

W AND D CONSULTANTS PRIVATE LIMITED
and
VIMBAI WILLARD ZIREVA
versus
JUSTICE MASAKA
and
FUNGAI MASAKA
and
DAVID MUCHINGURI
and
CHRIS WILKINSON PEARCE
and
PATRICIA ELIZABETH KIRSTEIN

HIGH COURT OF ZIMBABWE
MAKONI & MWAYERA JJ
HARARE, 17 November 2015 & 13 January 2016

Civil Appeal

T.Z. Zvobgo, for the appellants
T. Moyo, for the respondents

MWAYERA J: The appellants have approached this court seeking the setting aside of the court *a quo*'s decision. The court *a quo* granted an order interdicting the first appellant from engaging in business that violates the standards expected in a residential area and ordering the first and second appellants to cease forthwith committing acts of nuisance at number 75 Kennedy Drive, Greendale, Harare or performing acts that disturbs and infringe on public peace .

The brief background to the matter is that the first respondent is the owner of 74 Kennedy Drive, Greendale, Harare and resides at that property. The property is situated close and opposite to the appellant's property 75 Kennedy Drive, Greendale. The area is residential. The appellants have however, converted the residential premises, being 75 Kennedy Drive, Greendale. into a venue for public functions like weddings, music shows and parties. All the respondents, who live in the vicinity, approached the magistrate court seeking a prohibitory

interdict so as to stop the noise and nuisance caused by the conversion of a residential premises into a venue of social functions. The court *a quo* acceded to the respondents' claim and granted the order as prayed for. It is that decision which now falls under scrutiny on appeal. The appellants raised grounds of appeal as follows:

1. The court *a quo* erred in granting the relief sought by the respondents as per the amended draft order, when the averments made in the respondents' founding papers did not support such relief.
2. The court *a quo* erred in finding that there was no material dispute of fact when all the averments made by the respondents regarding the alleged excessive noise at number 75 Kennedy Drive, Greendale, Harare, were denied by the appellants. It was therefore impossible to ascertain the extent of the alleged noise on the papers and conclude that noise caused disturbances to the respondents and disrupted their tranquillity.

We proposed to deal with the first ground of appeal which is to the effect that the court *a quo* erred in granting the relief sought by the respondents as per the amended draft. The argument by the appellants that the amended order granted was not supported by the evidence in the founding affidavit is rendered hollow when one closely looks at the respondents' Founding Affidavit and the reasons for the judgment of the court *a quo*. Paragraph 5 p 25 of the respondents' Founding Affidavit summarises the prayer sought by the respondents as follows:

“This is an application in terms of which the applicant seeks an interdictory relief. The relief sought is prohibitory in that it seeks the honourable court to order the respondents to cease, forthwith, committing any acts of nuisance at his residential property being number 75 Kennedy Drive, Greendale, Harare”.

The prayer as outlined in pleadings materially tallies with the order which was granted by the court *a quo*. The court *a quo* ordered as follows on p 111B of the record:

1. The first respondent be and is hereby interdicted with immediate effect from engaging in business that violates standards expected in a residential area until such a time that it is permitted by law to do so through a permit of the City of Harare.
2. The 1st and 2nd respondents are hereby ordered to cease forthwith committing acts of nuisance at number 75 Kennedy Drive, Greendale, Harare or perform any acts that disturb and infringe on public peace.

3. The first and second respondents jointly and severally one paying the other to be absolved are to pay the costs of this application on the legal practitioner and client scale.

The amended draft order which was granted is clearly anchored on the respondents' founding affidavit. The respondents sought to have the appellants stopped from engaging in events which disturb public peace. The order emphasised the need for the appellant being interdicted from causing noise at number 75 Kennedy Drive Greendale as the noise was viewed as a nuisance in a residential area by the respondents.

The argument that the granted amended order was not averred in the pleading is without basis given respondents' founding affidavit. Further the court *a quo* properly granted the amendment after the respondents successfully applied for the amendment. The respondents in seeking the amendment did not change the nature of relief sought. The same mischief which they sought redress in the initial order was reflected in the amended order which the court *a quo* granted. The amended draft order sought to emphasise that the noise which was being occasioned in a residential area was a nuisance and was in violation of standards expected in a residential area. If the original order on p 39 is juxtaposed with the amended order on p 111B it shows the same mischief of disturbance of public peace by noise is what the respondents sought to have sanctioned by the court. The only difference would be in detail and emphasise but clearly the respondents' prayer is well pinned on the pleadings. In the face of there being no prejudice occasioned by the amendment the court *a quo* granted the amended draft order which was well ensconced sones in the respondents' averments. There is no misdirection in the manner the court *a quo* granted the draft order as amended. To this end therefore the first ground of appeal cannot stand.

The appellant's second ground of appeal is basically to the effect that the respondents opted for wrong procedure in proceeding by way of application in circumstances where there are material disputes of facts. Consequently, the appellants argued, that the court *a quo* erred in finding that there were no material disputes of fact. Principles that fall for consideration in entertaining proceedings on motion are fairly settled. In the case of *Chiparaushe and other v Triangle Limited and another* HH 196-15 Chigumba J ably canvassed the principles relating to application proceeding. She outlined three important principles as following:

Firstly it is a trite rule of procedure that an applicant bringing a matter by way of a court application must make his or her case on the founding papers.

Secondly having chosen to approach the court by way of application the applicant takes the risk that the matter would result in disputes of fact arising and thus the applicant proceed at his own peril.

Thirdly a court will not entertain an application matter where the applicant knew or ought to have known in advance that there would arise material disputes of fact.

See also *Muzenda and Others v Usayiwevhu and Others* HH 107-12.

The learned authors Hebblethorn and Van Winsen in their book *The Civil Practice of the Superior Courts in South Africa* 3rd ed on p 61 state that it is trite that the court can only entertain proceedings on motion where there is no genuine dispute of fact. The question of whether there is a real and genuine dispute of fact is for the court to decide. As aptly defined by Makarau J (as she then was) in *Supa Plant Investment (Pvt) Ltd v Edgar Chidavaenzi* HH 92-09.

“A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

In casu the question is, given the respondents and appellants’ pleadings in the court *a quo* was the court left with no ready answer to the dispute between the parties. Where there material disputes of facts requiring further evidence. The appellants in their pleadings admitted that they were conducting weddings and parties at 75 Kennedy Drive Greendale a residential area. (see p 46 appellant’s opposing affidavit para 19)

“I admit that the immovable property has been converted to being a wedding and events venue”.

Given this evidence, surely, the court *a quo* in examining whether in truth there is a real issue or dispute of fact would not be in need of further evidence. The admitted facts constitute the action complained of by the respondents and thus buttress the prayer for an interdict to stop the nuisance and disturbance of public peace. The court *a quo* properly exercised its discretion and made a finding that there were no material disputes of facts in the circumstances of the case. The respondents complained of the act of noise as an inconvenience interfering with the ordinary physical comfort of their stay in the neighbourhood. The appellants did not dispute having converted their residence into a weddings and party venue and occasioning noise. They rather sought to portray that the level of noise had to be established by oral evidence. The question is by whose standards then would the noise be measured to be sufficient or not sufficient to constitute a nuisance. The

conversion of the residential premises to a wedding and party's events venue would materially interfere with the respondents' residence comfort and convenience.

In the face of that evidence we are inclined to agree with the court *a quo* that there were no material disputes of fact necessitating action proceedings. The court *a quo* in exercise of its discretion ably grasped the relevant principles p9 of the record second from last paragraph the learned magistrate made pertinent remarks:

“However taking into account that the nuisance is from weddings and parties it would be just and proper for the court order for the barring of activities which cause the disturbing noise as the weddings and parties are the source of noise.”

The court *a quo* properly exercised its discretion and made a finding there were no material disputes of fact. The second ground of appeal cannot be sustained. There is no basis for interfering with the decision of the court *a quo*. The appeal lacks merit and must fail.

Accordingly it is ordered that:

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the cost.

MAKONI J agrees: _____

Dube Manikai & Hwacha, appellants' legal practitioners
Tamuka Moyo Attorneys, respondents' legal practitioners