PAUL MGODI
versus
DUWENI KUTEPA
and
CHIRUNDU LOCAL BOARD

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 10 November 2022 & 27 April 2023

Civil A**ppeal**

B Makururu, for the appellant
T Nyamucherera, for the 1st respondent
No appearance for 2nd respondent

TSANGA J: The appellant, Paul Mgodi, who was a respondent in an application for an interdict in the court below, was interdicted from developing or causing the development of Stand 1484 Chirundu. The applicant, was Duweni Kutepa and is the first respondent herein. His averments in seeking that interdict were that sometime in 2015 he had been offered a commercial stand, being Stand 1484 Chrirundu by Chirundu Local Board, the second respondent herein. This had been through a letter dated 4 December 2014 which he annexed to his application. He averred that he had since paid the purchase price inclusive of all rates up to July 2019. Despite making what he deemed full payment, his critical averment was that he had found the appellant, Paul Mgodi, pouring footing concrete on the said stand number 1484 Chirundu without his knowledge and consent. He had also averred that the act of developing the stand damaged his pecuniary interests.

The first presiding officer granted the application provisionally *ex parte* for the reason that there were pecuniary damages the applicant was facing and that without an order of court, he had no lawful remedy. On the return date, which was during the time the country was seized with the covid epidemic, the court had granted the permanent order sought excluding clauses 2, 3, and 4 of the order that had accompanied the application for the interdict.

Clause 2 sought to declare him as owner but since the Magistrate Court Act excludes orders that are declaratory in nature, the order was not granted in that it sought to declare Duweni Kutepa the owner of the stand and to compel Chirundu Board to deliver that stand.

Clause 3 sought that Paul Mgodi remove all his structures and rubble within 21 days from date of order. The court considered this clause as potentially raising material disputes of facts which could not be addressed by way of application and hence that clause too was excluded from the final order. Clause 4 was altered from costs on a higher scale to ordinary costs.

In outlining the reasons for its order the court in part explained the context of the confirmation of the provisional order as follows:

> "On the return date, the country was then seized with (the) corona virus epidemic. In good faith this court granted the permanent order sought by the Applicant which excludes clause 2, 3, and 4.

The order was therefore granted with ordinary costs encapsulating clause one which read as follows:

> That the first and second respondents be and are hereby interdicted from developing or causing the development of Stand Number 1484 Chirundu by any other person other than the applicant.

In opposing the confirmation of the interdict, on the return day Chirundu Local board had argued that Duweni Kutepa had not made full payment for the stand. It was said he ought to have paid USD 1267.50 by the 30th of January 2015 which was 65% of the purchase price of US 1950.00 and yet at the time had only paid USD 125.00 of the total purchase price of US$1950.00. The Board conceded though that amounts of USD 475.00 and US$5.00 had been paid by Duweni Kutepa but however argued that these amounts were not part of the purchase price. It further averred that the stand had therefore been repossessed and sold to the appellant, Paul Mgodi because Duweni Kutepa was in breach.

Looking at the requirements for the granting of an interdict, namely, a clear or *prima facie* right; reasonable apprehension of injury or actual injury; and the absence of any other remedy, the court concluded that it was common cause that Duweni Kutepa had been offered the stand. What was in dispute were the amounts paid for the stand and the requirements for repossession of the stand. It also concluded that Duweni Kutepa could not seek relief from any

other forum other than a court of law. It was for these reasons that the court granted the application of the interdict which excluded clauses 2, 3 and 4 which had been sought and ordered each party to pay its own costs. As highlighted the court had also referred to the context where the corona virus was endemic at the time as a reason for granting the order in good faith.

The grounds of appeal

The grounds of appeal are that the court erred as follows:

1. In granting a permanent interdict without having considered whether the first respondent had a clear right to the commercial stand in question.
2. In granting a permanent interdict on the basis of good faith due to covid.
3. In interdicting that which is lawful as the appellant's occupation of the commercial stand was pursuant to a valid purchase of the same.

What is sought is that the appeal succeeds and that the decision of the court *a quo* permanently interdicting the appellant from developing or causing the development of stand no 1434 Chirundu be set aside and substituted with the following:

"The application for an interdict be and is hereby dismissed with costs."

The submissions

Counsel for the respondent Mr Nyamucherera argued that the appeal is fatally defective in that the notice does not specify which part of the judgement is being appealed against. He also argued that the relief sought seeks to set aside the whole judgment when in fact what is before the court is a partial appeal.

These points are without merit. The appeal is certainly not against part of a judgment. It is an appeal against the granting of the final interdict. What the appellant seeks to set aside is the granting of the interdict which was within the jurisdiction of the Magistrate court to deal with. It is therefore perfectly in order for the relief to seek to set aside that judgment. The points *in limine* are without merit and are dismissed.

Turning to the merits of the appeal, regarding the first ground of the appeal, Mr Makururu's emphasis was that the court granted the interdict yet it had found that the amount paid was in dispute. A final interdict also presupposes a finding of a clear right which the court did not find. In fact the lower court found that the issue of Paul Mgodi removing his structures raised dispute of facts arising from the payment and repossession issue. The court itself was thus urged not to have found the existence of a clear right.

Turning to the second ground of appeal, he argued that by referencing the covid lockdown in its reasons for the granting of the interdict expediently, the court in fact threw out of the window the requirements for granting a final interdict.

As regards the third ground of appeal, he argued that the appellants 's occupation of the stand was indeed pursuant to a valid purchase and insisted that the court cannot interdict that which is lawful. By interdicting, he argued that the court was interfering with a lease which had not been cancelled. Moreover the stand had been advertised before it was repossessed. He therefore stood firm that the interdict ought to be set aside.

Mr *Nyamucherera* for the respondent emphasised that in terms of the Contractual Penalties Act [*Chapter 8:04*] a notice ought to have been served on the respondent regarding any cancellation of the land contract and this had not been done. As for the reference to the corona virus, this was said to be merely in terms of the exigencies of dealing with the matter expeditiously at the time.

The appellant's reply to the Contractual Penalties Act argument was that if the proper process of giving notice was not followed, then the first respondent ought to have sought a review. Moreover, he had not filed a counter appeal and could not now seek to ride his issues on the back of the other party's appeal. Consequently, there could be no clear right where none was established. He maintained that the order ought to be set aside as it wrong at law.

Analysis

The requirements for a final interdict are a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other remedy"

SEE *Universal Merchant Bank Zimbabwe Ltd* v *The Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (HC) drawing on seminal cases such as Setlogelo v Setlogelo 1914 AD 221 at 227, and *Sanachem (Pty) Ltd* v *Farmers Agri Care* (Pty) Ltd 1995 (2) SA 781 (A) at 789B-C.

As stated in *Universal Merchant Bank* above:

> "The reference to a clear right in respect of a final interdict, as opposed to a *prima facie* right in regard to a temporary interdict, means no more than a clear right must be established on a balance of probabilities."

As also explained in F*red Marere* v *T. Mukwazi* HH 462/19:

> "The authorities show that the word "clear" in the context of the interdict does not really qualify the right itself but speaks to the extent to which the right has been proved by evidence. Whether there is a right is a question of substantive law, whether that right is clearly established is a matter of evidence. What is required where a final interdict is sought is that the right must be established clearly (as opposed to it being *prima facie* established) on a balance of probabilities."

The main ground of appeal is that the court erred in granting the interdict when the amount paid was in dispute. The Board indeed raised the issue of what was not paid as being the reason why it had repossessed the stand. That in itself ought to have stopped the lower court in its tracks in granting a final order. Duweni Kutepa did not prove evidentially that he had a clear right. He could not have been granted the final interdict on the basis of good faith when the court itself made it clear that there were aspects to his quest that raised disputes of fact. The lower court materially shied away from ordering Paul Mgodi to remove his structures and rubble because it stated that this raised material dispute of facts. Yet the court appears to have in fact granted an order akin to a declarator in that in reality it treated him as owner in preventing anybody else from so constructing on the stand save for Duweni Kutepa himself.

Accepting the principle that a final interdict ought not to be granted unless the court is satisfied on a balance of probabilities that the other side has no defence there is absolutely no doubt in this case that a clear right was not established. There is therefore full merit in the first ground of appeal and it succeeds.

The stand having already been advertised and repossessed long before the interdict was sought, there is equally merit in the ground of appeal that the court sought to interdict that which was lawful. Chirundu Local Board, the second respondent, had already repossessed the stand and given it to Paul Mgodi the appellant. If, as Duweni Kutepa argued, he was not given notice in terms of the Contractual Penalties Act, then the remedy for such administrative failure ought to have been a review.

In the circumstances:

1. The appeal succeeds with costs.
2. The order of the court below is substituted to read
    a. The application for an interdict is dismissed with costs.

MAXWELL J……Agrees

Makururu & Partners, appellant's legal practitioners
Lawman Law Chambers, first respondent's legal practitioners