

REPORTABLE (21)

ELLIOT RODGERS

v

**(1) PUWAYI CHIUTSI (2) TENDAYI MASHAMHANDA (3)
REGISTRAR OF DEEDS (4) SHERIFF OF ZIMBABWE (5)
BARIADE INVESTMENTS (PRIVATE) LIMITED (6) LAW SOCIETY
OF ZIMBABWE**

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GUVAVA JA & BHUNU JA
HARARE, 16 & 17 SEPTEMBER 2021 & 15 FEBRUARY 2022**

Ms C Damiso, for the appellant

T Mubaiwa, for the first respondent

T Magwaliba, for the second respondent

Adv T. Mpfu, for the fifth respondent

No appearance for the sixth respondent

GWAUNZA DCJ

[1] This is an appeal against the whole judgment of the High Court handed down on 14 March 2019, in which the court *a quo* dismissed the appellant's application for interim relief. The appeal was heard together with that in SC 09/20 which involved the same parties, centered around the same dispute and effectively sought the same relief that the appellant seeks *in casu*. However, separate judgments for the two appeals have been issued. The sixth respondent, having applied for the de-registration of the first respondent as a legal practitioner, indicated it would abide by the decision of the court.

FACTUAL BACKGROUND

- [2] In 2012 the appellant in this matter sold his house at No.30 Arundel School Road, with the conveyancing was done by the first respondent (a legal practitioner). From a series of actions and applications brought before the courts, it was accepted that the first respondent misappropriated some of the proceeds from the sale of the immovable property. Consequently, the appellant successfully instituted legal proceedings against the first respondent and obtained a judgment against him in 2015. Despite a multiplicity of legal proceedings at the instance of the first respondent, the appellant managed to place a *caveat* on the latter's immovable property, being a certain piece of land situate in the district of Salisbury called the remainder of subdivision C of Lot 6 of Lot 190, 191, 192, 193, 194 and 195 Highlands estate of Welmoed measuring 4377 square metres, under Deed of Transfer No. 8421/2000.
- [3] Pursuant to this, the Sheriff successfully sold the first respondent's property in execution, to the fifth respondent. The first respondent in a number of applications challenged the sale in execution which the Sheriff, nevertheless, eventually confirmed. The High Court as well as this Court further upheld the confirmation of the sale. Despite these numerous judgments and the *caveat* placed upon his property, the first respondent managed to transfer the same property to the second respondent on 8 February 2019. The appellant in his founding affidavit *a quo* averred that such transfer could only have been made possible through some fraudulent conduct on the part of the first respondent in connivance with the Registrar of Deeds.
- [4] Subsequently, the appellant filed an urgent application before the court *a quo* seeking a provisional order in the following terms: -

“Terms of final order sought

It is ordered that:

1. Puwayi Chiutsi be and is hereby struck off from the roll of legal practitioners.
2. Puwayi Chiutsi and the Sheriff of Zimbabwe each paying the other to be absolved, pays costs of suit on a scale as between attorney and client.
3. The applicant’s legal practitioners be and is hereby given leave to serve the copy of this order to the Registrar of Deeds.

Terms of Interim Order Sought

Pending the final determination of this matter, at the return date, the applicant is granted the following relief;

- i. That Deed of Transfer No. 708/19, issued in the name of Tendai Mashamhanda in respect of a piece of land in the district of Salisbury called the remainder of subdivision C of Lot 6 of Lot 190, 191, 192, 193, 194 and 195 Highlands estate of Welmoed measuring 4377 square metres be and is hereby cancelled.
- ii. That forthwith the Law Society of Zimbabwe, must place the law firm of Puwayi Chiutsi under curatorship in terms of the Legal Practitioner’s Act.
- iii. Puwayi Chiutsi be and is hereby suspended from the practise of the legal profession.¹”

[5] On 28 February 2019 the court *a quo* found that the application was not urgent in as far as it related to the relief sought to compel the Law Society of Zimbabwe to place the first respondent’s law firm under curatorship and, also, his suspension from practice as a legal practitioner. On 1 March 2019, the court *a quo* proceeded to hear the rest of the application on the merits.

[6] The court *a quo* found that the interim relief sought by the appellant in respect of the cancellation of Deed of Transfer No. 708/19 would in fact be a final order. The court brought this issue to the attention of the parties. It was submitted on behalf of the second respondent that he was ready to accept an interim interdict to stop any transfer of the

¹ At the commencement of proceedings, counsel for the appellant informed the court that both the first respondent and his legal firm had since been de-registered by the Law Society of Zimbabwe.

property pending determination on the return date. However, the appellant did not move for any relief in the alternative and chose to stand or fall on the final relief being sought.

[7] Consequently, the court *a quo* held that it was improper to seek final relief on the basis of submissions supporting the grant of an interim order. The court noted, correctly, that such a circumstance would leave nothing for the court to confirm or discharge on the return date. It also expressed the view that the appellant's interests could have been secured by a temporary interdict prohibiting any transfer of property by the second respondent pending the return date. However, the court took the view that it could not grant such an order as it had not been prayed for, and accordingly, dismissed the application.

Aggrieved by this decision, the appellant noted the present appeal on the following grounds: -

1. The court *a quo* grossly erred, holding that there was no urgency in the application in so far as it related to the suspension of *Puwayi Chiutsi* the first respondent from practicing as a legal practitioner.
2. The court *a quo* grossly erred in not understanding and holding that the court, as well as the appellant, had the duty to ensure the protection of the public and indeed the legal protection against errant lawyer (sic) whose damage to the public and to the legal profession was immense.
3. The court *a quo* grossly erred, in failing to grant the provisional order sought in terms of the chamber application filed by the appellant.
4. Further as a question of law, the court *a quo* erred in not finding that in the circumstances of this case, the appellant had shown the legal basis for the granting of the order that was sought whether or not it could be classified as final.

In addition to an order that the appeal be allowed with costs, the appellant seeks an order that the judgment of the High Court be set aside and substituted with an order granting the relief that he originally sought *a quo*. This is notwithstanding the fact that

he had amended his draft order to leave out the parts of the relief that the court had ruled not to be urgent.

ISSUE FOR DETERMINATION

[8] Notwithstanding the fact that the appellant has four grounds of appeal as outlined, the only issue that arises for determination in this matter is contained in the appellant's third and fourth grounds of appeal, that is, whether or not the court *a quo* erred in dismissing the application for what was in fact a final order disguised as provisional order. The court finds the other two grounds of appeal to be both misplaced and without merit.

[9] As already indicated, the court *a quo* ruled not to be urgent, two aspects of the appellant's application². These pertained to the order seeking to compel the Law Society of Zimbabwe to place the law firm of *Puwayi Chiutsi* under curatorship, and the order seeking the suspension of *Puwayi Chiutsi* from practising as a legal practitioner. The court then proceeded to hear the rest of the application on the merits, as outlined thus in its judgment: -

“I proceeded to hear the merits of the application on 1 March 2019. The first respondent was in default. Before commencement of submissions, I drew *Mr Biti's* attention to the fact that the interim relief sought was in fact a final order i.e. the prayer for cancellation of Deed of Transfer No. 708/19 issued in the name of the second respondent. *Mr Biti* said he was aware of that and was going to seek the order in that form. **He applied for the amendment of the Provisional Order by removal of that part of the prayer for which the court had ruled could(*sic*)not proceed on urgency. He also sought the removal of**

² The propriety or otherwise of the splitting of the draft reliefs sought by the appellant *a quo* was not raised by any of the parties, and has therefore not been considered. Suffice to say that the appellant, according to the learned judge *a quo*, accepted it and proceeded to amend his draft order accordingly. The matter however becomes academic when regard is had to the fact that the two issues adjudged not urgent have been overtaken by events. This is because by the time this appeal was heard both the first respondent and his legal practice had been de-registered by the Law Society of Zimbabwe.

all such similar relief from the final order sought and that the final order sought should only contain the issue of costs. This was so, I believe, because the interim relief sought a final order.” (my emphasis)

[10] The import of these remarks is that the appellant abandoned, for purposes of the proceedings *a quo*, paras 1 and 3 of the final relief sought, leaving only para 2, which pertained to the prayer for costs against the first and fourth respondents. Further, that in so far as the ‘Interim Relief’ sought was concerned, the appellant abandoned the last two paragraphs. That left only the first paragraph, pertaining to the cancellation of the Deed of Transfer No 708/19, issued in the name of *Tendai Mashamhanda*, the second respondent. Thus, the appellant’s amended draft order *a quo* would have read something like this: -

Terms of the Final Order Sought

It is ordered that:

Puwayi Chiutsi and the Sheriff of Zimbabwe each paying the other to be absolved, pays costs of suit on a scale as between attorney and client.

Terms of Interim Order Sought

Pending the final determination of this matter, at the return date, the applicant is granted the following relief;

That Deed of Transfer No. 708/19, issued in the name of *Tendai Mashamhanda* in respect of a piece of land in the district of Salisbury called the remainder of subdivision C of Lot 6 of Lot 190, 191, 192, 193, 194 and 195 Highlands estate of Welmoed measuring 4377 square metres be and is hereby cancelled.

[11] Since the urgency referred to in the appellant’s first ground of appeal relates to relief that the appellant abandoned, that ground is left with no leg to stand on, as it were. Ground number two suffers the same fate, since it relates to a part of the application that the court declined to hear for lack of urgency. The second respondent submits that once the court *a quo* found that part of the relief sought could not be granted on an urgent basis, the appellant, if dissatisfied, should have requested the reasons for the order, sought leave, and then appealed against it³. Not having done so, the appellant

³ See the remarks in footnote 2, above.

cannot now seek to smuggle the issues that the court *a quo* did not deal with, into his grounds of appeal for consideration by this Court. It is trite that an appeal court, by nature, sits to consider and assess the correctness or otherwise of the decision of a lower court on a particular issue. (*See Dynamos Football Club (Pvt) Ltd & Another v Zifa & Others* 2006(1) ZLR 346 (s) at 355).

Grounds of appeal 1 and 2 are accordingly discussed.

Whether or not the court *a quo* erred in not granting the provisional order sought.

[12] It is evident from the appellant's fourth ground of appeal that he accepted that the relief that he sought could very well be determined to be final in nature. That notwithstanding, his attitude is that the court *a quo* still erred in not granting the relief that he sought. It is argued in his heads of argument that the cancellation of the Title Deed in question was part of the 'interim interdict' that he sought *a quo* and that, in any case, there was '*small difference between the granting of an interim interdict and the granting of a final interdict.*'

[13] The appellant argues further, that there is nothing in the High Court Act or the Rules, that says that a final interdict or final order cannot be granted in chambers. This is because, so the argument goes, a final order can be granted provided there is evidence and facts to support its granting. The appellant's lengthy heads of argument chronicle at length and with harsh condemnation, instances of the first respondent's alleged unprofessional conduct in this whole dispute. On that basis and relying on a number of authorities, the appellant surprisingly shifts from the interim relief argument,

to submit that the matter *a quo* was argued on the basis of final relief. That being the case, he contends, the court *a quo* should have granted the final relief sought.

[14] The first and second respondents both sought the dismissal of the appeal with costs. It was argued for the first respondent that the relief sought in the form of an order cancelling a Deed of Transfer was final in both effect and nature, since it constituted an extinction of all rights vesting by circumstance of the Deed in question. Further, that such relief could not '*properly be sought or procured on an urgent basis or at any rate, on the strength of a prima facie case.*' Echoing the same sentiments, the second respondent submits that in an urgent application, a party comes to court with a *prima facie* case and is granted relief that is temporary in nature and meant to preserve the rights of the parties pending final resolution of the dispute on the return date.

[15] There is merit in the submissions of the first and second respondents in this respect. The court *a quo* correctly found that the interim relief sought to cancel Deed of Transfer No. 708/19 issued in the name of the second respondent, was final in its form and effect. Contrary to the appellants' contention that there is very little difference between a provisional and a final order, the definition and purpose of the former is markedly different from that of a final order. This distinction is stressed and underlined in a *plethora* of authorities both within and without our jurisdiction. *C. B Prest* in his book, *The Law and Practice of Interdicts*⁴ defines and explains the purpose of a provisional order as follows: -

“A provisional order is a remedy by way of an interdict which is intended to prohibit all *prima facie* illegitimate activities. By its very nature it is both temporary and provisional, providing (*interim*) relief which serves to guard the applicant against irreparable harm which may befall him, her or it, should a full

⁴ 9th ed Juta & Co (Pty) Ltd p2

trial of the alleged grievance be carried out. **As the name suggests, it is provisional in nature, as the parties anticipate certain relief to be made final on a certain future date** upon which the applicant has to fully disclose his, her or its entitlement to a final order that the interim relief sought was ancillary to” (*my emphasis*)

[16] In the South African case of *Development Bank of Southern Africa (Ltd) v Van Rensburg NO and Ors* [2002] 3 All SA 669 (SCA) the court stressed that the purpose of a provisional order is to preserve the status *quo* pending the return day. (See also the Australian case *In Re Brian Charles Gluestein; Exparte Anthony* [2014] WASC 381, and the English case *In Attorney General v Punch Limited and Anor* [2002] UKHL 50) where the same principles were emphasised.

[17] Thus, unlike a provisional order, a final order is conclusive and dispositive of the dispute. It finally settles the issues in dispute and has no return date. Once a final order is given the court issuing the order becomes *functus officio* and cannot revisit the same issues at a later date. In *Chiwenga v Mubaiwa* SC 86/20 this Court made the following remarks: -

“It is settled law that the standard of proof for a provisional order is different from that of a final order. A provisional order is established on a *prima facie* basis because it is merely a caretaker temporary order pending the final determination of the dispute on the return date. The parties have an opportunity to argue the matter again on the return date. **On the other hand, a final order is obtained on the higher test of a clear right because it is final and definitive as it has no return date.**”

[18] Interestingly, both the appellant and the first respondent cite the same passage from *Kuvarega v Registrar General and Anor 1998(1) ZLR 188 (HC)* in support of their opposing views on the propriety of the order sought by the appellant *a quo*, as follows:

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“There was nothing interim about the provisional relief sought. It would have provided the applicant with the relief she sought on the day of the election. **The**

practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. **That is so because interim relief is normally granted on the mere showing of a *prima facie* case.** If the interim relief sought is identical to the main relief and has the same substantive effect, **it means that the applicant is granted the main relief on proof merely of a *prima facie* case.** This, to my mind, is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return day. The point I am making will become clearer if I put it in another way. If, by way of interim relief the applicant has asked for a postponement of the election pending the discharge of confirmation of the provisional order she would not in that event gain an advantage over the respondents, because the point she wanted decided would have been resolved before the election was held. But if the interim relief were granted in the form in which it is presently couched, she would get effective protection before she proves her case and the election would be conducted on the basis that it is unlawful to wear t-shirts emblazoned with party symbols and slogans. Therefore, it would be fruitless for the respondent to establish their entitlement to wear such t-shirts. **Care must be taken in framing the interim relief sought as well as the final relief so as to obviate such incongruities.** (*my emphasis*)”

The first respondent relies on this passage to buttress his argument that the final order sought by the appellant could not be granted on the basis of a *prima facie* case.

Per contra, the appellant argues that the same passage: -

“Supports the position that where the matter is argued on the basis of a final relief, and there are facts that show that a final relief should be granted then the court should grant a final relief.”

[19] While it is not clear just what part of the passage cited supports the appellant’s assertions in this respect, it is evident from the record that the appellant *a quo* and in this Court, argued for and effectively sought either provisional relief or final relief, based on the same set of evidence and facts. That this was the appellant’s somewhat unusual if not questionable approach in the court *a quo* is explained in the following remarks in the court’s judgment: -

“The applicant in his papers seeks a provisional order with an interim order which is in fact a final order. Urgent applications are brought to seek provisional orders as a measure to secure someone’s interests pending a return day for confirmation or discharge. The draft order by the applicant under the interim

order sought says “pending the final determination of this matter, at the return date, the applicant is granted the following relief.” (my underlining). It is then a self-defeating argument to say one should get a final order at this stage. What should then happen on the return date. In fact, the return day will no longer be necessary for the applicant. I disagree with *Mr Biti* for the argument he advanced to secure a final order. He relied on the inherent jurisdiction of this Court, that the High Court Act does not prohibit such order being granted and also referred to some case law which I did not find helpful to resolve this issue. **There are a number of issues which ought to be fully argued on the return day, e.g., the effect of the payment by *Chiutsi*, whether applicant has the *locus standi* to bring this application, issues of an innocent purchaser, existence of *caveat* or otherwise etc.**

This matter is an urgent application. If granted, it must have a return day, giving an opportunity to all parties to present their side of story not in an urgent atmosphere. While it is accepted that there are instances where the court may grant a final order in an urgent application. However, that depends with the uniqueness of the nature of relief sought. ***In casu*, it is not desirable because the applicant’s interests can be secured with a temporary interdict prohibiting any transfer of property by the second respondent.** The interim interdict has not been pushed for by the applicant as an alternative. The court can therefore not grant that which has not been asked for. The omnibus approach advocated by *Mr Biti* in his submission is undesirable, one cannot obtain a final order in these circumstances. For these reasons this application is bound to fail.”

[20] We find it difficult to assail the reasoning of the court *a quo* as set out above. The appellant, through his counsel, sought to secure what even he knew was a final order on the basis of a draft order formulated as a provisional order. In other words, he sought to be granted the main relief that he really craved, on an urgent basis, on proof merely of a *prima facie* case, and in circumstances where other relief would easily have secured his interests pending the return date. The court *a quo* properly applied the applicable law and gave cogent reasons for its inability to grant the provisional order in the form that it was presented by the appellant. In a similar vein, the court, while accepting that in some rare instances a final order could be granted in urgent circumstances, gave sound reasons as to why the case at hand could not be given that special treatment. The appellant, in short, failed to prove a case for either an interim, or a final order.

[21] A consideration of all the authorities cited above on the definition, purpose and requirements of a provisional and a final order, and the distinction between the two, lays bare the shortcomings of and serious procedural *faux pas* attendant on, the manner in which the appellant chose to prosecute this matter, both *a quo* and on appeal. His heads of argument before this Court persist with the argument that the grant of either a provisional order or a final one, had been proved through the evidence and facts argued before the court. It is difficult to conceive how both a *prima facie* and a clear right, could have been proved on the basis of the same facts and evidence.

[22] The appellant in the view of this Court, exhibited some ambivalence as to the exact nature of the relief that he is seeking *in casu*. This calls to mind the admonition by the court in the *Kuvarega* case (*supra*) to the effect that care needs to be taken in framing the relief that a litigant seeks from the court, be it interim or final. One may also add that the import and effect of the orders sought before the court also need careful consideration to ensure compliance with the relevant procedural and substantive law. Failure by a legal practitioner to pay attention to these details is to do grave injustice and disservice to the litigant concerned.

[23] For its failure to meet the requirements of the law both procedurally and on the merits, the application *a quo* was doomed to fail, and was accordingly properly dismissed.

When all is considered, the appeal lacks merit and ought to be dismissed with costs.

DISPOSITION

[24] The judgment and reasoning of the court *a quo* in this matter cannot be faulted. On the facts of the matter and the evidence placed before the court, the appellant failed to prove a case for either interim relief, or the final relief that he questionably sought.

It is accordingly ordered as follows: -

“The appeal be and is hereby dismissed with costs.”

GUVAVA JA : I agree

BHUNU JA : I agree

Tendai Biti Law, appellant’s legal practitioners

Puwayi Chiutsi, Legal Practitioners, 1st respondent’s legal practitioners

Mtewa & Nyambirayi, 2nd respondent’s legal practitioners

Gill, Godlonton & Gerrans, 5th respondent’s legal practitioners