AURTHER NCUBE

Versus

NTANDOYENKOSI MLILO

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA & NDLOVU JJ
BULAWAYO 10 July 2023 & 27 July 2023

Civil appeal

T. Masiye-Moyo, for the appellant

DUBE-BANDA J:

[1] This is an appeal against the whole of a judgment of the Magistrate Court (the court *a quo*) dated 29 August 2022, which granted a binding over order to keep the peace in favour of the respondent, and ordered the appellant to keep peace and stay away from Subdivision 3 of Darnaway Farm.

[2] At the hearing of the appeal, the respondent was in default, it being noted that according to the record before the court, he was aware of the date of set down of the appeal hearing. The respondent's name having been called out three times and no response having been received; notwithstanding his default the Court proceeded to determine the appeal on the merits. The court asked Mr. *Masiye-Moyo* counsel for the appellant to make submissions in support of the appeal. This is so because an appeal cannot be allowed or succeed in default. A judgment of a court may not be set aside because of the default of the respondent. It can be set-aside on the merits of the appeal.

[3] The background of this matter is that in 2009 the Government allocated the Apostolic Faith Mission of Africa Church (AFM) a farm called Darnaway Farm measuring 2700 hectares. AFM was issued with an offer letter. On 10 December 2020 the Government withdrew the offer letter issued to AFM. Subsequent to the withdrawal of the offer letter, AFM was allocated Subdivision 2 of Darnaway Farm measuring 500 hectares. An offer letter speaking to this issue allocation was issued to AFM. On the other hand, one Orpha Ncube (Ncube) was allocated

Subdivision 3 of Darnaway Farm measuring 500 hectares. Ncube died and the respondent was appointed the executor of her estate. The appellant is employed by AFM as a Farm Manager

[4] The respondent approached the court *a quo* contending that the appellant is interfering with his operations at Subdivision 3 of Darnaway Farm. The court *a quo* found in favour of the respondent, and ordered the appellant to keep and observe peace and keep away from Subdivision 3 of Darnaway Farm.

[5] The court *a quo* made a finding that the respondent had *locus standi* in this matter in that he was the employer of the workers at the farm. The court *a quo* found further that the respondent was in lawful occupation of Subdivision 3 of Darnaway Farm, and that AFM no longer owns the whole farm as the first offer letter was withdrawn. The court *a quo* found further that the appellant was disturbing the peace at Subdivision 3 of Darnaway Farm, as shown by the destruction of a foundation constructed by the respondent.

[6] The application was subsequently granted. It is against this decision that the appellant has noted an appeal on the following grounds:

i. The Honorable Court *a quo* grossly erred in law in failing to determine the point and in failing to hold that the respondent lacked *locus standi* in judicio, he not having alleged or proved that the actions complained off were directed at him.
ii. The Magistrate in the court *a quo* grossly misdirected himself in concluding that the appellant breached the peace when there was no admissible evidence led to support that conclusion, thereby rendering the finding irrational and liable for vacation.
iii. The Magistrate in the court *a quo* grossly misdirected himself in determining the issues relating to the parties' right of occupation of the farm by the Government of Zimbabwe and thereby interdicting the respondent from occupation of the farm when in fact that issue was not before the learned Magistrate.
iv. The learned Magistrate in the court *a quo erred* at law, even then, in failing to find as he should have, that a lease can only give rights to personal rights which,

once unrealized, cannot be transferred upon the death of the holder, to his / he executor.

v. The Magistrate in the court *a quo* grossly misdirected himself on a point of law in failing to find that an offer letter in the context of farm allocation does not entitle the holder to forcibly invade the farm without due process.

Appellant's submissions

[7] Mr *Masiye-Moyo* submitted that that respondent did not establish that the appellant committed any acts against him which empowers him to seek a binding over peace order. Counsel argued that the evidence shows that the respondent had not been threatened and no acts of violence were directed at him. And that he could not provide the names of the persons who were allegedly threatened with violence. Counsel contended that the respondent had not established *locus standi* to litigate in this matter.

[8] Counsel submitted further that the court *a quo erred* in relying on hearsay evidence. In that no affidavits were filed from the persons allegedly threatened by the appellant, and the respondent was not present when the threats were allegedly made. Counsel argued further that this is a proper case for this court to interfere with the factual findings of the court *a quo.* Counsel submitted that there was a misdirection on the facts in the court *a quo* which is so unreasonable that no sensible person who had applied his mind to the facts would have arrived at such a decision.

[9] Counsel highlighted that a judicial officer should only determine issues placed before the court by the parties. However, the court *a quo* is said to have dealt with issues relating to the rights of the parties to occupy the farm, whereas the application before court was of a peace order. It is contended that the court *a quo* interdicted the appellant when no application or prayer for an interdict had been made. Counsel cited *Chiwenga v Mubaiwa* SC 86/20 in support of this proposition.

[10] Counsel submitted that a lease agreement creates personal rights which are only enforceable between the parties who entered into the lease agreement. It was submitted further

that the rights of Ncube arising from the offer letter were extinguished at her death and cannot be enforced by the executor of her estate.

[11] Counsel argued that a party is not entitled to dispose another of property without following due process. It was submitted that AFM has always been in occupation of the whole farm. And such occupation has not been challenged. It was submitted further that even if the court *a quo* was satisfied that the respondent was the rightful holder of an offer letter in respect of Subdivision 3, it did not entitle him to forcibly invade the farm and interdict other occupiers from accessing the farm without following due process. Counsel cited *Mswelangubo Farm (Pvt) Ltd & Ors v Kershelmar Farms (Pvt) Ltd & Ors* SC 80/22 in support of this submission.

[12] Counsel prayed that the appeal succeeds with costs.

Analysis

[13] The first ground of appeal attacks the respondent's *locus standi* in seeking a peace order against the appellant. *Locus standi* relates to whether a particular applicant is entitled to seek redress from the courts in respect of a particular issue. In terms of the common law an applicant must show a "direct and substantial interest" in the subject matter and the outcome of the litigation. See *Matambanadzo v Goven* SC-23-04; *Sibanda & Ors v The Apostolic Faith Mission of Portland Oregon (Southern African Headquarters) Inc* SC 49/18; *Kirstein v Registrar General* 2019 (3) ZLR 1275 (H). In *Makarudze & Anor v Bungu & Ors* 2015 (1) ZLR 15 (H) the court pointed out that *locus standi in judicio* refers to ones right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a direct and substantial interest in the outcome of the litigation. Such interest is a legal interest in the subject matter of the action which would be prejudicially affected by the judgment of the court. See *Zimbabwe Stock Exchange v Zimbabwe Revenue Authority* SC 56/07.

[14] In *casu* the late Ncube was allocated Subdivision 3 of Donaway Farm. The respondent is the executor of the estate of the late Ncube, and it is in this capacity that he deployed workers at the farm. The fact that the names of the workers were not given is inconsequential. The

actions of the appellant were not directed against the workers, but the respondent who was their employer. The foundation of the construction that was destroyed by the appellant, did not belong to the workers, but to the respondent. The respondent has a direct and substantial in ensuring that there is peace at Subdivision 3 of Donaway Farm. No doubt he had *locus standi* to sue out an application for a peace order. The attack on the respondent's *locus standi* to sue out an application for a peace order has no merit.

[15] Counsel contended that the court *a quo* grossly misdirected itself in concluding that the appellant breached the peace when there was no admissible evidence led to support that conclusion, thereby rendering the finding irrational and liable to vacation. This ground of appeal is essentially against the court *a quo's* factual findings. We can only interfere with the trial court's factual findings if they are vitiated by material misdirection or shown by the record to be wrong. See *R v Dhlumayo & Another* 1948 (2) SA 677 (A) at 705-706; *S v Naidoo* 2003 (1) SA 347 (SCA) para 26; *Mupande v The State* SC 58/22; *Musimike v The State* SC 57/20; *RBZ v Granger & Anor* SC 44/15 @ 5-6.

[16] The court *a quo* found that the respondent's workers constructed a foundation structure and the appellant destroyed it, and that such conduct amounted to a breach of peace. This factual finding is supported by the evidence on record. The appellant testified that after the respondent's workers exhibited their offer letter, him and his team told the workers to go away, i.e., asking them to leave the farm. The workers had constructed a foundation for a building; however, the appellant destroyed it. And the police failed to maintain peace at the farm. The factual finding that the appellant breached peace cannot be assailed. In fact, it was arrived at after a consideration of admissible evidence, I say so because it was the appellant himself who testified regarding the events that resulted in the respondent's workers being asked to leave the farm and their foundation construction being destroyed. The court *a quo* cannot be faulted in making these factual findings, and concluding that the appellant breached the peace. There is no legal basis for interfering with the factual findings made by the court *a quo* in this regard.

[17] The court *a quo* is attacked for allegedly determining the issues relating to the parties' right of occupation of the farm and interdicting the appellant from occupying Subdivision 3 when in fact that issue was not before the court. It is clear that the matter before the court *a quo*

was an inquiry in terms of s 388 of the Criminal Procedure and Evidence Act [Chapter 7:09] (CP & E Act). The purpose of the inquiry was to locate the root of the dispute and to arrest it. The court found that the respondent was in lawful occupation Subdivision 3, and that the root of the breach of peace was appellant's refusal to allow the respondent to use and built at his portion of the farm. It is in this context that the court *a quo* ordered the appellant to keep peace at all times at Subdivision 3 of Donaway Farm, and not to interfere with the respondent's operations thereat. The submission that the court *a quo* granted a relief that was not asked for has no merit.

[18] The contention that the court *a quo erred* at law in failing to find that a lease can only give personal rights which, once unrealized, cannot be transferred upon the death of the holder, to his / her executor has no merit. For the purposes of the inquiry, the issue of personal rights flowing from the lease was irrelevant. The court had to ensure that there was peace at the farm, and to achieve that purpose it had to grant a binding over order to keep the peace in favour of the respondent. Whether the respondent had no right to be at the farm could be an issue for argument on another day, but for the purposes of the inquiry in terms of s 388 of the CP & E Act the court found that he was lawfully at the farm, and a binding over order to keep peace was necessary.

[19] On the facts on this case the attack anchored on the contention that the court *a quo* misdirected itself in failing to find that an offer letter in the context of farm allocation does not entitle the holder to forcibly invade the farm without due process has no merit. The court made a factual finding that the respondent was in occupation of Subdivision 3 of the farm. On the findings of the court *a quo*, which are unassailable the issue of whether a holder of an offer letter may forcibly invade the farm does not even arise.

[20] In the circumstances, and notwithstanding the fact that the respondent did not participate in this appeal, I am unable to detect any misdirection on the part of the findings and the decision of the court *a quo*. It is for these reasons that this appeal must fail.

[21] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. However, in this case the respondent was in default. In the circumstances he is not entitled to an order of costs.

[22] In passing, I flag the following issue: - it is trite that in an appeal from the magistrates' court, the trial magistrate is required to comment on and reply to the notice of appeal. The magistrate's comments are made in terms of Order 31 r 2(1) of the Magistrates Court Rules, 2019. The rule says:

> Upon delivery of a notice of appeal the magistrate shall within 14 days deliver to the clerk of the court his or her comments in writing showing, so far as may be necessary, having regard to the written judgment already delivered by him or her –
> (a) the facts he or she found to be proved; and
> (b) the grounds upon which he or she arrived at any finding of fact specified in the notice of appeal as appealed against; and
> (c) his or her reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against.

[23] In his comments to the grounds of appeal the magistrate says: "I stand by my judgment and the ruling. The lawyer is confused." The comment that the lawyer is confused cannot be said to be sanctioned by the rule. A comment made in terms of the rule is meant to assist the appeal court in determining the issues arising on appeal. The rule directs the attention of the magistrate to the issues he or she may address in the comments. It is not open to the magistrate to start expressing opinions on issues not sanctioned by the rule. To say the lawyer is confused neither assist the appeal court nor serves a useful purpose in the resolution of the appeal, and does not answer the issues raised in the notice of appeal. Magistrates must refrain from such unhelpful comments which are not sanctioned by the rule.

In the result, I hold that there is no merit in this appeal. It is accordingly ordered that the appeal be and is hereby dismissed with no order as to costs.

Dube-Banda J…….

Ndlovu J …….I agree

Masiye-Moyo and Associates (Incorporating Hwalima, Moyo & Associates), appellant's legal practitioners