AKIM ISAAC MUTITI

And

ADMORE NDLOVU

And

BERNARD MAGAMA TONGOGARA

Versus

HWANGE COLLIERY COMPANY

IN THE HIGH COURT OF ZIMBABWE
DUBE JP & DUBE-BANDA J
BULAWAYO 18 MARCH 2020 & 25 APRIL 2024

Civil appeal

S. Chamunorwa, for the appellants
L. Mlala, for the respondent

DUBE-BANDA J:

Introduction

[1] This is an appeal against the whole judgment handed down on 21 November 2022 by the Magistrates Court sitting at Hwange.

[2] On 21 May 2021 the respondent sued out a summons seeking the eviction of the appellants from certain immovable properties it contended it owned. The appellants were sought to be evicted from houses number 6 Fairview Road, Hwange; number 3 Prospect Hill Hwange; and number 10 Hillcrest, Hwange, respectively. At the conclusion of the respondent's case, the appellants made an application for absolution from the instance. The application was dismissed with no order as to costs.

[3] At the hearing before the court *a quo*, the respondent adduced evidence in support of the claims. Upon closure of the respondent's case, the appellants, being of the view that the respondent had failed to adduce sufficient evidence upon which a reasonable court might grant judgment in the respondent's favour, applied to be absolved from the instance. On behalf of the respondents, the court *a quo* was urged to dismiss the application with costs.

[4] The court *a quo* declined to make a determination on the special plea taken by the appellant on the basis that another magistrate had dealt with the issue and made a ruling. Regarding the merits the court found that the respondent's claim was based on the common law remedy of *rei vindicatio*, and that it had proved that it was the owner of the properties and that the appellants were in occupation of such properties without its consent. The court stated that as the respondent had proved ownership and occupation without its consent the *onus* shifted to the appellants to prove the right of retention. It was for these reasons that the court *a quo* dismissed the application for absolution.

Grounds of appeal

[5] Aggrieved by the decision of the court *a quo,* the appellants noted this appeal on the following grounds:

i. The court a quo misdirected itself on a point of law in that having accepted that the court had not disposed of the entire special plea, it refused to entertain the appellant's special plea.
ii. The court a quo grossly misdirected itself on a point of law in failing to find that there is no company resolution authorising the respondent to institute legal proceedings against the appellants and that the resolution signed by the purported administrator and his assistants was a nullity and consequently could not be used as authority to institute legal proceedings.
iii. Alternatively, the court a quo misdirected itself on a point of law in holding that the appointment of Mr M Shava as an administrator of the respondent had retrospective effect and that in particular, it rendered valid the resolution which he affixed his signature to which resolution was made during the tenure of the previous administrator, Mr D. Sibanda.
iv. The court a quo misdirected itself on a point of law by placing an onus on the appellants to establish their right of occupation without enquiring into whether or not the respondent had discharged its obligations to the appellants in terms of their respective retrenchment agreements.
v. The court a quo misdirected itself on a point of law by disregarding the judgment of the High Court in *Hwange Colliery Company Ltd v Tongogara & Ors* HB 214/18 and thus failing to determine on the question of whether or not the respondent had discharged its obligations to the appellants.

vi. The court a quo grossly misdirected itself on the facts when it found that no reasonable court faced with the same facts would have arrived at the same decision in finding that the appellants are occupying the respondent's premises without the respondent's consent when there is no board resolution authorising Neshavi to act on behalf of the respondent.

[6] At the centre of this appeal is an order by the court *a quo* dismissing, at the closure of respondent's case, the appellants' application to be absolved from the instance. In my view, and regard being had to matters flowing fairly from the record, there is one main issue for determination i.e., whether the order of the court dismissing the application for absolution is appealable. The subsidiary issue is whether the issues of special plea etc. can be determined at the absolution stage. It is for these reasons that at the commencement of the hearing the court requested Mr *Chamunorwa*, counsel for the appellants to address the issue whether an order dismissing an application for absolution at the close of the plaintiff's case is appealable. The court informed both counsel that it shall adopt a holistic approach. This approach avoids a piece-meal treatment of the matter, and the preliminary issues are argued together with the merits, however when the court retires to consider the matter, it may dispose of the matter solely on preliminary issues despite that they were argued together with the merits. Both counsel addressed the court on the preliminary issue whether in this instance the decision of the court *a quo* is appealable and on the merits of the appeal.

The law

[7] This analysis must start with a consideration of s 40(2) of the Magistrates Court Act [Chapter 7:10], which says:

> "Subject to subsection (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 and definitive judgment, including any order as to costs."

[8] The first issue is capable of speedy resolution. The test for an appealable judgment or order was succinctly stated by Harms AJA, in *Zweni v Minister of Law and Order*, 1993(1) SA 523 (A), as follows:

> "First, the decision must be final in effect and not be susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it

must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

[9] What constitutes an interlocutory order was enunciated in the case of *Blue Rangers Estates (Pvt) Ltd v Muduviri and Anor* 2009 (1) ZLR 368 (S). In that case the court explained the correct test to be applied in determining whether an order/judgment is final and definitive or is interlocutory and not appealable. The court said at 376G:

> "To determine the matter one has to look at the nature of the order and its effect on the issues or cause of action between the parties and not its form. An order is final and definitive because it has the effect of a final determination on the issues between the parties in respect to which relief is sought from the court."

The court continued at 379:

> "Many orders which are final in form are in fact interlocutory whilst some which are interlocutory in form are in fact final and definitive orders. The test is whether the order made is of such a nature that it has the effect of finally determining the issue or cause of action between the parties such that it is not a subject of any subsequent confirmation or discharge." See *Minister of Higher and Tertiary Education v BMA Fasteners (Private) Limited & Anor* SC 33/17.

[10] In light of the principles set out above, the question to be posed and answered is whether an order refusing absolution from the instance at the close of the plaintiff's case is appealable in the reading of s 40 of the Magistrates Court Act.

The application of the law to the facts

[11] A judgment given and an order refusing an application to absolve a defendant from the instance is not the final determination of final relief sought. The refusal amounts to no more than a direction or ruling that the trial should proceed. The final word on the matter, that being whether the respondent had proved its case as required by the law had not yet been spoken. The order is not final in effect in that the appellants will have an opportunity at the defence case to ventilate all their issues. The final word whether the appellants should be evicted from the houses they occupy has not been spoken. Furthermore, the order and its effect are clearly susceptible to alteration by the trial court. This will happen when the trial proceeds to finality, in that the trial court may at the end of the case give judgment in favour of the appellants. In essence, the matter in the court below is still pending. See *Liberty Group Limited t/a Liberty Life v K & D Telemarketing and Others* (2020) ZASCA 41; *Steytler v Fitzgerald* 1911 AD 295 at 304.

[12] The refusal to grant absolution from the instance is purely interlocutory and has not the effect of final and definitive judgment in that the final word in that suit has still to be spoken. It does not have the effect of a final and definitive judgment, as contemplated by s 40 of the Magistrates Court Act. The order is merely temporary and does not inflict irreversible harm to the appellant. Therefore, the order of the court *a quo* refusing absolution from the instance is not appealable.

Special plea

13] Regarding the submissions turning on the refusal of the court *a quo* to deal with the special plea, I take the view that at the stage of absolution the issues of special pleas etc. do not arise. It is so because the grant or refusal of absolution turns on the evidence. It can be granted if the plaintiff has failed to prove a *prima facie* case and it cannot succeed if he has done so. This is not a window available to the defendant to start arguing issues of specials pleas and absence of authority to institute proceedings. The only question before the court a quo was whether, at the close of the plaintiff's case, there was such evidence before it upon which a reasonable court might, not should, give judgment against defendants. See *Competition and Tariff Commission v Iwayafrica Zimbabwe (Pvt) Ltd* SC 58/19; *United Air Charters (Pvt)Ltd v Jarman* 1994 (2) ZLR 341 (S) at 343; *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A; *Manyange v Mpofu & Ors* 2011 (2) ZLR 87 (H) at 88 F-H; *Gaibie & Anor v Castanheira & Anor* SC 58/20. To me, it would be erroneous for a trial court to start upholding a special plea at the absolution stage or declining jurisdiction.

Disposition

[14] In the reading of s 40(2) of the Magistrates Court Act [Chapter 7:10], an order dismissing an application for absolution from the instance at the close of the plaintiff's case is not a final and definitive judgment, and not appealable. Again, the sole issue for determination at an application for absolution stage turns on the evidence adduced by the plaintiff. Issues of special pleas etc. do not arise at this stage. Having found that the decision sought to be appealed is not appealable, this court declines to deal with the merits this appeal. In the circumstances this appeal stands to be struck off the roll.

Costs

[15] As for the costs of this appeal, there is no reason why they should not follow the result. They are for the account of the appellants.

In the result, I order as follows:

i. In terms of s 40(2) of the Magistrates Court Act [Chapter 7:10], an order dismissing an application for absolution from the instance at the close of the plaintiff's case is not a final and definitive judgment, and is not appealable.

ii. The appeal be and is hereby struck off the roll with costs of suit on a party and party scale.

DUBE JP…… I agree

Calderwood, Bryce Hendrie & Partners, appellants' legal practitioners
Mashindi & Associates, respondent's legal practitioners