CLIFFORD NHAU
versus
SHUDHASI ZUZE

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 22 September, 6 & 12 October, 2022

Civil Appeal

Ms *M Chigwaza*, for appellant,
Ms *C Mashura*, for respondent

MUCHAWA J: This is an appeal against the judgment of the Magistrates' Court which dismissed the appellant (then defendant)'s application for absolution from the instance after the close of the respondent (then plaintiff)'s case. The matter was then postponed for continuation. Thereafter, the appellant noted this appeal.

The grounds of appeal before us are as follows;

1. The court *a quo* erred in holding that the respondent had *locus standi* to evict appellant from a privately owned property using an offer letter.
2. The court *a quo* erred in failing to appreciate the law regulating the acquisition of private

It is prayed that the appeal be upheld with costs and the decision of the court a quo be set aside and substituted with a finding allowing the application for absolution from the instance with costs.

The brief background to this matter is that the respondent issued out summons seeking the eviction of the appellant and all those claiming occupation through him, of Subdivision 20 of Laitre in Chegutu District of Mashonaland West Province. His claim was based on him being the rightful owner of the land through an offer letter he acquired from the Ministry of Lands, Agriculture, Fisheries, Water and Rural Resettlement. The appellant was alleged to be illegally using the land for farming purposes. In his plea, the appellant disputed that the respondent was the owner of the

farm and contended that the farm was registered under Deed No 6173/94 in the name of one Tennyson Irmai Zvaita and it had never been acquired by the government under the Land Reform Programme. It was averred that the owner who was a staunch ZANU PF supporter had in fact donated the farm for use by the youths of the party. An amendment was sought later and granted, which in fact changed the name of the alleged owner of the farm from Tennyson Irmai Zvaita to Wyde Farm Enterprises (Pvt) Ltd.

The respondent's case before the court *a quo* was closed after three witnesses had given evidence. It is then that the application for absolution from the instance was made. In commenting on this appeal, the learned magistrate stated as follows;

> "I abide by the record and my ruling of record. The decision appealed against is in my view not final and definitive."

At the hearing of the appeal counsel were asked to make submissions on whether the appeal had not been prematurely lodged, given that the decision appealed against is not final and definitive. It was our opinion that the matter could be disposed of on this point.

Ms *Chigwaza* simply submitted that she was of the view that the appeal was properly before the court as the court *a quo* had made a determination which they had a right to appeal against whilst conceding that the decision appealed against is not final and definitive. On the other hand, Ms *Mashura* submitted that the appeal had been prematurely brought in an attempt to avoid finalization of the matter, particularly as the decision appealed against is not final and definitive.

I start off with the Magistrates' Court Act *[Chapter 7:10*] in s 40 (2) which provides as follows;

> "1) No appeal shall lie from the decision of a court if, before the hearing is commenced, the parties lodge with the court an agreement in writing that the decision of the court shall be final.
>
> (2) Subject to subsection (1), an appeal to the High Court shall lie against—
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> (*a*) any judgment of the nature described in section *eighteen* or *thirty-nine*;
>
> (*b*) any rule or order made in a suit or proceeding referred to in section *eighteen* or *thirty-**nine*** **and having the effect of a final and definitive judgment, including any order as to costs;" (my emphasis)**

This means that allowing an appeal on an interlocutory order by the court *a quo* which is not final and definitive is bad at law. The order of the court *a quo* did not affect in a final and

definitive manner, the issues between the parties which would be settled at the end of the trial. This appeal offends against the provisions of S 40 (2) (b) of the Magistrates' Court Act.

This subject has already been settled in various judgments of the Supreme Court and this Court. I take a leaf from the case of *NMB Bank Ltd* v *Tawanda Mushaya & Ors* SC 164/21 wherein the Honourable GARWE JA (as he then was) stated as follows;

> "That such interference is undesirable has been emphasized in a long line of cases, both in this jurisdiction and in South Africa.
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> [29] There is need for finality in litigation. If every ruling by a subordinate court or tribunal were to be the subject of an appeal or review or in some cases an application for a *mandamus*, there would be no end to litigation. Assuming, *arguendo*, that a ruling is made by a lower court and made the subject of an appeal. The appellate court might uphold or dismiss the appeal. The matter will be remitted to the subordinate court for continuation. In the course of the continuation of those proceedings, further rulings may be made. These would again be subject to further appeal proceedings. Such a situation would stultify the litigation process and could easily be taken advantage of by persons who stand to benefit from the delay in the final determination of the dispute between the parties. ----------
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> [30] In *National Housing Enterprise* v *Edwin Beukes and Six Others* Case No. SA 21/2013, a decision of the Supreme Court of Namibia, I had occasion to make the following pertinent remarks in paras 18-21 of the judgment:
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> "(18) There is a plethora of decided cases which are authority for the proposition that it is inappropriate for a superior court to intervene in unterminated proceedings of a lower court.
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> (19) In *Masedza and Others* v *Magistrate Rusape and Another* 1998 (1) ZLR 36 Devittie J remarked at p 39G-40A:
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> 'The position has always been that the right of appeal against an interlocutory decision of a magistrate's court is limited to cases where there has been a conviction.
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> (20) There is however an exception to this rule. In a proper case a superior court can grant relief – before completion of the proceedings in a lower court – in order to obviate a grave injustice. In general a superior court should be slow to intervene in unterminated proceedings in a court below and should confine the exercise of such powers to rare cases where grave injustice might otherwise result or where justice might not by any other way be attained. ----------
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> In the matter of *Walhaus* v *Additional Magistrate, Johannesburg* 1959 (3) SA 113 (A) the court held that a superior court would be slow to exercise any power upon the unterminated course of criminal proceedings in a court below, but it would do so in rare

> cases where grave injustice might otherwise result or where justice might not by other means be attained.'
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> (21) On a consideration of all the above authorities, I take the view that a superior court can, but only in very exceptional circumstances, intervene in uncompleted proceedings, be they civil or criminal, in order to prevent or obviate a clear miscarriage of justice. The process for achieving such intervention may be an appeal or a review application."
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> [31] The above remarks aptly illustrate why it is undesirable and improper for an appellate or reviewing court to interfere in unterminated proceedings taking place before a lower court. In the absence of proof of grave injustice that might eventuate, the appellate court should decline the invitation to sit as an appellate or review court and instead direct that the matter continues before the lower court until the final determination of the matter. At that stage any aggrieved party can appeal or institute review proceedings to deal with all perceived irregularities in the proceedings of the lower court or tribunal. Various decisions of the courts in this country have also stressed the need to avoid piecemeal appeals in respect of ongoing proceedings in lower courts and tribunals – see for example the remarks of Patel JA (as he then was) in *Prosecutor General of Zimbabwe* v *Intratek Zimbabwe (Private) Limited and Two Ors* SC 67/20, at pp 7-8 of the judgment and *Prosecutor General of Zimbabwe* v *Intratek Zimbabwe (Private) Limited & Two Ors* SC 59/2019, at pp 23-24 of the judgment.
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> [32] The need for a superior court to be slow in exercising any powers of appeal or review, or to grant a *mandamus*, in respect of unterminated proceedings taking place before courts of inferior jurisdiction applies to all courts exercising appellate or review jurisdiction. I leave the question open whether the same principle would apply to tribunals that enjoy appellate or review jurisdiction. On the face of it, however, the same considerations should apply."

In *casu, Ms Chigwaza* did not point to any exceptional circumstances which would result in a grave miscarriage of justice if this matter were to be finalized in the lower court. The court *a quo*, in its ruling found that the respondent had laid down a basis for his claim through the evidence adduced by three witnesses and the valid offer letter from the relevant Ministry which he tendered. The offer letter was considered as prima facie proof of right, title and interest to the land. It was the court *a quo's* view that the respondent had, at that stage discharged the onus on him.

It is my finding that this appeal is premature and is simply calculated to frustrate the finalization of this matter, particularly on the grounds of appeal placed before us. To impugn the court *a quo*'s decision by saying that it should have found that the respondent had no *locus standi* to evict the appellant from a privately owned property using an offer letter and that the court *a quo* had no appreciation of the law regulating acquisition of private land by government, is to do precisely what the Honourable GARWE JA warned against. This is a piecemeal appeal. The court *a quo* should be allowed to conclude the trial, come up with its decision and only then can its

determination be questioned regarding whether the respondent has a right to evict the appellant and whether the law regulating the acquisition of privately owned by government is properly understood. This would apply both ways, in my view. On the one hand would be the case of a party holding an offer letter from the relevant Ministry whilst on the other is an individual who claims land was donated to party youths by a staunch supporter of the party but then amends his plea to show that title to the land is held by a company and not the party supporter he claims donated the land.

Costs

Ms *Mashura* submitted that the respondent has been put out of pocket by defending an ill-fated appeal whose purpose is to avoid putting the defendant to his defence yet he is aware that he has no plausible defence on the merits. Costs were prayed for on an attorney client scale.

Ms *Chigwaza* made no submissions on the issue of costs. Costs on a higher scale should be awarded only in exceptional circumstances where a party's conduct is mischievous and objectionable and the cause of all the costs or an attempt to harass the defendant/respondent. See *Davidson* v *Standard Finance Ltd* 1985 (1) ZLR 173 and *Faust Products (Pvt) Ltd* v *Continental Fashions (Pvt) Ltd* 1987 (1) ZLR 45 (HC).

In this case it is clear that the appellant is trying to stultify the litigation process and is taking advantage of this appeal so as to benefit from the delay in the final determination of the dispute between the parties. Such conduct is mischievous and objectionable. Costs on a higher scale are justified.

Accordingly, I order as follows;

"The appeal be and is hereby dismissed with costs on a higher scale."

MUCHAWA J----------

WAMAMBO J AGREES----------

Chikore & Chigwaza Law Chambers, appellant's legal practitioners
Pundu & Company, respondent's legal practitioners