctly set them out. The court held that:

“What the appellants in this case sought was a final interdict. In order to succeed in obtaining such an interdict they had to establish: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other ordinary remedy. See *Setlogelo v Setlogelo* 914 AD 221 at 227 ; *Sanachem (Pty) Ltd v Farmers Agri-care (Pty) Ltd & Ors* 1995 (2) SA 781 (A) at 789 B-C; *Charuma Blasting & Earthmoving Svcs (Pvt) Ltd v Njanjai*

& Ors 2000 (1) ZLR 85 (S) at 89 D” *Blue Rangers Estates (Pvt) Ltd v Muduviri & Another* 2009 (1) ZLR 368 (S)”

Whereas the requirements for an interim interdict were aptly stated in *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511(S). The Court cited with approval the case of *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F, CORBETT J (as he then was) wherein the court said an applicant for such temporary relief must show:

- “(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
- (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the balance of convenience favours the granting of interim relief; and
- (d) that the applicant has no other satisfactory remedy.”

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[23] There can be no doubt from the above cited authorities that the requirements to be considered and assessed by a court when faced with an application for an interim and final interdict are different. The court *a quo*, in *casu*, however assessed the respondent’s application on the requirements of an application for interim interdict which had not been sought or motivated by the respondent. The court could not have properly assessed whether or not the respondent had satisfied the requirements for an interim interdict as the respondent’s founding affidavit was making a case for a final interdict.

[24] In *Gwaradzimba N.O. v CJ Petron & Co. (Pty) Ltd.* 2016 (1) ZLR 28 (S) the Court emphasised the importance for a court to determine all issues raised before it. The court held that:

“The position is well settled that a court must not make a determination on only one of the issues raised by the parties and say nothing about other equally important issues

raised, “unless the issue so determined can put the whole matter to rest” – *Longman Zimbabwe (Pvt) Limited v Midzi & Ors* 2008 (1) ZLR 198, 203 D (S)

The position is also settled that where there is a dispute on some question of law or fact, there must be a judicial decision or determination on the issue in dispute. Indeed the failure to resolve the dispute or give reasons for a determination is a misdirection, one that vitiates the order given at the end of the trial.”

[25] In *PG Industries Zimbabwe (Pvt) Ltd. v Bvekerwa & Others* SC 53/16 the court held the following:

“The position is settled that where there is a dispute on a question, be it on a question of fact or point of law, there must be a judicial decision on the issue in dispute. The failure to resolve the dispute vitiates the order given at the end of the proceedings.”

Also, in *Nzara and Ors v Kashumba N.O. and Ors* SC 18/18 at page 13 of the cyclostyled judgment held that:

“The function of a court is to determine the dispute placed before it by the parties through their pleadings, evidence and submissions. The pleadings include the prayers of the parties through which they seek specified orders from the court. This position has become settled in our law. Each party places before the court a prayer or she wants the court to grant in its favour. The Rules of court require that such an order be specified in the prayer and the draft order.”

These requirements of procedural law seek to ensure that the court is merely determining issues placed before it by the parties and not going on a frolic of its own. The court must always be seen to be impartial and applying the law to facts presented to it by the parties in determining the parties’ issues.”

[26] From the above referred authorities it is clear that this Court has pronounced itself on the importance of a courts to be guided by the papers and pleadings placed before them.

A court must neither stray from the issue it is asked to determine nor must it create an issue for the parties. It must not go on a frolic of its own.

[27] In *casu*, the respondent placed before the court *a quo* an application for a final order.

The draft order sought clearly showed that the respondent was seeking a final interdict as per para 1 of the draft order for the sharing of the rentals which had been collected

since 2014 to 2018 in terms of the partnership agreement. Paragraph 2 was more of an interim relief which sought to prohibit the appellants from interfering in the management of the properties pending the outcome of the appeal which had been filed under SC 351/19.

[28] The court *a quo* thus grossly misdirected itself in granting the draft order on the basis of the requirements of an interim interdict which had not been motivated by the respondent. The court *a quo* ought to have been guided by the papers placed before it by the parties before making its determination on the application which was being sought by the respondent. The respondent made an application for a final interdict and went on to motivate the requirements for such application. There was no application for an interim interdict before the court and as such the order granted by the court was erroneously granted.

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[29] The court finds merit in the arguments made by counsel for the appellant and on this basis alone the appeal must succeed. The appellants have succeeded and they are thus entitled to their costs. I am not however persuaded by the argument that the appellants have made out a case that justifies that they should have been awarded costs on a legal practitioner client scale before the court *a quo*.

DISPOSITION

[30] In the result, it is accordingly ordered as follows:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:
“The application be and is hereby dismissed with costs.”

MAVANGIRA JA I agree

BHUNU JA I agree

Garabga, Ncube & Partners, appellants' legal practitioners

Zinyengere & Rupapa, respondent's legal practitioners

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Civil Appeal No. SC 444/1912