VICTOR VAVARIRAI MUNYIKWA

v

EMMANUEL HANDIVHUNDUKI GONO

And

MINISTER OF LANDS & RESETTLEMENT

HIGH COURT OF ZIMBABWE
MAWADZE J & ZISENGWE J
MASVINGO, 24 January, 2024.
Judgment delivered on 17 May 2024

**Civil Appeal**

K.I.Phulu for the appellant
E K. Moyo for the first respondent
T. Undenge for the second respondent

ZISENGWE J. This is an appeal against the whole judgment of the Magistrates court sitting at Chiredzi ("the court *a quo"*) dismissing the appellant's application for an interdict. The applicant had approached the court *a quo* seeking an order interdicting the first respondent from interfering with his (i.e., appellant's) utilisation of a 10 hectare stretch of land situated between their respective farms which are adjacent. Both are resettlement farms in the Chiredzi district of Masvingo province, namely Subdivision 3 of Hippo Valley settlement Holdings (Subdivision 3) and Hippo Valley Settlement Holdings Lot 53 (the remaining extent of Lot 53). They were allocated to the appellant and the first respondent respectively by the government under

its land reform programme. In a word, the appellant and the first respondent each claim to be the legitimate holder of rights over the disputed piece of land to the exclusion of the other.

**The background.**

The dispute stems from the following chronology of events. In 2002 the appellant was offered subdivision 3. At that stage subdivision 3 measured 18, 40 hectares. However, a portion of the original holding (Lot 53) the remaining extent remained vacant. The first respondent was not in the picture yet. This latter piece of land was later allocated to the first respondent in 2008, initially on a caretaker basis. It measured 28,5 hectares. Some three years later, i.e., in 2011, a formal offer letter in respect of the remaining extent was granted to the first respondent. It now measured 35 hectares.

That allocation soon proved to be the incendiary spark which ignited the current dispute which has been raging for some time now. This is because in 2012, (if the averments of the second respondent are anything to go by), the appellant made representations to the second respondent wherein he basically complained of the allocation of the now disputed 10 hectares situated at the common boundary between the remaining extent and Subdivision 3 to the first respondent.

According to the second respondent the basis of the complaint/representations by the appellant was that he (i.e. appellant) had been recommended first (i.e., ahead of the first respondent) by the provincial Lands Committee in 2004 for the disputed 10 hectares and that he had already commenced operations on the ground.

Consequent to appellant's representations, the 2011 offer letters were, according to the second respondent, withdrawn. The intention being to issue offer letters matching the situation on the ground.

Pursuant to this, new offer letters were issued in 2016 which according to the second respondent correctly reflected "the situation on the ground". Those offer letters dated 19 January 2016 effectively shrunk the remaining extent to 22,5 hectares while concomitantly increasing the hectarage of subdivision 3 to 47,125 hectares.

According to appellant, therein lies the problem because the first respondent consumed by jealously completely refused to accept a situation where his (i.e., first respondent's) farm was approximately half the size of that of the appellant. He claims that the first respondent has

therefore effectively excised the 10 hectares and annexed it to his farm and continues to utilize the same despite several communications setting the record of their respective holdings straight. Two of such communications being a letter by the second respondent dated 2 January 2013 authored by the then Minister of Lands Herbert Murerwa directed to the Company Secretary of Tongaat Hullet confirming that the disputed 10 hectares belonged to the appellant. The other being a letter dated 18 March 2016 by the then deputy Minister of Lands also confirming the same position.

Faced with the impasse of the refusal of the first respondent to relinquish the disputed 10 hectares, the appellant approached the court *a quo* for an interdict, as earlier stated, barring the first respondent from interfering with the appellant's use and enjoyment thereof.

The application was resisted by the first respondent who alleged that the 2016 offer letters were fraudulently obtained and that the purported withdrawal of his 2011 letter was ineffectual as it was never communicated to him.

The court *a quo* dismissed the application on several grounds. Firstly, it found that the applicant had not been able to demonstrate that the first respondent had encroached onto his (i.e. applicant's) land. It found in this regard that no maps had been produced showing the locations of the applicant's farm relative to that of the first respondent, which maps would have depicted the geographical location of disputed 10 hectares and the extent of the alleged encroachment. The court *a quo* referred to such maps as the "defining factor" without which the issue of encroachment did not lend itself to determination.

The court *a quo* therefore found that the appellant had failed to establish both a clear right and injury/harm committed, both being prerequisites for the granting of an interdict.

The court *a quo* also found that the appellant had not established the absence of any alternative remedy. In its judgment it posed the following rhetorical questions:

i) Was the Ministry of Lands not involved and it was, what was its decision?

ii) Was the matter ever referred to the Agricultural Land Settlement Board which has the Statutory mandate to deal with the land dispute as provided by s10 of the Agriculture Settlement Act [*Chapter 20:01*]

iii) Was the Lands Commission ever involved?

iv) Was any other relevant lawful authority ever involved to solve this land dispute?

The court *a quo* referred to the communication between the Ministry of Lands and the first respondent over the latter's query over government policy against downsizing of farms allocated to war veterans.

The reasons for dismissing the application are summarised in the final paragraph headed "conclusion" of the judgment wherein it wrote:

> "firstly, as indicated at the introduction of what needs to be determined by the court, that this final interdict stands or falls on whether or not the applicant succeeded in establishing a clear right to interdict. The clear right has been frustrated by the lack of clearly locating the area in issue by the help of mapping, clearly showing the location, boundaries and extent of the land in question thereof. This was not successfully established. Secondly, failure to establish the clear right also affected the alleged injury alleged (sic) to have been occasioned by the first respondent. Thirdly, on the non-availability of a satisfactory remedy to the dispute, the decision promised by the Ministry of lands which is purported to bring a lasting solution in line with the government policy on war veterans Benefit dated 22/11/22 is still pending. So, it has been premature for the applicant to bring the matter before this court and amounts to jumping the gun. Predicated on the argument and reasons highlighted supra, the application for a final interdict against 1st and 2nd respondents fails and is thus dismissed with costs."

Aggrieved by this decision the appellant mounted the present appeal. His grounds of appeal are couched in the following terms:

**Grounds of appeal**

1. The trial court erred by failing to appreciate that the application was predicated not on earlier offer letters which were consequently withdrawn but on the offer letters of January 2016.
2. By dwelling a lot on whether the 1st respondent's offer letter was procedurally withdrawn, the trial court erred as the 2nd respondent had clearly stated that it was done, and that was not the issue before the court.
3. The court *a quo* erred by dismissing the appellant's argument that the first respondent had encroached into his farm, when the fact is admitted by the acquiring authority, being the 2nd respondent.
4. The trial court deliberately confused itself, and fell into error by stating that the offer letter of 2016 was not attached to the application when in fact it was and marked 17 and was the basis of the interdict application.
5. That the trial court erred by failing to appreciate that the offer letter of the 19th of January 2016, conferred on the appellant, a clear right on the land in dispute.
6. In dismissing the application for an interdict in the circumstances, the learned Magistrate erred.

Apart from contesting the appeal on the merits, the first respondent raised two preliminary points. First, he contended that the appeal was defective in that the grounds of appeal basically attack the court *a quo's* findings of fact contrary to the established position that an appeal lies on a question of law and not fact unless such findings of fact amount to a gross misdirection. Second, it was averred on his behalf that the appeal is defective because the relief sought on appeal was different from the relief sought in the proceedings *a quo*.

In countering the first preliminary point the appellant insisted that the grounds of appeal whether taken individually or collectively were unquestionably an attack on misdirections on matters of law.

Before addressing each ground of appeal to establish if it attacks a point of law or a purely a point of fact it is necessary to revisit an appellate court's role. One of the leading cases on the appellate function is *Barros v Chimphonda* 1999 (1) ZLR 58 (S) at 62 F-G, where the following was said:

> "It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution..."

What then is a question of law? This question was answered comprehensively in *Muzuva v United bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S) where GUBBAY CJ said the following:

> "The term "question of law" is used in three distinct though related senses. First, it means "a question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter". Second, it means "a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter". And third, any question which is within the province of the judge instead of the jury is called a question of law. This division of judicial function arises in this country in a criminal trial presided over by a judge and assessors"

The appellate court can only interfere with the primary court's findings of fact if those factual findings amount to a gross misdirection or fall into category of gross irrationality, see *Chenga* v *Chikadayo & Others* SC-7-2013 where the following was said:

> *"*It is trite that an appellate court will not interfere with a decision of a trial court based on findings of fact, unless there is a clear misdirection or the decision reached is irrational.

In the case of *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670C-E KORSAH JA stated the following:

> "The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion: *Bitcon* v *Rosenberg* 1936 AD 380 at 395-7; *Secretary of State for Education & Science* v *Metropolitan Borough of Tameside* [1976] 3 All ER 665 (CA) at 671E-H; *CCSU* v *Min for the Civil Service* supra at 951A-B; *PF-ZAPU* v *Min of Justice* (2) 1985 (1) ZLR 305 (S) at 326E-G."

To summarise therefore, for a ground of appeal to be considered proper, it must attack the findings of the court *a quo* on a point of law or must allege a gross misdirection or irrationality in the factual findings of that court. The true nature of the grounds of appeal in *casu* (i.e., whether they merely attack purely factual findings of the court *a quo* or are proper grounds of appeal) will therefore be assessed against the background of the above principles.

**Ground 1**

This ground, to my mind amounts to an attack on the court *a quo*'s factual findings on the basis of gross irrationality although it does not say in as many words. In essence the appellant contends that the court *a quo* disregarded an important fact, namely the existence of new (the 2016) offer letters, in arriving at its decision and took irrelevant facts, namely the 2011 offer letters in doing so. If proved this would amount to a gross misdirection as contemplated in the *Hama* v *United Bottlers* and *Barros* v *Chimphonda* cases (supra). It is not necessarily the uttering of the epithet "gross misdirection" that conveys that meaning but rather the substance of thereof.

**Ground 2**

The attack here, whether correctly or incorrectly, is that the court *a quo* was unduly influenced by an irrelevant factor (i.e., the propriety or otherwise of the withdrawal of first respondents offer letter). This ground falls squarely within the ambit of what was referred to in *Barros* v *Chimphonda* (*supra*) as "extraneous or irrelevant matters". This ground therefore proper ground of appeal.

**Ground 3**

Under this ground, the attack is on the court *a quo's* factual finding on the basis that it is at odds with an admitted fact, the admission (of first respondent's encroachment onto appellant's land) having been made by the second respondent. This ground (if proved) would fall under the rubric of a factual finding "being so outrageous in its defiance of logic or acceptable moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion"

What the appellant alleges therefore is that the court *a quo* led itself astray by not appreciating that the question of encroachment had been laid to rest by the second respondent as owner of the land. It is a proper ground of appeal.

**Ground 4**

This ground of appeal dovetails with Ground 1. The allegation being that the court *a quo* neglected or disregarded a relevant fact, (in the form of the 2016 offer letters), it being central to the application. That allegation, if proved would clearly amount to be gross misdirection on the facts which constitutes a proper ground of appeal.

**Ground 5**

The essence of the complaint here is that the court *a quo* failed to appreciate what constitutes a 'clear right' in the context of an application for a final interdict. What does or does not constitute 'a clear right' is a question of law. As will be demonstrated later in this judgment, a court's findings on the existence or otherwise of a clear right, in all its nuanced forms, is broadly speaking a question of law.

**Ground 6**

Strictly speaking, this is not a ground of appeal at all. It does not attack a specific finding of the court *a quo*. It is merely an overall conclusion of the appellant's position ostensibly based on the preceding five grounds of appeal. There is therefore no need to inquire whether it is an attack purely on the court's factual findings or on the law.

Ultimately however, the first preliminary point lacks merit and is accordingly dismissed.

**Whether the relief sought on appeal is different from the relief sought in the proceedings *a quo***

In the proceedings *a quo* the appellant's prayer was for the respondent to be -

a) "...ordered to cease all farming operations in the 10ha that falls within subdivision 3 Hippo Valley holdings 53 belonging to the applicant"
b) ... ordered not to interfere in the applicant's use of the said 10ha on the said 10ha a portion that he had been illegally using.

The Prayer in this appeal reads:

"Wherefore the appellant prays that the appeal be upheld and the court a quo's judgment be set aside and substituted with the following:

(1) That the 1st respondent be and is hereby interdicted [from] interfering with the appellant's farming operations in the 10 hectares that were apportioned to him in terms of the offer letter of the 19th of January 2016.

Although the wording in the two prayers is different it is plain to see that in both instances what is sought is an interdict barring the first respondent from utilising the contested 10 hectares. I do not believe that an appellant is confined to the precise wording employed in the prayer of the proceedings *a quo*. Circumstances may exist justifying a recrafting of the prayer on appeal provided it does not amount to a wholesale amendment of the relief originally sought nor should it be prejudicial to the respondent.

In the same vein, sight must not be lost of the provisions of s31 (1) of the High Court Act [*Chapter 7:06]* which grants the High Court the power to – *"*vary, amend or set aside the judgment appealed against *or give such judgment as the case may require..."* Provided no prejudice is thereby occasioned, (italics for emphasis). Implicit in this provision is that the appeal court may give an order different from the one originally sought in the court *a quo*, subject to the condition that no prejudice is thereby occasioned to either party. In the event that this appeal succeeds and an order is granted using the wording captured in the grounds of appeal, I do not foresee any prejudice that is likely to be suffered by the first respondent from the difference in the wording as aforesaid.

The second point preliminary point is therefore equally without merit and is accordingly dismissed.

**On the merits**

It goes without saying that in the court *a quo* the appellant needed to satisfy the requirements for the granting of a final interdict. These are:

1. The existence of a clear right.
2. Actual or reasonably apprehended injury; and
3. Absence of any other remedy by which applicant can be protected with the same result.

See *Flame Lily Investments Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378, *Setlogelo* v *Setlogelo* 1914 AD 221 & *ZESA Staff Pension Fund* v *Clifford Mushambudzi* SC-57-02

When everything is said and done, the most contentious issue is whether in the proceedings *a quo* the appellant managed to demonstrate the existence of a clear right, it being one of the pre-requisites for the granting of an interdict. This issue, as will shortly be seen, addresses grounds 1, 2, 4 and 5of the grounds of appeal. The appellant's position both in the proceedings *a quo* and in this appeal is that his offer letter dated 19 January 2016 coupled with the second respondent's averments in his "opposing papers" demonstrate the existence of such a clear right. According to him, the absence of a formal notice of withdrawal in respect of the first respondent's 2011 offer letter is inconsequential. He holds the view that by offering the disputed 10 hectares of land to him and by communicating such an intention through a letter and through his opposing affidavit the second respondent undoubtedly expressed the correct position, namely that the contested 10 hectares were allocated to the appellant.

The first respondent's position on the other hand is that by failing to formally withdraw and communicate such withdrawal to him, the purported withdrawal is a nullity and the corollary is that the offer of the same piece of land to the appellant was equally a nullity.

The term clear right has been interpreted to mean a right clearly established at law" in Erasmus *"Superior Court practice"*, 2nd edition at D6-12-13, the following is stated:

> "It is submitted that what is meant by the phrase (clear right) is a right clearly established. Whether the applicant has a right is a matter of substantive law, whether that right is clearly established is a matter of evidence. In order to establish a clear right, the applicant has to prove on a balance of probability the right he seeks to protect."

In *Flame Lily Investments Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd* (*Supra*) it was held that a clear right need not be incontrovertible but definite.

Finally, in *Masimba Charity Huni Fuels (Pvt) Ltd* v *Kadurira & Anor* SC 39-22, a clear right as it relates the granting of a final interdict was explained in the following terms:

> "...the word "clear" relates to the degree of proof required to establish the right an should strictly not be used to qualify the right at all …. A clear right must be established on a balance of probabilities….. From the authorities it is clear that where a final interdict is sought, a clear right as opposed to *prima facie* right must be established by evidence on a balance of probabilities."

The court *a quo's* reasoning on the existence or otherwise of a clear right was regrettably muddled up. It equated the absence of a map depicting the precise location of the disputed 10 hectares in relation to the two plots to want of the existence of a clear right. That amounted to a *non-sequitur*. It obviously conflated the question of injury committed (or reasonably apprehended) with the existence of a clear right.

In my view the crux of the matter insofar as the existence of a clear right is concerned, is whether or not the absence of a written letter of withdrawal of the 2011 offer letter from the record of proceedings negates the notion of a clear right on the part of the appellant.

The appellant relied to a great extent on a passage from the case of *Simbarashe Mutsahuni &Another* v *The Minister of Lands Agriculture, Fisheries Water and Rural Resettlement &Another* HH-407-21.

The brief facts of that matter were that the appellants were issued with an offer letter on 22 June 2017 by the Minister in respect of a certain piece of land. Subsequently they were served with a notice of intention to withdraw the offer letter. Despite objections raised, the Minister withdrew the offer letter. The applicants were then issued with another offer letter in a different area. The applicants then sought to rely on the original letter and the court had this to say:

> "It is difficult to appreciate how the applicants rely on their stay on the farm as a right. I am sure the right may be premised on the 2017 offer letter. The fact is that the offer letter that gave rise to their stay was withdrawn. The applicants do not have a valid offer letter in respect of the farm. Their right is now limited to the land set out in the valid offer letter.*"*

What distinguishes the *Mutsahuni* case from the present one is that *in casu* apart from the second respondent's *ipse dixit* there is no evidence of a formal notice of withdrawal.

Be that as it may, the fact remains that as far as the second respondent is concerned the offer letter in favour of the first respondent was withdrawn in 2013 consequent to which the second

respondent issued fresh offer letters to the parties in 2016. This, in my view is what is critical. The absence of a document showing the procedure of withdrawal does not in my view detract from the fact that second respondent withdrew the 2011 offer letters.

Sight must not be lost that a clear right need only be established on a balance of probabilities. As has been said in several cases the word "clear' does not qualify the right. In *MDCT &Ors* v *Timveous &Ors* SC-9-22 the following was said:

> "In *Herbstein and van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th Ed 2009 at page 1459-60 the authors whilst noting the difficulty in defining the term 'clear right' acknowledged that:
>
> > "What is meant by the phrase is a right clearly established, that the word 'clear' relates to the degree of proof required to establish the right and should strictly not be used to qualify "right" at all. ... a clear right must be established on a balance of probabilities.*"*

It is also important to note as earlier stated that in *Flame Lily investments (Pvt) Ltd* v *Zimbabwe Salvage (supra)* that a clear right need not be incontrovertible but definite.

In *casu*, the following set of facts should have convinced the court *a quo* that the appellant had established a clear right on a balance of probabilities.

a) That the second respondent as the "*owner*" of the land confirmed by means of an affidavit deposed to in this application that the first respondent's 2011 offer letter was withdrawn in 2013 and fresh offer letters were issued to the appellant and first respondent.
b) That, related to a) above, the second respondent in the aforementioned affidavit rebutted the first respondent's assertions that the 2016 offer letters produced by the appellant were a fraud.
c) That the 19 January 2016 offer letters issued by the second respondent, copies of which were produced in court showed that as things stood Subdivision 31 was 47.125 hectares in extent and remaining extent of holding 53 was 22.5hectares.
d) That the letter dated 2 January 2013 by the then Minister of Lands and Rural resettlement Herbert Murerwa, to Tongatt Hullet confirmed that the disputed 10 hectares "*belonged*" to the appellant.

e) That the letter dated 18 March 2016 by the then deputy Minister directed to the appellant equally confirmed that the disputed 10 hectares belonged to the appellant.

We find that there is merit in the appellant's contention as captured in the second ground of appeal that the court *a quo* erred in allowing itself to be unduly influenced by the question of whether the first respondent's offer letter was procedurally withdrawn. Should the second respondent be aggrieved by the manner of withdrawal in terms of whether it flouted any statutory provision (be it the Administrative Justice Act [*Chapter 10:28]*, the war veterans Act [*Chapter 11:15*] or the Agricultural Rural Settlement Act [*Chapter 20:01*]). It was and still is the first respondent's right to challenge the withdrawal accordingly in the appropriate forum. What is not open to doubt, however, is that the 2011 offer letter was withdrawn and fresh offer letters issued on 19 January 2016.

**Whether the appellant proved injury/harm actually committed or reasonably apprehended**.

This issue is captured in the third ground of appeal. The encroachment is the essence of the harm or injury committed. The question therefore is whether the court *a quo* erred in failing to appreciate that the first respondent had encroached onto Subdivision 3 by annexing 10 hectares thereof. From the history of the dispute there can be no doubt regarding the portion of land in question. It is disingenuous for the first respondent to charge in one breath that the 10 hectares in question belong to him by virtue of the offer letter of 2011 and then in the next breath challenge the appellant to establish which 10 hectares are in issue. A perusal of all the documents filed by the parties' shows that there was consensus as between all three parties as to which 10 hectares were subject to contestation. The court a quo regrettably allowed itself to go tangential to this fact which was in fact common cause.

**Existence of alternative remedies**

The appellant did not directly place this issue as a substantive ground of appeal. Mr Moyo for the first respondent however urged the court to consider this issue given that it is one of the three requirements for the granting of an interdict.

Ordinarily the appeal court confines itself to the complainants raised by the appellant in his or her grounds of appeal, they being the lenses through which the decision of the court *a quo* are

to be examined. We will however address this additional point out of an abundance of caution in light of the fact that it is a matter of law which can be raised at any stage.

The court *a quo* found that there was an alternative remedy under the Government Policy on War veterans. It further found that the application was premature. The letter dated 22 November 2022 assuring the first respondent that it was looking into the dispute only came well after the institution of application for interdict. More importantly, however, this particular avenue was one that was open to the first respondent not the appellant.

Pertinently, from the history of the dispute it is apparent that the appellant pursued internal remedies which resulted in the 10 hectares being allocated to him. This much is clear from the documents itemised on page 10 of this judgment. Having thus successfully lobbied the second respondent in 2012 and 2013 and having been granted the 10 hectares in question, appellant was left with no alternative but to assert his rights in a court of law for an interdict barring the first respondent from interfering with his use and enjoyment of the disputed 10 hectares. He could not continuously go back to the same authority that had granted him the disputed 10 hectares after he had made representations to it. What else would he have sought from second respondent to assert his rights, other than to seek refuge from the courts?

From the foregoing, we hold the opinion that the appellant managed to establish all the requirements for the granting of a final interdict and accordingly the appeal stands to succeed.

**Costs**

The general rule is that the substantially successful party is (which the appellant has been) is entitled to his or her costs. However, whether by design or inadvertence there appears to be no prayer for the costs of the appeal. The appellant seems to be content with recovering costs of the proceedings *a quo*.

Accordingly, the following order is hereby made:

1. The appeal is upheld
2. The decision of the court *a quo* is hereby set aside and substituted with the following:
    a) The application for a final interdict succeeds with costs.

b) The first respondent be and is hereby interdicted from interfering with the appellant's farming operations in the 10 hectares that were apportioned to him in terms of the offer letter of the 19th of January 2016.

ZISENGWE J.....

MAWADZE J agrees…….

*Chuma Gurajena & Partners; appellant's legal practitioners.*
*Moyo & Jera Legal Practitioners; first respondent's legal practitioners.*