

BLANDINA CHIPARE
versus
FORGET GOMBINGO
and
SAMUEL MASHONGANYIKA
(Deceased Estate represented by Joan Rufaro Mashonganyika N.O.)

HIGH COURT OF ZIMBABWE
WAMAMBO J & ZISENGWE J.
MASVINGO, 27 January, 2021 10 & 17 March 2021 and 9 June, 2021

Civil Appeal

R. Chavi, for the appellant
P.C. Ganyani for the 1st respondent
D. Chirima for the 2nd respondent

ZISENGWE J: This is an appeal against the decision of the Magistrates Court sitting at Chiredzi wherein it granted an application for an interdict against the appellant in the following terms: -

“The application is hereby granted and it is hereby ordered as follows;

- 1. 2nd respondent whether through agents, employees or representatives are hereby ordered to stop forthwith from accessing Stand Number 4549, Chiredzi Township for purposes of any other business incidental thereto.*
- 2. Each party to bear its own costs.”*

The dispute is yet another tussle over ownership of an urban residential stand arising apparently from the sale of the same property to two different persons. In the court below the 1st respondent (then as applicant) sought and obtained an interdict against the appellant barring the

latter from proceeding with any construction work on the stand in question namely Stand No. 4549 Chiredzi Township (“the stand”).

The facts leading to this appeal (which are for all intents and purposes common cause) can be summarised as follows. The 1st respondent purchased the stand from an outfit called Shineplus Housing Development Trust. A copy of the Agreement of Sale was attached to the application in the proceedings *a quo* which shows that the sale took place in October 2019. In the wake of the purchase of the stand 1st Respondent’s name was duly entered in the relevant Chiredzi Town Council registers reflecting him as the owner thereof.

In November of the same year appellant commenced construction work on the stand purportedly on the basis that she had bought that very same stand from one Samuel Mashonganyika (hereinafter referred to simply as “Mashonganyika”). This then led to a confrontation between the two rival purchasers, each claiming ownership of the stand. In a bid to resolve the standoff a meeting was then convened comprising the 1st respondent, appellant and Mashonganyika. The outcome of that meeting is however contested terrain.

The version of the 1st respondent presented to the court *a quo* was that at that meeting Mashonganyika admitted that he (i.e. 1st respondent) was the legitimate owner of that stand and pleaded for his forbearance and not to report him to the police. Further it was his position that Mashonganyika then offered him a replacement stand in its stead, an overture he declined. Just when he thought the matter was water under the bridge he was shocked to discover that the appellant was continuing with construction work on that stand regardless. It was then that he approached the court *a quo* with an application for an interdict to restrain both Appellant and Mashonganyika from having any dealings whatsoever with that stand.

For their part both appellant and Mashonganyika in their respective papers opposing the application alleged some form of novation, wherein they insisted firstly that the original contract of sale was in fact between the latter and 1st respondent and secondly that that original contract had been superseded by a subsequent separate agreement. This according to them was on account of 1st respondent’s failure to settle the full purchase price of the stand.

Pertinently paragraph 4 of Mashonganyika’s opposing affidavit reads:

“We had asked Shine Plus to draft the offer letter in the name of Forget Gombingo because I had sold it to him believing he would honour his payments, which he did not, thus one had to cancel the deal and agreed to replace the stand with my wife’s low density stand of the same size which my wife was still paying for. The idea was to facilitate the sale of stand 4549. The sale of stand 4549 was only done after full consultation and agreement between the three parties.”

Implicit in the above paragraph, therefore, is the suggestion that in reality the stand initially belonged to Mashonganyika but that for reasons which are yet obscure it was decided that the agreement of sale be disguised to reflect that it was Shineplus which had sold the stand to the 1st appellant. The relationship between Mashonganyika and Shineplus was not disclosed. Be that as it may, Mashonganyika’s justification of the subsequent sale of the stand to Appellant (and construction work thereon) appears therefore to be based two broad premises: firstly, that the 1st respondent having failed to pay for the stand was in breach of the agreement of sale justifying its cancellation and secondly that the 1st respondent consented to both the sale to Appellant and to construction work being undertaken on the stand by the latter.

Unfortunately, Mashonganyika died before the application was heard and the application was withdrawn as against him. It suffices to say that the application for interdict (featuring only the 1st respondent and appellant) then proceeded at the conclusion of which the court found for the latter as aforementioned. The main reason informing that decision is located in the last two paragraphs of the ruling wherein the court reasoned that the 1st respondent being the registered owner of the property enjoyed an unassailable right in respect of the same. Further, the court a quo found that although the appellant appeared to have bought the stand from Mashonganyika and had commenced construction thereon in good faith, her rights at law could not supersede those of the 1st respondent.

Disgruntled by that outcome the appellant approached this court to have it overturned and substituted with one dismissing that application for an interdict. Her grounds of appeal are couched in the following terms;

- 1. The court a quo erred and misdirected itself in hearing and determining the matter which is in excess of its’ monetary jurisdiction.*
- 2. The court erred and misdirected itself in allowing the withdrawal of the application before it against the 2nd respondent.*

3. *The trial court erred and misdirected itself in finding that the 1st respondent had a clear right in respect of the propriety in question contrary to the facts of the matter and its own pronouncement that appellant had an agreement with respondents in good faith.*
4. *The court a quo erred in finding that all the requirements for the granting of an interdict had been met.*
5. *In the circumstances, the court erred and misdirected itself in granting the relief sought by the 1st respondent.*

The appeal is resisted by the 1st respondent who insists that there was no misdirection on the part of the court *a quo* in granting the application for an interdict given that the uncontroverted facts are that he is the registered owner of the stand and that the appellant had no right to wrest it from her.

The grounds of appeal will be dealt with seriatim.

1. Regarding the alleged absence of jurisdiction.

In her heads of argument, the appellant contends that the court *a quo* should have declined to entertain the application for the interdict given that the value of the subject matter of contestation, namely the stand, exceeded the court's monetary jurisdiction.

Section 12(1) as read with the section 11 of the Magistrates Court Act, [Chapter 7:10] circumscribes the jurisdiction of magistrates' courts in respect of interdicts. It provides:

11. Jurisdiction in civil cases

(1) Every court shall have in all civil cases, whether determinable by the general law of Zimbabwe or by customary law, the following jurisdiction-

(a) ...

(b) (i)- (vi) [irrelevant]

(vii) in all cases other than those already specified in this paragraph, where the claim or the value of the matter in dispute does not exceed such amount as may be prescribed in the rules... ”

Section 12 on the other hand provides as follows:

12. Arrests and interdicts

(1) Subject to the limits of jurisdiction prescribed by this Act, the Court may grant against persons and things orders for arrest tamquam suspectus de fuga, attachments, interdicts and madamenten van spolie.

The magistrate in his written response the grounds of appeal, expresses the view on this subject as follows:

“The magistrates Court Act [Chapter 7:10] does not oust the Court’s jurisdiction in an application wherein an interdict is sought. The relief sought by the applicant had absolutely no bearing on the value of the property in question therefore the issue of monetary jurisdiction is absolutely misplaced”

That view is incorrect. This issue is explored in some detail in the South African Supreme Court of Appeal Case of *Botha v Andrade* 2009 (1) SA 259 (SCA). The question for determination in that appeal was the extent to which the jurisdiction of the Magistrates Court to grant an interdict under s 30(1) of the South African Magistrates Court Act 32 of 1944 (equivalent to our section 12) is limited by s 29(1)(g) of the Act (which is equivalent to our Section 11) which sets a monetary limit on the value of the subject in dispute. The court had this to say in this regard:

“The approach adopted by GOOSEN AJ in the court below, where he discusses the interrelationship between ss 28, 29 and 30 cannot be faulted. The Magistrate’s conclusion that s 29 was inapplicable to the granting of an interdict under s 30(1) is clearly incorrect. It seems to me that the two sections complement each other and where the limit of the Magistrates jurisdiction are required to be determined in interdict proceedings, in so far as the value of the matter in dispute is concerned, the two sections ought to be read together. Section 29 speaks to the value of the matter in dispute and s 30 limits the jurisdiction of the court to the limit in s 29, which at the present moment is fixed at R100 000. In my view this accords with the limitation placed on jurisdiction as a creature of statute. To follow the approach adopted by the Magistrate, which in effect places no jurisdictional limit at all on interdict orders granted in that court, cannot be correct, and would result in the court exercising parallel jurisdiction with the High Court, a consequence which could never have been contemplated by the legislature”

The court continued as follows:

*“To hold, as the Magistrate did in this case, that s 29 of the Act is not applicable displays a lack of appreciation of the interplay between the two sections (i.e. 29 and 30). In *Mans v Marais* 1932 CPD 352 the interplay between the two sections and how they complement each other was neatly illustrated by GARDINER JP, where he rejected a contention similar*

to the approach adopted to the effect that s 29 applied to actions only. The learned judge said at 357):

'it is contended that as this section refers throughout to actions, one of the limits upon the Magistrates jurisdiction is that he can try only actions, or matters connected with actions. But it seems to me a fair construction to apply it to say that the "limits" provided by section 29 are limits of amount. Actions are not limits. But are the things to which the limits are to be applied. By section 29 the limits are applied as actions; by section 30 they are applied to arrests, attachments, interdicts and mandamenten van spolie. A writ of spoliation cannot be granted by a Magistrates Court where the value of the property seized exceeds £200; that in the limit by which the Magistrates jurisdiction is confined, whether he is hearing an application for a spoliation, or he is trying an action.'

The court concluded as follows:

"It follows that s 29(1)(g) is applicable to interdicts granted by the Magistrates under s 30 and the section operates to set the jurisdictional limit of the value of the subject matter in dispute and other specific matters referred to in s 20"

I respectfully agree with that view.

SI 126 of 2019 which came into operation on 7 June 2019 sets the monetary value in respect of the "other actions" as contemplated under Section 11 (1) (b) (vii) of the Act (the category to which interdicts belong) at RTGS\$300 000.

The cause of action arose either in November 2019 (when 1st respondent first found construction work taking place on the stand) or February 2020 (when he later discovered construction work continuing). In either instance, the cause of action arose after the promulgation of SI 126 of 2019.

The purchase price of the stand (which in my view is the determining factor) was given in the agreement of sale between 1st respondent and Shineplus was given as USD\$ 8211.00, which is below the aforementioned monetary threshold (even after considering that value in the local currency at the official rate) hence this ground of appeal cannot carry the day for the appellant. The appellant apart from some oblique reference in her answering affidavit (which document the 1st respondent claims was irregularly introduced into the record) to having expended "over \$300 000" on developments at the stand, did precious little to raise in the proceedings *a quo*,

let alone establish that the court did not have jurisdiction. This ground of appeal is therefore dismissed.

2. The withdrawal of the application against Mashonganyika.

In this ground the appellant challenges the propriety of the said withdrawal without due observance to Order 4 Rule 3 of the Magistrates Court (Civil) Rules, 2018 which provides as follows: -

“Death or incapacity of party

3. *If a party dies or becomes incompetent or incapacitated to continue an action or application, the action or application shall thereby be stayed until—*
 - (a) *such time as an executor, trustee, guardian or other competent person has been appointed in his or her place; or*
 - (b) *such incompetence or incapacity ceases to exist.*
4. *Where an executor, trustee, guardian or other competent person has been so appointed, the court may, on application, order that he or she be substituted in the place of the party who has so died or become in-competent or incapacitated.”*

A perusal of the record of proceedings reveals that at some point the application stalled in the wake of Mashonganyika’s demise and upon its resumption, *Ms Chakauya* purportedly on behalf of Mashonganyika made the following submissions to court.

“The respondent (she was referring to Mashonganyika) is late and the applicant is still serving us with court process. The only option which was there was to withdraw the application against the 1st respondent, that withdrawal has not yet been made.

If the applicant sees that he has a claim against the 1st respondent, he should withdraw and institute a new application suing the Estate of the late Samuel Mashonganyika.

Therefore as there is no such application we cannot proceed with 1st respondent who cannot be cited.”

Mr P.C. Ganyani who acted on behalf of the 1st respondent reacted to those submissions in the following fashion:

“The 1st respondent’s lawyers filed an assumption of agency which is in the record. Where 1st respondent passed on, my colleague controverted acting on behalf of him (the deceased) and they continued making applications for postponement.

We advised them that there was no point in continuing to act on behalf of the deceased. Our informal discussion led my colleague to file a letter date 16 June, 2020.

Because of the demise of the 1st respondent we will not proceed against him, we will withdraw.”

What is apparent therefore is that the parties were oblivious of the aforementioned peremptory provisions. They appeared to be in a self-inflicted quandary on how to proceed in the wake of the demise of Mashonganyika.

Be that as it may, I am of the view that *Ms Chakauya’s* mandate to represent Mashonganyika terminated with the death of the latter. She could not purport to continue acting on his behalf and make representations to the court as she did, which representations regrettably did not accord with the rules of court. *Ms Chakauya* was clearly alive to the fact of the termination of her mandate upon the death of Mashonganyika as evidenced by her protestation against the continued referral of court process in the matter to her office. She however somewhat confused issues by continuing to appear in court and make representations purportedly on behalf of Mashonganyika. However, whatever representations she made wherein she moved for the withdrawal of the application against Mashonganyika could not bind Mashonganyika’s estate, the latter which assumed a separate legal personality.

In the case of *Du Toit v Borman and Another* 1992 (4) SA 257(C) the following was stated:

“In our common law and quite apart from the rules of court, the mandate of an agent is generally terminated on the death of the principal. (See Heartley v Poupart, Attorney of McCoy I Menz 400....) There are exceptions to this rule. Voet 17.1.15 confirms the general rule and refers to certain exceptions which include the situation where the agent has in good faith carried on the business of his principal in ignorance of his death”

Counsel’s ethical role was perhaps to correctly advise Mashonganyika’s family of their rights in terms of the Order 4 Rule 3 and 4 of the Magistrates Court (Civil) Rules.

I now revert to the question of stay in terms of Order 4 rule 3 of the rules. Commenting on an identical provision in the South African Magistrates court civil rules, the learned authors Jones and Buckle, in *“The Civil Practice of the Magistrates’ Courts in South Africa 10th edition”*, explain the rule in the following terms:

“The effect of action in terms of this subrule is that nothing can be done to advance the action beyond the stage which it had reached when the party died become incompetent”

The case of *Du Toit v Borman and Another (supra)* is perhaps the leading authority on this subject and the following was said in relation to a situation as the present.

*“In my view the effect of the death of the second plaintiff on 26 January, 1982 was to stay the action in terms of Rule 52(3). The action was stayed until the appointment of the executor on 6 February, 1986. **The effect of the stay was that nothing could be done to advance the action beyond the stage which it had reached when the second plaintiff died.** To permit either party to advance his case or to take any step which has the effect of promoting the furtherance of the case, in my view, negates they stay. All proceedings were suspended by the death of the second plaintiff. The proceedings came to a complete halt. They were revived when the executor was appointed and from that moment continued from the stage where the stay had become effective.”* {emphasis added}

Therefore, the rule requiring that upon the death (or incapacity) of a party the proceedings be stopped and held in abeyance pending the appointment of an executor (or other such representative) is couched in peremptory terms.

Further, in my view, it matters little that appellant did not oppose the withdrawal despite her fate being inextricably tied to that of Mashonganyika (or more accurately to that of his estate). The error lies not so much on the withdrawal *per se*, but rather the act of proceeding with the application when what was required was to stay of the proceedings pending the appointment of the executor of Mashonganyika’s estate. The magistrate in his response to this particular ground of appeal attempts to justify the withdrawal of the application against the now deceased Mashonganyika on the basis that it was the sole prerogative of the 1st respondent (then as appellant) to continue or withdraw the application against a party. That view cannot be sustained against the backdrop of the peremptory provisions of Order 4 Rule 3. In short, the death of Mashonganyika froze the application at that stage and nothing further could be done (in my view this includes any purported withdrawal of the case against a party) in furtherance of the same. As matters stand the supposed withdrawal was not insignificant in view of the common position adopted by Mashonganyika and the appellant.

The parties spar on the chronology of events surrounding the appointment of executor *vis a vis* the hearing of arguments in the application. The 1st respondent contends that the matter was only argued *after* the appointment of the executor of Mashonganyika's estate rendering such hearing compliant with Order 4 rule 3. The appellant however contends to the contrary, she avers in her heads of argument that the matter was heard *before* the appointment of the said executor thus violating the said rule. The 1st respondent appears to labour under the misapprehension that the registration of the estate is synonymous with the appointment of the executor. This is because in paragraph 8 of his heads of argument he states the registration of the estate was conducted on the 7th of July 2020. Although in paragraph 11 of the same heads of argument, it is contended that by the time the application for interdict was heard (which he claims was on the 13th of July 2020) the executor had since been appointed, he did not present before the court proof thereof.

In my view it was incumbent upon the 1st respondent to establish in the court below that the executor for Mashonganyika had since been appointed and that the matter could then move forward. To the contrary through counsel he moved for the withdrawal of the application against Mashonganyika.

I am constrained to comment *orbiter* on the Appellant's apparent misconception that in the wake of the death of a party the proceedings are to be stayed pending the deceased party's substitution with his executor. In the case of *Du Toit v Borman and Another* (supra) the following was stated in this regard:

"In my view the magistrate was correct in finding that the subrules are to be interpreted to mean that the appointment of a representative terminates the stay of the action. Rule 52 (3) is clear and unambiguous. The action is stayed 'until such a time as an executor ... has been appointed'. The subrule does not link the stay to the substitution of the representative for the deceased or incompetent party. Rule 52(4) empowers the court to grant an application for the substitution. It does not oblige the court so to do. Had it been the intention that the action be stayed until a representative was substituted I would have expected the rule to have indicated that intention. Indeed, it would have been a simple matter to do so."

There was therefore a material misdirection in granting the proceeding with of the application without due observance to the provisions of Order 4 Rule 3 of the Magistrates Court (Civil) Rules, 2018. That being the case it shall not be necessary to deal with the remaining grounds of appeal.

However, this finding does not *ipso facto* justify the substitution of the decision of the court *a quo* with one dismissing of the application for an interdict. What accords with the rules is to set aside the decision of the court below and remit the matter to the court *a quo* for a fresh hearing with due observance to Order 4 Rule 3 and 4 of the Rules of court.

Accordingly, the following order is hereby made;

ORDER

1. The appeal partially succeeds and the decision of the court *a quo* is hereby set aside;
2. The matter is hereby remitted to the court *a quo* for a fresh hearing with due regard to the provisions of Order 4 Rule 3 of the Magistrate Court (Civil) Rules, 2018.
3. The 1st respondent to meet Appellant's costs of this appeal.

Zisengwe J.

Wamambo J. agrees

Ross Chavi law office; Appellant's legal practitioners

P.C. Ganyani Legal Practitioners; 1st Respondent's legal Practitioners

Chirima and Associates: 2nd Respondent's Legal practitioners