CHARWADZA MADZWAWAWA

verses

ROSEMARY VAMBE

HIGH COURT OF ZIMBABWE

GUVAVA & MAWADZE JJ

HARARE, 1 June 2011 and 23 February 2012

FAMILY LAW COURT

**Civil Appeal**

The appellant, in person

The respondent, in person

*T Mpofu SC, amicus curiae*

MAWADZE J: This is an appeal against the judgment by the Harare Magistrates’ Court delivered on 16 March 2010.

During the hearing of the appeal both the appellant and the respondent appeared in person and were not able to meaningfully address the court on the legal issues involved in the matter. We are greatly indebted to Advocate *T Mpofu* who agreed to be appointed *amicuis curiae* and submitted very useful and detailed heads of argument on the pertinent legal issues involved in this matter.

The facts giving rise to this appeal are as follows:

The magistrates court applying the provisions of the Domestic Violence Act [*Cap 5*:*16*] (hereinafter the DVA) granted an interim protection order in favour of the respondent which was later confirmed on 16 March 2010. The final protection order confirmed by the court *a* *quo* reads as follows:

“1. the protection order be and is hereby confirmed as prayed for.

2. The respondent (now the appellant) is interdicted from selling the matrimonial home being number 50 Banister Road without the consent of the applicant or a valid court order.”

Dissatisfied with the court *a quo*’s judgement in respect of item (2) above the appellant caused notice of appeal to be filed with this court on 24 March 2010 on the following grounds;

“**Grounds of Appeal**

1. The learned magistrate erred in referring to number 50 Bannister Road as the parties’ matrimonial property when in fact the parties are not legally married and the house was bought by the appellant before he started living with the respondent in an unregistered customary law union.
2. The learned magistrate erred in interdicting the appellant from selling the above mentioned house without the respondent’s consent or a valid court order when in fact the house in question is owned by the appellant who bought the same before he started living with the respondent.”

It is common cause that the parties are not legally married. The parties entered into a customary law union in 2002 and have been staying together as “husband and wife” to date. Two children were born out of this customary law union and the parties reside at number 50 Bannister Road Braeside, Harare. The house in question is registered in the appellant’s name and was so registered on 31 December 1996, about six years before the appellant and respondent entered into the customary law union. It is not disputed that the appellant bought the house in question through a loan advanced to him by his then employer Reserve Bank of Zimbabwe.

The appellant’s position is that he is not legally married to the respondent and that the respondent has no legal claim to the house. On the other hand the respondent’s contention is that when she entered into a union with the appellant in 2002 the appellant had not fully paid up the bond and was in arrears. The respondent alleges that she helped with the payments of monthly instalments until the bond was paid up in full in 2004. The respondent on that basis alleges that she made significant contributions to the ultimate acquisition of the house as she was at the material time gainfully employed as a Sales and Marketing Manager by Netcom M Systems and earned more than the appellant.

It is common cause that the parties are experiencing serious marital problems threatening to tear their customary law union apart. The appellant is accused of infidelity, various forms of abuse and that he harbours an intention to sell the matrimonial house number 50 Bannister Road Braeside, Harare behind the respondent’s back which would result in the respondent and the two children being homeless. The appellant on the other hand disputed the allegations of abuse and instead accused the respondent of verbally and emotionally abusing him to the extent that the respondent burnt his personal clothes in 2009, a fact not denied by the respondent. Instead the respondent said she acted in that manner in August 2009 after the appellant had brought a prostitute home in the respondent’s presence.

The court *a qou* shied away from dealing with the issue of the contribution of the parties in the acquisition of the house in question but did find that the appellant had breached the provision of the DVA in that he abused the respondent and also wanted to sell the house in issue without the respondent’s consent. This is the basis upon which the interim protection order was confirmed.

There are only two issues which exercised our minds and therefore fall for determination in this appeal. There are;

1. Whether an appeal lies against the judgment appealed in view of the fact that the DVA makes no provision in respect of appeals.
2. The substantive correctness of the interdict granted against the appellant barring the appellant from disposing of the so called matrimonial house number 50 Bannister Road Braeside, Harare.

I now proceed to deal with these issues;

**Whether or not an appeal lies against the judgment appealed?**

It is common cause that the DVA makes no provision in respect of appeals. Part II of the DVA deals with protection orders. Section 7 deals with the application for protection order. Section 8 relates to the determination of the application for protection order. Section 9 deals with interim protection orders and s 10 with the confirmation of interim protection orders. Section 11 relates to the contents of the protection order. Section 12 deals with the revocation variation or extension of protection orders. Section 13 deals with issue of further copies of orders and warrants of arrest and s 14 relates to enforcement of protection orders. It is clear from the provisions of Part II of the DVA that the DVA is designed to afford the aggrieved party a robust remedy. One may therefore be of the well founded view that such a robust remedy will be undermined by noting of an appeal which would result in the suspension of the order. In that vein one may therefore argue that the legislature by not making provision in respect of appeals in the DVA did intend not to provide such a right of appeal. On the other hand one may also argue that any party should be afforded the opportunity to appeal as a right and that if the legislature intends to oust such a right then a clear provision in the Act should state that an appeal will not suspend the operation of the order granted. There are similar provisions in s 27 (3) of the Maintenance Act [*Cap 5*:*09*] and s 92 E (2) of the Labour Act [*Cap 28*:01]. Further s 9 of the DVA provides in my view for drastic interim measures of protection which may be granted *ex parte* and the respondent on being served with the interim order is simultaneously served with a warrant of arrest which is conditionally suspended upon compliance with the order. I make the point the DVA clearly ensures that a party who is genuinely entitled to relief and requires the robust remedy is afforded that provisional relief which by being interlocutory in nature is not susceptible to appeal. It is the interim relief which is subsequently confirmed or discharged on the return date after a due inquiry.

It is my firm view that an appeal indeed lies against the judgment appealed. I arrive at this conclusions on the basis of a number of reasons.

The DVA does not create a special or separate court which deals with domestic issues but extends the jurisdiction in such matters to ordinary courts. Section 2 (1) of the DVA provides as follows:

“Section 2 (1) court means – a magistrate court, High Court and for purposes of section eighteen, a local court”.

The net effect of the above definition is that in dealing with the matters of domestic violence the magistrates’ court, the High Court and the local courts (in the restricted manner provided for) do not exercise any special jurisdiction. All these three courts may be approached in domestic violence matters as courts of first instance. The only determinant factor a party should pay due regard to is the issue of jurisdiction. As an example a matter which is outside the jurisdictional threshold of the magistrate court must of necessity be dealt with by the High Court. See also the specific provision is s 18 of DVA dealing with the jurisdiction of local courts in respect of domestic violence matters. It can therefore be inferred, quite correctly, I believe, that the DVA reposes jurisdiction in such matters in the ordinary courts as defined in s 2 (1) and does not create specialised courts. It logically follows therefore that the appealability or otherwise of the judgment of the court cannot be resolved with reference to the absence of an enabling provision in the DVA because the DVA does not establish a separate court. The DVA defers to the courts that are in existence hence one has to refer in *casu* to the provisions of the Magistrates Court Act which creates the court as defined in s 2 (1) of the DVA in particular s 40 (2) of the Magistrates Court Act [*Cap 7*:*10*] which provides as follows;

“Section 40 (1) …

(2) Subject to subs (1) an appeal to the High Court shall lie against-

(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 or definitive judgement including any order as to costs;”

In *casu* the order granted by the magistrates’ court upholding the application for a protection order is in all material terms a judgment in favour of the applicant. Such a judgment is appealable in terms of s 40 (2) of the Magistrate Court Act *supra* which should be read together with the provisions of s 30 (1) of the High Court Act [*Cap 7*:*06*] which deals with the powers of the High Court on appeal in civil matters dealt with by the lower courts as provided for in the relevant statutes.

It is clear that the matter before us is a judgement of the court of the magistrate. The matter as to what law the judgment applies is irrelevant. What matters is that it is a judgment of the court of the magistrate and such a judgment is appealable to this court in terms of s 40 (2) of the Magistrates Court Act *supra* and s 30 (1) of the High Court Act *supra*. There is no law which bars the High Court from dealing with such an appeal and I am fortified in this regard by the comments by GARWE JA in *Guwa & Anor* v *Willoughby*’s *Investments* (*Pvt*) *Ltd* 2009 (1) ZLR 380 at 383 D-E in which the LEARNED JUDGE OF APPEAL *inter alia* said:

“The High Court, on the other hand, has jurisdiction to hear all matters except where limitations are imposed by the law. In other words whilst the Supreme Court may do nothing that the law does not permit, the High Court may do anything that the law does not forbid.”

I am also of the strong view that a right to appeal is an important right which is protected in our law. I do not share the view that the legislature would grant such immense powers to a Magistrate and make their exercise immune from the interference by a process of appeal. It is my finding therefore that this appeal is properly before this court on account of the fact that an appeal lies against the judgment appealed.

**The substantive correctness of the interdict granted**

The next issue to consider is whether the court *a quo* acted properly within the confines of the law in granting the order which is the subject of appeal. Section 3 of the DVA deals with the meaning of domestic violence and its scope. The first point to consider is whether the selling or threat to sale matrimonial property constitutes domestic violence. This question is answered with regard to the provisions of s 3 (1)(k) which defines domestic violence as:

“3(1)(k) the unreasonable disposal of household effects or other property in which the complainant has an interest” (underlining is mine)

In terms of s 11 of the DVA dealing with the contents of a protection order a protection order may where appropriate;

“11(1)(a) prohibit the respondent from committing or enlisting the help of another person to commit any act of domestic violence.”

In *casu the court* a *quo* could only competently grant the interdict if it was satisfied that the applicant was engaged in unreasonable disposal of property in which the respondent has an interest. This important point seems to have eluded the learned magistrate who failed not only to consider the nature of the relationship between the parties and the nature of the interest the respondent may competently have at law in the property involved. No inquiry in this regard was made and this is a serious misdirection.

I have already alluded to the nature of the relationship between the parties and the property involved. The appellant and the respondent are not legally married hence they may not be afforded the same protection as is provided in respect of parties who are legally married. A customary law union is not regarded as a valid marriage in terms of our law and is only recognised for limited purposes provided for through statutory provisions. To put it bluntly, the respondent cannot regard herself as the appellant’s wife at law. She cannot competently sue for divorce and division of the matrimonial estate in terms of s 5 and 7 of the Matrimonial Causes Act [*Cap 5*:*13*].

This leads me to the next point. The property in issue even assuming that the appellant intends to dispose of the same is registered in the name of the appellant. This aspect would remain valid even if the appellant and the respondent were legally married. The appellant has a deed of title. In *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S) the Supreme Court said:

“The registration of rights in immovable property in terms of the Deeds Registries Act is not a mere matter of form. Nor is it simply a device to confound creditors or tax authorities. It is a matter of substance. It conveys real rights upon those in whose name property is registered. See the definition of “real right” in s 2 of the Deeds Registration Act [*Cap 139*] (as it was). The real right of ownership, of *jus in re propria*, is “the sum total of all the possible rights in a thing”. See *Wille*’s *Principles of South African Law* 8 ed at 255.”

The interdict granted by the court *a quo* ignores this basic principle and therefore falls on that simple basis alone.

The other misdirection on the part of the learned magistrate was the failure to appreciate the fact that it is now trite law, even in the context of a valid marriage, (in *casu* it is even a customary law union) that a spouse whose name does not appear on a deed of title does not have a legal interest in the property before divorce. See *Muzanenhamo & Anor* v *Katanga* 1991 (1) ZLR 182; *Dhlembeu* v *Dhlembeu* 1996 (1) ZLR 105 (S); *Muganga* v *Sakupwanya* 1996 (1) ZLR 217 (S); *Maponga* v *Maponga* 2004 (1) ZLR 63 (1), *Muswere* v *Makanza* 2004 (2) ZLR 262 (H) and *Kerenza Mushati* v *Luise Kudakwashe Mushati* & *2 Ors* HH 225-11.

It is clear from the facts of this case that the respondent has no legal interest in the house in issue. There is therefore no valid basis upon which the court *a quo* could have granted the interdict.

The court *a quo* also failed to consider that it had no jurisdiction to interdict the sale of the property in issue. As already said where on account of jurisdictional limits the magistrates’ court cannot deal with this matter it has to refer the matter to the High Court and this is precisely why the administration of the DVA is vested on the local courts, the magistrate court and the High Court as courts of first instance. Section 12 of the Magistrates’ Court Act *supra* deals with arrests and interdicts. Section 12 (1) of the Magistrate Court Act *supra* provides as follows:

“12 Arrests and Interdicts

1. Subject to limits of jurisdiction prescribed by this Act, this court may grant against persons and things orders for arrest *tamquam suspectus de fuga*, attachments, interdicts and *mandamenten van spolie*.”

It is therefore clear that the grant of an interdict by the court *a quo* is made subject to the limits of jurisdiction of the magistrate court in civil matters. In *casu* the value of the house is not even stated but it is common cause that its value is way above the current monetary threshold of the jurisdiction of the Magistrates’ Court. What this means in simple terms is that given that an interdict is only granted upon the injury complained of being set out, it must follow that the injury concerned must be capable of pecuniary evaluation before the court could come to the conclusion that it has jurisdiction to stop the occurrence. That is also the only way that makes the magistrates’ court different from the High Court in respect of the grant of interdicts. The magistrates’ court has no unlimited jurisdiction in issuing interdicts. The court *a quo* did not establish the monetary component of the injury sought to be interdicted in order to be satisfied as to whether it falls within the jurisdiction of the court *a quo*. The value of the house is not ascertained but I am able to take judicial notice that houses in Braeside, Harare are way above the monetary jurisdiction of the Magistrates’ Court in civil matters. The court *a quo* therefore had no jurisdiction to grant the interdict and this is a serious misdirection.

I am therefore satisfied that there is ample basis to interfere with the order of the court *a quo* in respect of the interdict as the order is patently incompetent and upholding would result in a miscarriage of justice. This court once made aware of such an incompetent order has the powers to set it aside even in circumstances where this court may not be exercising its appellate functions. This court has this power to interfere with an irregular order. See *Matanhire* v *BP Shell Marketing Services* (Pvt) *Ltd* 2005 (1) ZLR 140 (S) at 147 F-G. This principle is founded on the basis that a court cannot give effect to a patent nullity.

Accordingly for the above reasons I make the following order:

1. The appeal is allowed.
2. The order of the court *a quo* in para (2) relating to an interdict is hereby set aside.
3. There shall be no order as to costs.

GUVAVA J: agrees

Advocate *T Mpofu*, amicus curiae