MARY REBECCA GOBVU
versus
ISHEANESU TRUST

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 25 October & 17 January 2023

**Civil Appeal**

Ms *L Chiperesa*, for the appellant
Ms *S Mbauya*, for the respondent

**MUCHAWA J:** This is an appeal against a judgment rendered by the Magistrates' Court which was in favour of the respondent (the applicant then) against the appellant (the respondent then). The order was in the following terms;

> "IT IS ORDERED THAT:
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> 1. The respondent is interdicted from:
>    a. Approaching, visiting and or entering any premises of St. Michaels Ishe Anesu Group of Schools
>    b. Carrying out any unauthorized duties on behalf of St. Michaels Ishe Anesu Group of Schools
>    c. Interfering in any way whatsoever from the smooth operations of St. Michaels Ishe Anesu Group of Schools
> 2. That this order authorizes any attested member of the Zimbabwe Republic Police to arrest and charge the respondent with contempt of court should she fail to abide and or comply with the terms of the order.
> 3. That this order shall be served by the Messenger of Court or any attested member of the Zimbabwe Republic Police."

The background to this matter, according to the respondent, is that the appellant was a founding trustee of the respondent and was also employed as the principal of St. Michaels Ishe Anesu Group of Schools. A board meeting of the 18th of September 2018 is said to have relieved the appellant of her duties from the board of trustees as a result of her having embezzled school funds and resigned. An extract of the board minutes was supplied which shows that the appellant was removed from the board of trustees. It is alleged that the appellant had resigned but no such

resignation is on record. The respondent claims that from that date of 18th September 2018, the respondent ceased to be a board member and to have anything to do with the running of the school. The appellant is alleged to have appeared at the school on or about the 22nd of February 2022 and invaded the bursar's office and to have taken over the bursar's duties by receipting and collecting funds from learners and retaining same for her personal use. This spurred the respondent to approach the court *a quo* leading to the granting of the above stated order.

Disgruntled with the order of the court *a quo*, the appellant noted this current appeal on the following grounds;

1. The court *a quo* misdirected itself in failing to find as a fact that the respondent failed to establish the requirements for the granting of an interdict. The respondent did not establish a clear right which is being or is about to be interfered with.
2. The court *a quo* erred by not finding as a fact that the respondent failed to discharge its *onus* by failing to provide proof of ownership of the land on which the alleged school is operating from nor did it establish registration of the school in question in terms of Zimbabwean laws.
3. The court of first instance further erred in failing to find as a fact that the appellant is the registered owner of the land in question where the alleged school is operating from.

It is prayed that the appeal succeeds, the decision of the court *a quo* be set aside and the order be substituted with one dismissing the application for an interdict and that the respondent be ordered to pay costs on a legal practitioner and client scale.

The appeal is opposed. We heard the parties and reserved our judgment. This is it.

Ms *Chiperesa* submitted that the respondent failed to meet all the requirements that need to be satisfied for an interdict to be granted as set out in *Setlogelo* v *Setlogelo* 1914 AD 221. These requirement are that the applicant must have a clear right, a well- grounded fear of irreparable injury, the absence of any other remedy and that the balance of convenience should favour the granting of the interdict. In particular, it was averred that the respondent failed to establish a clear right to the land in issue. The deed of donation relied on by the respondent which shows that a donation of Stand 11392 Nyatsime was done in favour of the respondent was said to be insufficient to establish a clear right as nothing was provided to show that the donors were indeed the owners

of the land which they purportedly donated. Ms *Chiperesa* argued that without that, one cannot say there is a clear right which is not open to doubt and that the donation is a nullity, therefore.

On the contrary, the appellant relies on a UDICORP card for Nyatsime Housing Project from the Ministry of Local Government, Public Works and National Housing which allowed her to make payments into Nyatsime Housing Project account to argue that she is in fact the one who has registered right, title and interest in stand 11392 Nyatsime and not the respondent and she cannot therefore be interdicted from her property.

The court *a quo* was alleged to have further erred by not considering whether the respondent was operating a registered school in terms of the Zimbabwean laws as there was no proof of registration with the Ministry of Primary and Secondary Education unlike the appellant who had proof of registration being under consideration. Ms *Chiperesa* contended that allowing the court *a quo's* order to stand was akin to allowing illegalities to be perpetuated.

Furthermore, it was argued for the appellant, that it could not be held that the respondent suffered a well- grounded fear of irreparable injury where it is, in fact breaching the law by committing an illegality.

It was prayed that the respondent should pay costs on a legal practitioner and client scale as its conduct is despicable as it sought an interdict against the holder of rights, title and interest to the land in issue, well knowing that it did not have clear rights.

Ms *Mbauya* submitted that the respondent indeed met all the requirements to be established for the granting of an interdict by reference to the case of *Movement for Democratic Change (Tsvangirai) & Ors* v *Lilian Timveos & Ors* SC 9/22. She submitted that it is settled law that a deed of donation bestows real rights and the respondent had therefore established a clear right on a balance of probabilities. It was contended that the court *a quo* need not have probed further as to whether the donor had real rights in the land as it was clearly established that the respondent had a clear right. Ms *Mbauya* contended that it was shown that the appellant is a former trustee of the respondent and that there was an application for a licence made on behalf of the respondent before the Ministry of Primary and Secondary Education and whatever letters were written by the appellant were written in her capacity as trustee and principal. The letter on page 92 of record directed to the Town Clerk of Chitungwiza City Council on 21 July 2014 which was an application

for a stand to build a primary school and signed off by the appellant, was alleged to have been written at the instance of the respondent which had been established on 17 July 2014.

The issue of the registration of the school was said not to be decisive and this was given as another example of the appellant having acted in her capacity as trustee and principal of the school.

The UDCORP card on page 44 of record was alleged to have been tellingly issued on 13 June 2017 yet the deed of donation is of 17th July 2014 and the appellant even signed as one of the respondent's trustees. Ms *Mbauya* contended that where there is double allocation in land, then the first allocation usually succeeds as per *Guga* v *Moyo & Ors* 2000 (2) ZLR 458. Furthermore as the appellant already knew that the land had already been allocated to the respondent and she took advantage of the disputes between trustees which had already emerged by 2017 and ran to secure the land for herself, it was argued that her claim to the land was tainted and *mala fide*. See *Harren Zaranyika* v *Daniel Rangarirai & 2 Ors* HH 481/18.

A well- grounded fear of irreparable harm was said to have been established as the respondent was able to show that the appellant had acted in interference/ invasion of its rights by collecting money from learners and converting it to her own use to the detriment of the applicant. Her actions are also said to be disruptive of the school operations. The respondent claims not to have had any other option available to it except to approach the court a *quo.*

Furthermore, Ms *Mbauya* submitted that the appellant, in grounds two and three of appeal is asking this court to interfere with the factual findings of a lower court. It was argued that the court cannot interfere with factual findings made by the lower court except on the basis of irrationality, where the court reaches a decision which is not supported by the evidence where such finding is patently wrong. In *casu* the findings of the court *a quo* are that;

1. The respondent is the holder of rights ' title and interest in the land by virtue of the deed of donation in its favour by Nyatsime Housing Development Association
2. The appellant is a former trustee of the respondent
3. The respondent is in the process of registering the school
4. Appellant was removed as a trustee by a resolution on the 18th of September 2018
5. The appellant suddenly started interfering with the school business by continuing to act as a trustee/principal of the school and taking money from the school

It was argued that in the circumstances, the reasoning of the court *a quo* is supported by the evidence presented before it and cannot be described as irrational. The two grounds of appeal are alleged to be defective as they did not mention any irrationality on the part of the court *a quo*. It was prayed that the appeal be dismissed with costs on a legal practitioner and client scale as the numerous suits instituted by the appellant amount to an abuse of court process unnecessarily putting the respondent out of pocket.

The case of *Setlogelo* v *Setlogelo supra* is the *locus classicus* on the issue of the requirements to be met in the granting of a final interdict. It is stated as follows;

> "In order to succeed in obtaining a final interdict, whether it be prohibitory or mandatory, an applicant must establish:
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> (a) a clear right;
> (b) an injury actually committed or reasonably apprehended; and
> (c) the absence of similar or adequate protection by any other ordinary remedy."

*Setlogelo* v *Setlogelo* 1914 AD 221 at 227.

The courts have already interpreted what is meant by a clear right. Honourable ZHOU J held as follows;

> "Whether the applicants have a clear right is a matter of substantive law; whether that right is clearly established is a question of evidence. The right which is sought to be protected through the interdict must thus be a legal right. The evidence tendered must prove on a balance of probability the existence of a right which exists in law, be it at common law or statutory law, which can be protected. In the case of *Starke NO* v *Schreiber* [2001] 1 All SA 167(C) at 174, it was held that "in order to establish a 'clear right' . . . the applicants must prove, on a balance of probability, that they are legally entitled to prohibit the respondents . . ." See also Cilliers *et al*, Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa 5th Ed.*, pp. 1656-1658." See *Kefias Mujokeri" & Anor* v *Apostolic Faith Mission in Zimbabwe & Ors* HH 372/18.

In *casu* the respondents as a matter of substantive law established a clear right to the land by way of a properly executed deed of donation. This establishes a legal right to the land. The evidence tendered is the deed of donation which shows that the trustees of the respondent, appellant included, were donees in respect of stand 11392 Nyatsime Phase 4 Chitungwiza from Nyatsime Housing Development Association on 17 July 2014. In order to establish their clear right, the respondents proved, on a balance of probabilities that they are entitled to prohibit the appellant. There is a written deed of donation and no proof of its revocation. The fact that the appellant, well knowing of the existence of this deed of donation, as she participated in its execution, went ahead

in her personal capacity, some three years later and got a UDCORP card for the same property, in the light of the alleged disputes, smacks of nothing but clear *mala fides*. See the case of *Harren Zaranyika* v *Daniel Rangarirai Gusha & 2 Ors* HH 481/18. The Honourable HUNGWE J (as he then was held as follows;

> "And in *BP Southern Africa (Pty) Ltd* v *Desden Properties (Pty) Ltd* 1964 RLR 7 (G) MACDONALD J (as he then was) said;
> "When one is dealing with the question of double sales of immovable property, as in the matter under consideration, the preference to real rights is tempered by an equitable doctrine called the Doctrine of Notice."
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> See: *Cussons en Andere* v *Krovn* 2001 (4) SA 833
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> Thus, if it is shown that the second defendant at the time of entering into the sale with first defendant, knew that the immovable property stand 794 had already been sold by first defendant to plaintiff, he would, despite transfer be enjoined to relinquish it to plaintiff. It is actual knowledge which is required and this may take the form of *dolus eventualis*, i.e. circumstances which show that the second defendant ought reasonably to have known of the prior sale, but chose to ignore it and proceeded to purchase the same property from the first defendant."

In *casu* the appellant who had actual knowledge of the unrevoked donation to the respondent of the same land, cannot just wave the UDCORP card as a magic wand.

The question of the school not being registered yet, is inconsequential in the circumstances. It was not disputed that there was in fact a school on stand 11392 Nyatsime which was operational. The letter on page 93 of record confirms that the institution's registration, that is Isheanesu Christian College, Seke District Mash East Province is pending and that the documents for registration were submitted for processing by the appellant. This does not make her the owner of the school.

The other requirements of there being an injury actually committed or reasonably apprehended; and the absence of similar or adequate protection by any other ordinary remedy were not seriously contested. The court *a quo* cannot be said to have misdirected itself on the facts to the extent of the conclusions being so unreasonable that no sensible person could have arrived at such a conclusion.

In the circumstances of the facts before it, the court *a quo* cannot be said to have erred when it found that the respondent had a clear right worthy of protection, that there was an actual injury being committed on it by the appellant and there was no other remedy to protect its rights.

Costs on a higher scale are awarded only in exceptional circumstances where a party's conduct is mischievous and objectionable and the cause of all costs. See *Davidson* v *Standard Finance Limited* 1985 (1) ZLR 173 (HC). In *casu* the appellant's conduct is mischievous and objectionable. She participated in the donation of the land to the respondent as a trustee but has taken advantage of governance challenges bedeviling the respondent to substitute her name for that of the respondent over the land in the absence of a revocation of the deed of donation. She is also claiming to be owner of the school merely on account of her having been the one who submitted registration documents of the school. The court has to register its displeasure with such conduct.

Accordingly, the appeal is dismissed with the appellant paying costs on a legal practitioner and client scale.

MUCHAWA J----------

WAMAMBO J Agrees----------

*Mkuhlani Chiperesa Legal Practitioners*, appellant's legal practitioners
*Coghlan Welsh & Guest*, respondent's legal practitioners