WEBSTER MUDUWA AND 9 OTHERS
versus
THE TRUSTEES OF THE HARARE HOME INDUSTRIES ASSOCIATION TRUST

HIGH COURT OF ZIMBABWE
CHITAKUNYE AND NDEWERE JJ
HARARE, 2 July 2015 and 21 December, 2016

Civil appeal

N. Mugiya, for the appellants
R. Gasa, for the respondents

CHITAKUNYE J: This is an appeal against a judgement by a magistrate at Harare interdicting the appellants from interfering with respondents' occupation of their offices at Stand no. 20115 Mbare and collecting rentals from respondent's tenants. That judgment was granted on the 15 March 2015.

The grounds of appeal were couched as follows:

1. The learned magistrate erred by granting an interdict which failed to satisfy the requirements of an interdict at law.
2. The court *a quo* misdirected itself by granting an order which is not in compliance with the rules of the magistrate Court, wherein an order in terms of the rules of an *ex-parte* application yet the application granted was a normal application.
3. The learned magistrate erred by making a finding that there was need to interdict the appellants where there were serious disputes of facts which could not be reconciled on papers.
4. The learned magistrate erred by granting an order for eviction against the appellants where the Respondents had sought for an interdict and not an application for eviction.
5. The learned magistrate erred and misdirected herself by presiding and entertained a matter which had been dismissed by the same court when it came as an *ex parte* application and was dismissed.
6. The learned magistrate erred by allowing evidence which was inadmissible in terms of s 11 of the Civil Evidence Act.

7. The learned magistrate erred by entertaining a dispute which the High Court was ceased with where the court ought to have referred the dispute to the High Court.
8. The learned magistrate erred by dealing with a matter which the court has no jurisdiction to deal with in terms of value and subject matter.

At the end of the grounds of appeal the appellants' prayer was couched as follows:

"Wherefore the Appellants pray that the appeal succeeds with costs and the order for interdict be set aside."

In terms of the rules of this court a notice of appeal must state the exact nature of the relief sought. The above prayer apart from seeking the setting aside of the interdict does not ask for an exact relief after the setting aside of the interdict. It thus leaves the respondents' application hanging and the rights as between the parties undetermined. A proper relief must determine the rights of the parties at least as between them such that the matter reaches finality or some directive is given.

It is my view that the notice of appeal is defective for lack of an exact relief.

The effect of a defective notice of appeal is that there is no proper appeal and so the appeal will be struck off the roll.

Despite the above anomaly we proceeded to consider the grounds of the purported appeal as we considered that the appeal had no merit and parties should not waste their energy in attending to the notice of appeal only when the advanced grounds of appeal would not take the case any further.

In their initial submissions counsel alluded to the issue of the lack of a proper court order. Upon perusal of the record of proceeding it was our view that the draft order on p 65 of the record of proceedings is the order the magistrate had in fact granted when in his judgement he 'granted the application for interdict as per amended draft.' That was the only draft order before the court and it had been amended by deleting some clauses as it was no longer an ex-parte application but was an application on notice seeking a final order. The order could of course have been better prepared.

The reasons for concluding that the purported appeal has no merits are as follows:

Background

The facts of the case are that on the 28th August 2007, the respondents registered a Notarial Deed of Trust. The Notarial Deed of Trust, *inter alia*, outlines the circumstances under which the Trustees may cease to be such.

On the 18th February 2011, the respondents entered into a Memorandum of Agreement (MOA) with the City of Harare in terms of which the City of Harare agreed to lease Stand No. 20115 Mbare, Harare measuring 50000 square meters commonly known as Siyaso to the Trust.

In terms of the MOA the respondents were entitled to occupy the land on a build, operate and transfer basis for a period of 20 years with no option of renewal.

The respondents alleged that on the 2nd December 2014 the appellants unlawfully descended at the respondents' offices at Stand No. 20115 Mbare, Harare and forcefully pushed the respondents out of their office.

The appellants on the other hand argued that sometime in December 2014, members of the Trust decided to hold a special meeting and elect a new executive and voted out the old executive, being the respondents.

It is common cause that as a result of the events of that day in December 2014, the respondents filed an *ex- parte* application at the magistrates' court for an interdict against the appellants.

A presiding magistrate dismissed the *ex-parte* application and directed the respondents to proceed on Notice.

The matter was subsequently heard as a normal court application on the 26th February 2015. On the 19th March 2015 the application was granted in favour of the respondents.
The order granted was as follows:-

1. The respondents be and are hereby interdicted from barring the applicants from accessing their office located at Stand No. 20115 Mbare, commonly known as Siyaso Market, Harare.
2. The respondents be and are hereby interdicted from coming anywhere within 100 metres radius of the applicants' office.
3. The respondents be and are hereby interdicted from collecting rentals from the applicants' tenants
4. Respondents to pay costs of suit at a higher scale.

In granting the order the trial magistrate ruled that the respondents had met the requirements for a final interdict.

The appellants being dissatisfied appealed to this court. The grounds of appeal are as already alluded to above. In this regard the grounds of appeal shall be dealt with in seriatim.

1. The learned Magistrate erred by granting an interdict which failed to satisfy the requirements for an interdict at law.

The requirements for a final interdict are set out in a *plethora* of cases. These requirements include that the applicant must establish: – (a) a clear right; (b) an injury actually committed or reasonably apprehended; (c) the absence of any other satisfactory remedy; and (d) that the balance of convenience favours the grant of the interdict.

The appellants argued that the respondents merely narrated issues in their application which issues were common cause and did not constitute any right.

Unfortunately, in this argument appellant over looked basic tenets of the respondents' case. The respondents' case was based on a Notarial Deed of Trust and a Memorandum of Agreement with the City of Harare. Those two documents clearly established respondents' basis for alleging that they had a clear right to the property in question. Though the appellants tried to challenge these documents such challenge was feeble and without merit. I say so because from the appellants' own version a Trust was formed. A Notarial Deed of Trust was executed and registered. The Trust, through its leadership, entered into a Memorandum of Agreement with the City of Harare for the lease of the land in question. That Trust was led by 'an executive' comprising persons who are the trustees of that Trust. These are the respondents. This is clearly evident from paragraphs 1,2,3,4 and 5 of appellants' heads of arguments wherein it is stated that:-

> "1. Sometime in 2006, the Appellants sat down and decided to form an association called the Mbare Home Industry Association Trust and registered a Notarial Deed of Trust to that effect.
> 2. The Trust lobbied the government and the City of Harare to be allocated land for use and for industrial purposes.
> 3. The Trust was given land measuring 50 000 square metres by the City of Harare and the Town Clerk, the Stand being number 20115 Mbare Township, Harare.
> 4. The Trust or Association was an amalgamation of the Zimbabwe Association of people's shops and Mbare Home Industry Group and has a membership exceeding 8 thousand people.
> 5. The Association or Trust has always been paying rates to the City of Harare collectively and has always used a single account for payment of electricity.
> 6. The respondents' members abused the association's funds to the extent that they treated it as their own personal business account serving their own interests.
> 7. Sometime in December 2014, the members of the Trust decided to hold a special meeting and elect a new executive committee and voted out the old executive being the members of the respondent."

It is clear that appellants admit to the formation of a Trust which was duly registered. That Trust entered into an agreement with the City of Harare. The leaders of that Trust are the current respondents.

Though the appellants denied that the Trust was called Harare Home Industry Trust and, instead, argued that it was called Mbare Home Industry Association Trust, they were unable to produce any document confirming this. The only documents tendered tended to support the respondents' version on the name of the Trust and the agreement with the City of Harare.

It may also be noted that as this was a Trust it means that there were Trustees. The appellants in both the court *a quo* and in this court were unable to state the Trustees of the Mbare Home Industry Association Trust. Clearly the appellants did not have any strong ground to stand on. Theirs was a case of desiring to remove Trustees without following the laid down procedures for the removal of trustees.

In the face of the Notarial Deed of Trust tendered by respondents and non by appellants, clearly respondents had a more credible version. It is this Trust, as represented in the trust document tendered, which entered into an MOA with the City of Harare over the land in question. The respondents produced the memorandum of agreement between the City of Harare and Harare Home industry Association Trust in respect of Stand 20115 Mbare, Harare.

In terms of that Memorandum of Agreement, the City of Harare agreed to let Stand No. 20115 Mbare, Harare, measuring 50 000 square metres to the respondents on a build operate and Transfer for a period of 20 years.

This memorandum of agreement clearly gave the Trust led by the respondents a clear right to Stand No. 20115 Mbare, Harare. It is this right they sought to protect.

The appellants on the other hand produced nothing to confirm their entitlement to forcefully remove the respondents from the Trust's office and occupy it themselves. Their word of mouth was not backed by any independent evidence that they were now entitled to what they were seeking.

It cannot be said therefore that the learned trial magistrate erred in finding that respondents had established a clear right.

The other requirement to a grant of a final interdict is that applicant must establish that an injury has actually been occasioned or is reasonably apprehended.

The appellants' own assertions on how they booted out respondents from the office of the Trust clearly showed that appellants had taken charge yet they were not the trustees. The appellants did not deny that since booting out respondents from their office the respondents had not been collecting rentals as mandated by the Trust deed. Clear loss of rentals to

respondent was established. The respondents have also not been able to operate from their office. The harm respondents said they were suffering as a result of the interference by appellants was not denied.

On the aspect of the absence of any other satisfactory remedy not much was contested. Clearly the only remedy in the circumstances was to interdict the appellants from interfering with respondents in their mandate as Trustees of Harare Home Industry Association Trust.

Lastly the balance of convenience favoured the grant of the order. The appellants' were not likely to suffer any prejudice or harm by the grant of the order. The respondents on the other hand were bound to suffer prejudice in being denied access to their office and in not being able to do their work for the benefit of the Trust as they had been mandated.

I am thus of the view that the trial magistrate did not misdirect herself in finding that the requirements of a final interdict had indeed been met.

2. The court *a quo* misdirected itself by granting an order which is not in compliance with the rules of the Magistrates Court, wherein an order in terms of the rules of an ex-parte application, yet the application granted was a normal court application.

The manner in which appellant phrased this ground makes it difficult to understand the real issue. Appellants' counsel himself seemed at sea as to what he meant by this ground. Thus in his heads of argument all he could say was that:

> "the order granted by the learned Magistrate was accordingly defective because instead of granting an order for interdict as was prayed for by the respondent in its application, the learned Magistrate went further and granted an order for the eviction of the appellants from the premises, which order was not even prayed for on the respondents application and as such the order is defective at law."

Counsel could not refer to any particular Rule in the Magistrates Court Rules that had been infringed or to any clause in the order where eviction was ordered. The order as cited above clearly states that it is an interdict. The appellants were essentially interdicted from interfering with respondents' access to their office and collection of rentals. Page 65 of the record of appeal clearly captures the order that was granted by the magistrate.

If it is that counsel meant that appellants would by operation of the order be required to vacate respondents office they had unlawfully taken occupation of so be it. The net effect of the order was that the appellants were being interdicted from interfering with respondents.

Clearly there was no error or misdirection on this aspect. It is the natural consequence of taking the law into ones own hands and interfering with other people's operations.

It may also be noted that whilst initially the application came as an *ex-parte* application, this was changed to an ordinary court application after court had ordered so. So the matter before the court was no longer an ex-parte application but an application on notice.

3. The learned Magistrate erred by making a finding that there was need to interdict the appellants where there were serious disputes of facts which could not be reconciled on papers.

This ground has no merit at all. For such a ground to succeed the appellants were required to:

> "… at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after viva voce evidence has been heard. Courts are urged to make a robust common sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."

see *Room Hire Company (Pty)Limited* v *Jeppe Mansions(Pty) Ltd* 1949(3)SA 1155(T)at 1165 and *Remhewa* v *Secretary of the Public Service Commission* 1988 (1) ZLR 257(H) at 265.

The nature of disputes of facts appellants were alluding to were not relevant to the application for an interdict. Respondents were required to establish the requirements for the grant of a final interdict and this they did as already alluded to above. The appellants argued that there were issues about the respondents' claim that were not part of its inventory at the Registrar of Deeds and also issues of the land in question not having been ceded to respondents at any particular time. These issues were not relevant to the issues before the magistrate in the court a quo. It is clear that appellants wanted to bring in issues of ownership of the land but that is irrelevant. What is relevant is appellants own admission of having booted out respondents from their offices. It is that interference that had to be stopped. The respondents' application was based on a lease agreement with the City of Harare and not on ownership or the land having been ceded to it.

Whatever appellants perceived as material disputes of facts were clearly a creation of their own for which they cannot fault the magistrate in the court *a quo* for not falling for it.

There was no misdirection on this aspect as well.

4. The learned Magistrate erred and misdirected herself by presiding and entertaining a matter which had been dismissed by the same court when it came as an ex-parte application and was dismissed.

In this ground appellants were desperately clutching at straw. Had the appellants and their legal practitioners cared to examine this ground they would not have wasted their breath on it.

It is common cause that the respondents initially made the application as an ex-parte application. On the 15th December court ruled that:

> "an *ex-parte* for an interdict dismissed. To proceed on Notice."

I did not hear any party to contend that the ex-parte application was dismissed on merits. Consensus was that the magistrate declined to hear the matter as an ex-parte application but directed that the application be brought on notice. Whilst the use of the term 'dismissed' may not have been most appropriate, both parties agreed that it was not heard on technicality and respondents were ordered to proceed on notice. Clearly the ex-parte application was not dismissed on the merits. It was thus astounding to hear counsel for appellants persist with this ground. In paragraph 15 of his heads of argument he had the temerity to state that:

> "It boggles the mind as to how, a matter which was previously dismissed by the court can be entertained again. The first dismissal clearly shows that the court did not find any merit in the respondents' application to grant the order which was being sought. This clearly shows misdirection on the part of the court *a quo*."

This was stated despite knowledge that the same court that had purported to dismiss the *ex-parte* application had in fact said the application should proceed on notice. Clearly the purported dismissal was a decline to hear the matter as an ex-parte application and not a statement that the application had no merit.

The requirements of *res judicata* are well settled in our law. The purpose or object of *res judicata* is to avoid contradictory judgments on one and the same matter. Also public policy demands that there ought to be finality to litigation. Further it is important that a defendant should not be vexed twice for the same matter. For such a defence to succeed it must be shown that – (a)the case is between the same parties or their privies; (b)the thing or relief claimed is the same; (c)the cause of action advanced or subject matter is the same; (d)

finally, there ought to be a final and definitive judicial determination or judgment on the matter. See *Towers* v *Chitapa* 1996(2) 261(H) and *Banda and Others* v *ZISCO Steel* 1999 (1) ZLR 340(SC)

It is clear from the record of proceedings that on the 15th December 2014, the court did not make a final and definitive judicial determination on the matter, but court only gave directions on how the matter ought to proceed. The court directed that in order for the court to do justice to the parties, the applicants were supposed to serve the application on the other party and then both parties would then be heard before making a ruling on the merits of the matter. In other words, the court declined only to hear the matter without notice to the other party. Clearly therefore there was no final and definitive judicial determination of issues between the parties either on a point of law or on facts. It was therefore mischievous on the part of appellants to vigorously argue that the matter was *res judicata*.

I thus find that there was no error or misdirection on the part of the magistrate.

5. The learned magistrate erred by allowing evidence which was inadmissible in terms of s 11 of the civil evidence Act.

   Section 11 of the Civil Evidence Act [*Chapter 8:01*] provides that:

> "except as otherwise provided in this Act or any other enactment, a copy of a document shall not be admissible to prove the documents contents unless:-
> a) all the parties to the civil proceedings concerned consent to the production of the copy or;
> b) the court in its discretion permits the production of the copy, being satisfied that the original document;
> i) has been destroyed or is irretrievably lost or;
> ii) is in the possession of another party to the civil proceedings who refuses to produce the original document or;
> iii) is in possession of a person who cannot be required by law to produce the original or;
> iv) is outside Zimbabwe or;
> for any other good and sufficient cause, cannot reasonably or practically be produced;"

The appellants argued that in accepting the copies of the Notarial Deed of Trust and the MOA as he did the magistrate erred.

As this was an application the respondents were correct in attaching copies of documents they were relying upon. In any case the issue of there being a Notarial Deed of Trust and a Memorandum of Agreement with City of Harare is something appellants were aware of. This issue has been discussed above. The appellants could not tender any such

Notarial Deed of Trust and Memorandum of Agreement with City of Harare which they acknowledged was there. This therefore left the documents tendered by respondents as the only documents both appellants and respondents must have been referring to in their affidavits and submissions. This was really a non issue given factors that were common cause. They could easily have asked for the original documents if they seriously doubted the copies filed with the application.

6. The learned Magistrate erred by entertaining a dispute which the High Court was ceased with where the court ought to have referred the dispute to the High Court.

The appellants' heads of argument did not allude to this ground at all. Equally in his submissions in court counsel for appellants did not address this ground at all. The record of proceedings itself did not show that at the time the application was heard there was in fact any matter between the parties at the High Court. This was a ground raised to simply muddle the waters as it had no substance. I thus concluded that the ground was abandoned.

7. The learned magistrate erred by dealing with a matter which the court has no jurisdiction to deal with in terms of value and subject matter.

The appellants argument in this regard was to the effect that the monetary jurisdiction of the Magistrate court is a maximum of US$10 000. The magistrate therefore erred in dealing with the case when the value of the land in question exceeds US$80 000. Appellants' counsel did not refer to any valuation of the land in question. It would appear the figure was just plucked from the air. In any case the appellants were misguided on this aspect. The value to be considered in cases of lease is not the value of the property as this was not a battle for occupation of the stand as a whole but to simply not bar respondents from their office.

Section 12(1) of the Magistrates Court Act; [*Chapter 7:10*] provides that subject to the limits of jurisdiction prescribed by the Act, the court may grant such interdicts. In order to ascertain the jurisdiction of the court, both parties addressed court on the definition of 'Value to the occupier and how such value can be assessed.

According to *Black's Law Dictionary*, value to the occupier is the significance, desirability or utility of something. In the case of *Urquhart* v *Bruce* 1974 (1) SA 350 it was held that:

> "… as to the means of assessing the value of the right of occupation, that if there were comparable premises available to the occupier at the comparable rental then the value to her of the occupation of the premises in question was no more than the cost of removal to other

> premises at the same rental and comparable standard and, if any money value could be put on this aspect, the inconvenience suffered in having to move to other premises."

In *Greenice (Pvt) Ltd* v *Khan* 2000(2) ZLR 55(HC) CHINHENGO J held, *inter alia*, that:

> "… the value of such occupation must be assessed by a number of factors, not only by the rental that might be payable for the property. the value is the economic advantage to the occupier."

It is clear from the above cases that the value to the occupier is not the value of the property.

In *casu,* the rent payable was nowhere near US$80 000. The appellants did not adduce evidence showing the rent payable was more than US$10 000-00 or that the value to the occupier of the office was anywhere near $10 000-00.

The respondents contended that clause 8 of the Memorandum of Agreement with the City of Harare provided that the respondents shall not pay rent for the first year from the date of completion of each phase of development and thereafter, pay rent at the market rate applicable to the Home industry sites at the time. By virtue of such an arrangement at the time of the application they were paying US$1000-00 per month. Consequently, in the absence of evidence that the rent payable or the value to the occupier was more than US$ 10 000-00 per month court had jurisdiction to entertain the matter. The value to the occupier is certainly not the market value of the property.

In any case the appellants were not barred from doing their work within the 50 000 sq metres stand but were only barred from interfering with respondents' access to their office within that Stand.

In conclusion it is clear to me that the purported appeal has no merit at all. Had the notice of appeal been valid, the appeal would still have been dismissed on the merits.

Costs

In the heads of arguments respondents' counsel asked for an award of costs on the higher scale. She however did not justify such a scale in both the heads of arguments and in her submissions in court. Such costs are not granted just at the asking but must be justified.

Accordingly the appeal be and is hereby struck off the roll with appellants to pay costs on the ordinary scale.

NDEWERE J. I concur……..

Mugiya & Macharaga Law Chambers, appellants' legal practitioners

Gasa Nyamadzawo & Associates, respondents' legal practitioners.