

REPORTABLE: (32)

MASIMBA CHARITY HUNI FUELS (PRIVATE) LIMITED
v
(1) NATHAN AMOS KADURIRA (2) MAKONI RURAL
DISTRICT COUNCIL

SUPREME COURT OF ZIMBABWE
GUVAVA JA, BHUNU JA & MUSAKWA JA
HARARE, 25 JUNE, 2021 & 22 MARCH, 2022

L. Madhuku for the appellant

T. W. Nyamakura for the first respondent

No appearance for the second respondent

MUSAKWA JA: This is an appeal against the whole judgment of the
Judgment No. SC 39/22
High Court wherein the court *a quo* dismissed the appellant's appeal with costs. Civil Appeal No. SC 39/21

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BACKGROUND FACTS

The background to this matter is that sometime in 2006, the first respondent purchased five commercial stands in Nyazura from the second respondent and paid for them in full. Upon commencement of development on the allocated stands, one Mr *Mukada* indicated to the first respondent that he had been allocated a portion of the same stands, thereby essentially constituting a double sale. Upon enquiry, the second respondent admitted that it had erroneously made a double sale. In a bid to cure the error, the second respondent allocated new stands to the first respondent in 2014. Just as the first respondent was about to commence development, the second respondent persuaded him to allow Total Zimbabwe to

take over the stands with the promise that he would be allocated replacement stands next to Total Zimbabwe.

As a result, the first respondent averred that he was allocated five commercial stands (numbers 1497, 1498, 1499, 1500 and 1501 of Nyazura Township, hereinafter called the stands) by the second respondent sometime in 2014 which are the subject matter of this appeal. The allocation was done through a letter written to him by the second respondent advising him that he had been allocated the five stands as replacement for the 2006 allocation. Once the first respondent made plans to develop the stands, he contacted the employees of the second respondent who assured him that he was the sole owner of the stands.

However on 9 January 2020, the second respondent's legal practitioners wrote to the first respondent demanding proof of confirmation of ownership. Having been instructed about the letter, the first respondent's legal practitioners contacted the second respondent's legal practitioners for a round table conference. At the round table conference, it was highlighted to the first respondent that the second respondent had done a double allocation of the stands. On 21 January 2020, the first respondent became aware of a third party (the appellant) who had already initiated developments on the stands. Upon enquiry at the second respondent's offices, it was indicated that the second respondent had leased the stands to the appellant for a truck hire business until 2024.

PROCEEDINGS BEFORE THE MAGISTRATES COURT

It is against this background that the first respondent filed an application for an interdict in the Magistrates Court. The first respondent first filed an *ex parte* application in

which the appellant was interdicted from occupying or effecting any development or construction on the stands. The application was made on the grounds that the appellant was infringing on the first respondent's right to occupation of the stands. He also sought that the appellant and all those claiming occupation through it be ordered to vacate the aforementioned stands.

In seeking confirmation of the provisional order the first respondent contended that there were no material disputes. He submitted that the real dispute of fact was whether a holder of rights to unsurveyed land cannot protect such rights through an interdict. He also contended that since he was allocated the stands ahead of the appellant, he was entitled to an interdict.

In opposing the confirmation of the provisional order, the appellant contended that it had a valid lease agreement with the second respondent. The appellant further contended that it had already commenced developing the stands and that the developments could not be interfered with since they were *bona fide* in terms of the lease. The appellant also argued that the first respondent was not entitled to an interdict since he had not tendered adequate proof of ownership. It further stated that the first respondent, by not approaching the second respondent for redress, had not exhausted all domestic remedies available to him.

The Magistrates Court held that the second respondent received the purchase price from the first respondent. It further held that after receiving the purchase price, the second respondent proceeded to allocate the stands in question to the appellant on a lease basis. It found that notwithstanding the absence of title deeds there was proof that the first respondent paid the purchase price thus establishing a clear right over the land. It further

found that the first respondent could not have sought redress from the second respondent as the second respondent had interfered with the first respondent's right over the land in favour of the appellant. In the result, the Magistrates Court was of the view that the requirements for an interdict had been satisfied and thus the application was granted. The effect of the order was to prohibit the appellant, its agents, employees, contractors and all those claiming through it from occupying or making any developments on the stands. It also ordered the appellant to remove its equipment and materials and to restore vacant possession to the first respondent.

PROCEEDINGS BEFORE THE HIGH COURT

Dissatisfied by the decision of the Magistrates' Court, the appellant noted an appeal with the court *a quo*. The grounds of appeal were as follows:

1. The Magistrates Court erred in holding that there were no Appellate Disputes of fact. Judgment No. SC 39/22 Civil Appeal No. 156 of 21
2. The Magistrates Court erred in holding that the requirements for an interdict had been met despite the evidence.
3. The Magistrates Court erred in holding that the first respondent had proved his rights to the property despite evidence to the contrary.
4. The Magistrates Court erred in holding that there was a double sale despite the fact that the stands constituted state land.

Before the court *a quo*, the appellant contended that there was a material dispute of fact regarding which stands were in contention. Hence there was need to lead *viva voce* evidence. Thus the first respondent could not claim to have a clear right in respect of land he did not own.

The first respondent contended that there were no material disputes of fact warranting the leading of *viva voce* evidence. Thus the first respondent argued that he had produced evidence proving that he had been allocated the stands. He further argued that the second respondent had not produced any evidence pointing to the existence of different stands from those it had allocated to the first respondent. Thus he argued that the requirements for the granting of an interdict had been met.

The court *a quo* found no basis for interfering with the findings of the Magistrates Court. It noted that what is required when a final interdict is sought is that the right must be established clearly on a balance of probabilities. The court *a quo* held that the first respondent had established the requirements for an interdict as he had a clear right. In the result, the appeal was dismissed with costs.

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PROCEEDINGS BEFORE THIS COURT

Aggrieved by the decision of the court *a quo*, the appellant noted the present appeal on the following grounds:

1. The court *a quo* erred in law and misdirected itself in finding that the appellant's first ground of appeal on material disputes of fact was meaningless and invalid.
2. The court *a quo* erred in law and misdirected itself in finding that there was no misdirection in the magistrates court's ruling that the first respondent was the owner of the land in question and had thus established a clear right entitling him to the final interdict granted in his favour.

3. The court *a quo* erred in law and misdirected itself in finding that there was no misdirection in the magistrates court's ruling that the first respondent had established the second requirement for a final interdict, namely 'the absence of an alternative remedy'.
4. The court *a quo* erred in law and misdirected itself in not finding that the magistrates court had wrongly granted a final interdict in favour of the 1 respondent without an analysis of, an application of its mind to, the third requirement for a final interdict, namely 'irreparable harm actually committed or reasonably apprehended'.
5. The court *a quo* erred in law and misdirected itself in not finding that the final interdict granted by the magistrates court in favour of the first respondent was an eviction order against the appellant in circumstances where no eviction proceedings had been properly instituted in that court.

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SUBMISSIONS BY COUNSEL

In oral submissions, counsel for the appellant focused on the second ground of appeal. In urging the Court to find for the appellant, Mr *Madhuku* argued that the court *a quo* erred in upholding the Magistrates Court's ruling when the first respondent had not established a clear right to the land. He submitted that with regards to land rights only a party with a real right is entitled to an interdict against a third party. Counsel further argued that the court *a quo* had misdirected itself in holding that the respondent had established the requirements for an interdict, particularly a clear right and that being the case such a finding could not stand.

Per contra, counsel for the first respondent argued that the first respondent had established a clear right on a balance of probabilities which entitled him to an interdict. The fact that the appellant had paid the purchase price and was allocated the stands was not disputed before the court *a quo*. In addition to that, the second respondent did not deny that the stands had been sold to the first respondent. The acceptance of the purchase price by the second respondent meant that its rights to the land were now limited. Thus the second respondent could not lease the stands to the appellant.

The issue arising for determination in this appeal, in the Court's view, is the following:

Whether or not the court a quo erred in finding that the first respondent had a clear right entitling him to a final interdict.

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THE LAW

The purpose of an interdict is to prohibit unlawful conduct, to compel the doing of a particular act or to remedy the effects of unlawful conduct. In this respect see *Herbstein* and *Van Winsen* in *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th Ed p 1454.

The requirements for a final interdict are settled in this jurisdiction. These are:

- (a) A clear right;
- (b) Irreparable harm actually committed or reasonably apprehended; and
- (c) The absence of an alternative remedy.

See *Econet Wireless Holdings and Others v Minister of Finance and Others* 2001

(1) ZLR 373 (S) *Setlogelo v Setlogelo* 1914 AD 221 at 227.

As regards a clear right, again the authors *Herbstein and Van Winsen* at page 1459-60 define the meaning of clear right as it relates to interdicts as:

“...the word ‘clear’ relates to the degree of proof required to establish the right and should strictly not be used to qualify ‘right’ at all. ...a clear right must be established on a balance of probabilities”

From the authorities, it is clear that where a final interdict is sought, a clear right as opposed to a *prima facie* right must be established. Thus the word “clear” in the context of right in an interdict does not qualify such right but rather expresses the extent to which the right must be established by evidence on a balance of probabilities. *Herbstein and Van Winsen* also state that a right that is sought to be protected by an interdict arises from substantive law. The right can derive from any branch of substantive law to which one must have recourse in order to resolve the dispute involved.

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ANALYSIS

It was the appellant’s case that for the first respondent to be entitled to a final interdict, he ought to have proved ownership of the stands in question, failure of which the application for the interdict ought to have been dismissed.

I was not persuaded by Mr *Madhuku*’s argument that the first respondent was required in terms of the law to have real rights to the stands in order to establish a clear right for purposes of an interdict. This is because the real dispute between the parties is not related

to ownership rights. In this respect account must be taken of the purpose of an interdict; which among other things is to prohibit unlawful conduct. It is noted that the first respondent sought to prohibit the appellant from occupying and developing the stands because he had purchased them. The first respondent produced proof of the purchase and allocation of the stands to him and neither the appellant nor the second respondent were able to rebut that assertion. For purposes of protecting his interest in the stands, the first respondent did not need to prove ownership of real rights as argued by Mr *Madhuku*.

I am inclined to agree with the first respondent's counsel. From the evidence placed before the Magistrates Court and the court *a quo* it is evident that the right of the first respondent is clear. The second respondent issued a letter to the first respondent allocating to him the stands in question. In addition, the first respondent offered the second respondent a purchase price which it accepted as was proven by the receipt produced before the Magistrates Court. Therefore, on these facts the first respondent managed to establish the existence of a clear right in respect of the stands. On this basis, I find no reason to attack the findings of the court *a quo*.

The second hurdle a party has to overcome in order to prove that their particular case favours the granting of an interdict is that they stand to suffer irreparable harm actually committed or reasonably apprehended. In this case the appellant had occupied the stands and had commenced to develop them. This means that the displacement of the first respondent was complete. The harm complained of was to endure until 2024, which was the duration of the lease agreement between the appellant and the second respondent.

Finally, the party seeking an interdict has to prove the absence of an alternative remedy. The assertion that the first respondent stood to suffer irreparable harm and that there was no other remedy available to him was not challenged before this Court, the court *a quo* and the Magistrates Court. Thus an inference is drawn to the effect that the first respondent managed to prove that he stood to suffer irreparable harm had the interdict not been granted and that he had no other remedy available to pursue.

DISPOSITION

In the circumstances the court *a quo* cannot be faulted for finding against the appellant as it did. The appeal has no merit. There is no reason to depart from the general principle that costs follow the cause.

It is accordingly ordered as follows:

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The appeal is dismissed with costs.

GUVAVA JA: I agree

BHUNU JA: I agree

Rubaya and Chatambudza, appellant's legal practitioners.

Bere Brothers, 1st respondent's legal practitioners.