

TOGARA MAPINGURE  
and  
APOSTOLIC FAITH MISSION IN ZIMBABWE

HIGH COURT OF ZIMBABWE  
MUZENDA J  
MUTARE, 12 September 2022

**CIVIL APPEAL (Reasons for judgment)**

*T Musara*, for the appellant  
*Advocate F Mahere*, for the Respondent

MUZENDA J: On 28 September 2022 after hearing parties, an *ex-tempore* judgment detailing reasons for such was given to the parties why the appeal was dismissed with costs. On 29 September 2022 respondent's legal practitioners of record wrote to the deputy registrar requesting reasons for the judgment. These are they.

On 21 September 2021 at Mutare, Apostolic Faith Mission in Zimbabwe (the respondent) made an *ex-parte* court application for an interdict in terms of Order 23 of the Magistrates Court (Civil) Rules, SI 11 of 2019 ("Magistrates Rules") seeking the following relief.

- "1. That a rule *nisi* be and is hereby granted calling upon the respondent to show cause, if any, to this court on the 15<sup>th</sup> day of October 2021 why he shall not be prohibited from
  - (i) entering the premises of Apostolic Faith Mission in Zimbabwe, Odzi Assembly stand number 361 Odzi Township, Mutare without the express authority of the applicant.
  - (ii) addressing congregants or interfering with applicant's church services at Apostolic Faith Mission in Zimbabwe, Odzi Assembly at Stand 361 Odzi Township, Mutare.
2. The rule *nisi* shall operate as an Interim Order.
3. The Respondent shall pay costs of suit on attorney-client basis.
4. To be served by a Messenger of Court."

The court *a quo* granted the provisional order as prayed.

On the return date the appellant herein had filed his opposing papers. On 12 April 2022 the court *a quo* after analysing both facts and the law granted the application "as varied" and appellant was prohibited from:

- 1) Addressing congregants without requisite authority.

- 2) Interfering with applicant's church services at Apostolic Faith Mission in Zimbabwe Odzi Assembly at Stand 361 Odzi Township, Mutare.
- 3) Disturbing applicant's peace in any way."

On 14 April 2022 the respondent in the court *a quo* filed a notice of appeal against the whole judgment of the court and listed the following as grounds of appeal.

- 1) *The Honourable Magistrate erred and misdirected herself when he considered disputed facts as if they were common cause.*
- 2) *The court a quo further erred and misdirected itself when it interpreted the dispute that was before it and confused the requirements of a final interdict and an interim interdict.*
- 3) *The Honourable Magistrate further erred and misdirected himself when he granted the application for an interdict despite having made a positive finding that the respondents did not exhaust available internal remedies.*
- 4) *The court a quo further erred and misdirected itself when it went outside the pleadings that were before it and granted an order that was not being sought by the respondents without inviting the parties to comment or address it over same.*

#### Background of the matter

The now appellant was employed by the respondent as a pastor. He was dismissed and after the dismissal appellant appealed against the dismissal. On 12 September 2021 appellant at the invitation of the respondent's Odzi Assembly Board of Elders appeared at Odzi's respondent church and delivered a sermon to the members or assembly. Respondent in its affidavit alleged that during the sermon, appellant incited congregants to defy the authority of the respondent and its resident pastor. To the respondent appellant's address was calculated to engender feelings of hostility, hatred and ridicule in the congregants towards applicant's authority and ownership over the church premises. The appellant vehemently disputed all these allegations in his opposing affidavit and argued that the respondent does not own stand 361 Odzi, the church was now in the hands of the Odzi congregants and the community. As such appellant contended that respondent had failed to establish a clear right. He prayed for the dismissal of the application.

Submission by the appellants before this court.

Mr *Musara* submitted on behalf of the appellant that the court erred in granting a final order borne out of an interim relief or provisional order. In effect appellant was barred by the court not to set foot at the church premises for life and also not to interfere with church services or address congregants at Odzi Assembly. Appellant further added that respondent never wanted an interim order from the court right from the outset of its application. The nature of the order granted by the court *a quo* was final it was submitted, yet the purpose of an interim order is to preserve the status quo pending the return date, hence temporary. (Appellant cited the case of *Blue Rangers Estate (Pvt) Ltd v Muduvuri and Anor* SC 29/09)

Appellant further submitted that respondent had failed to satisfy all the essential elements of an interdict that is a clear right, an actual inquiry committed or reasonably apprehended and the absence of similar or adequate protection by any other ordinary remedy. (*Santod Investments (Pvt) Ltd v Shava* (HH 336/18)).

It was further submitted on behalf of the appellant that the court *a quo* erred in granting an order not prayed for by the respondent without asking the parties to address it more particularly in that appellant was barred from addressing congregants without authority and to desist from disturbing respondent's peace. Respondent never prayed for such orders in its founding and answering affidavits or anywhere in the application. Appellant referred us to the case of *Nzara & Others v Kashumba NO & Others* SC 18/2018.

Submissions by the respondent

Advocate *F Mahere* in her heads of argument extensively covered the applicable law relating to interdicts. She cited the case of *Masimba Charity Huni Fuels (Pvt) Ltd v Kadurira & Another* SC 39/22 where she added that the salient purpose of an interdict is to prohibit unlawful conduct, compel the doing of a particular act or to remedy the effects of unlawful conduct and other requirements already covered by the appellant. Respondent went on to submit that all these essentials were exhaustively and capably met by the respondent and that the court *a quo* was correct in granting the interdict in favour of the respondent.

Analysing the grounds of appeal

Out of the four grounds of appeal, it was our view that ground of appeal number one that is whether the court *a quo* misdirected himself when he considered disputed facts as if they

were common cause, is vague and not concise at all. The first ground of appeal is also argumentative and lacks particularity of what disputed facts were which the court *a quo* treated as common cause. Equally so the third ground of appeal is to us basically academic *vis-à-vis* the second ground of appeal where appellant contends that the court *a quo* erred in granting a final interdict whose foundation was laid on an interim order. Hence grounds one and three do not assist appellant at all. What we concluded was that the second and fourth grounds of appeal are both meritorious for our consideration.

**Whether the court erred and misdirected itself when it misinterpreted the dispute that was before it and confused the requirements of a final interdict and an interim interdict?**

The record of proceedings before the court *a quo* is clear that from the onset respondent embarked on an *ex-parte* court application seeking an interim order and on 20 September 2021 the learned magistrate granted the relief sought by the church applicant. Order 23(4)(3) of the Magistrates Court Rules explicitly provides that:

“O 23(4)(3):An order *ex-parte* may be discharged or varied by the court on cause shown by any person affected thereby and on such terms as to costs as it thinks just.”

The court *a quo* gave 15 October 2021 as the return day. It is apparent that on 15 October 2021 the person affected by the provisional order was the appellant. Appellant had opposed the application and had shown cause why the order should be discharged. What was open to the court *a quo* was either to discharge the order or confirm it and in confirming it, had a discretion to vary the provisional order if it was satisfied by the appellant's affidavits to vary the original interim order.

We were persuaded by the appellant's submission that the purpose of an interim order is to preserve the status quo pending the return date and an applicant sought an interim relief which was exactly the same as the substantive relief. Even if respondent would not have attended court on the return day it would have benefited from the interim relief which was granted by the court *a quo* as final. These courts have repeatedly discouraged such eventualities (See *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188 (H) a provisional Order should and ought to be granted as temporary or interim and should not be final. (See *Blue Rangers Estates (Pvt) Limited v Muduvuri and Anor* SC 29/09 cited by the appellants in his heads of argument).

We are satisfied that in granting a final order emanating from a provisional order, the court *a quo* misdirected itself. The second ground of appeal is meritorious and it succeeds.

**Whether the court *a quo* erred and misdirected itself when it went outside the pleadings that were before it and granted an order that was not being sought by the respondent without inviting the parties to comment or address it over same?**

During the proceedings before this court, Advocate *Mahere* was asked to assist the court as to who between the parties moved the court *a quo* to vary the interim order, her response was that from the perusal of the record, none of the parties did.

In the matter of *Nzara and Others v Kashumba NO and Others* 2018 (1) ZLR 194 (S) UCHENA JA at p 195 B held that:

“...that the High Court had erred in granting relief which had not been sought by either party before it. The court had done so without affording the parties the opportunity to make submissions on the relief that it intended to grant. The court should have asked for additional submissions on the issues pertaining to the relief it intended to grant, instead of granting the relief without hearing the parties as it did. In its judgment, a court must decide no more than what is absolutely necessary for the decision on the case. The decision of the court must always be based on the leadings of the parties, the evidence placed before the court and the submissions made by the legal practitioners representing the parties. The granting of relief which is not sought and in respect of which no argument was heard amounts to a violation of the right to a fair hearing. A court’s judgment must be founded on legal principles and not equity.”

We totally and unanimously subscribe to this seminal legal position espoused by the learned Judge of Appeal. The court *a quo* granted a peace order which was never sought by the respondent. Court did not alert the parties that it intended to grant a final order of an interdict, the court did not invite the parties to address it on issues it intended to give orders on. That was admittedly a misdirection at law by the learned magistrate and it leaves this court at liberty to interfere with the decision of the court *a quo* on that basis. We have concluded that the fourth ground of appeal has merit and is upheld.

Accordingly the appeal succeeds with costs and the order of the court *a quo* is set aside and substituted by the following:

***“The provisional order granted on the 20<sup>th</sup> September 2021 be and is hereby discharged with costs.”***

CHAREWA J agrees

*Gonese & Ndlovu*, appellant’s legal practitioners  
*Maunga Maanda & Associates*, respondent’s legal practitioners