MARTIN MATINYANYA
versus
THE TRUSTEES OF THE HARARE HOME
INDUSTRY ASSOCIATION TRUST

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 13 June 2017 and 29 November 2017

Civil Appeal

M. G. Bumhira, for the applicant
Ms *R Gasa*, for the respondent

MWAYERA J: On 6 June 2017 after hearing counsel and considering the documents filed of record we dismissed the appeal with costs. We gave an *ex tempore* judgment. Our written reasons are captioned herein. The court *a quo* issued the following order that:

'1. The respondent be and is hereby barred from interfering with the day to day operations of the applicants.

2. The respondent is interdicted from stopping the applicant's members from paying their subscriptions.

3. The respondent is interdicted from preventing the applicants from constructing and developing stand No. 2015 Siyaso, Magaba, Mbare in terms of the Memorandum of Understanding.

4. The respondent be and is hereby interdicted from threatening to physically assault the applicants.

5. The respondent is barred from threatening to remove the applicants from office and replace them with his appointees.

6. The respondent shall pay costs.

The appellant raised disquiet with the court *a quo*'s findings and thus mounted an appeal against the entire judgment of the court *a quo*.

The grounds as discerned from the notice of appeal are:

That the court *a quo* erred and misdirected itself in:

1. Failing to appreciate that there is no legal entity answering to the name 'Trustees of Harare Home Industry Association" capable of suing or being sued and consequently dismissing the point *in limine*.
2. Assuming jurisdiction in the face of a peremptory arbitration clause which ousted its jurisdiction.
3. Failing to appreciate that none –joinder of City of Harare the owner of the property in dispute was fatal to the application for interdict.
4. Failing to appreciate that on the evidence respondent had failed to prove a clear right to the relief sought.
5. Finding that the applicant had suffered irreparable harm notwithstanding the admission that there was no proof of the alleged harm.
6. Failing to appreciate that respondent had other remedies available to it and was therefore not entitled to the relief sought.

As regards the first ground of appeal whether or not court *a quo* misdirected itself by finding that Trustees of Harare Industry was proper citation for Trustees capable of suing or being sued. It is clear the court *a quo* took note of the fact that Gift Chigaro a trustee of the association was authorised to act and appear on behalf of the trustees of the trust. It is settled that a trust is simply a legal relationship and not a legal persona. It follows therefore that proceeding ought to be instituted in the names of the trustees as they are the ones with legal capacity see *Gold Mining and Minerals Development Trust* v *Zimbabwe Mineral Federation* HH 20/06 wherein MAKARAU J as she then was stated as follows:

> "As the law currently stands, a trust is not legal persona therefore cannot be detained. The trustees themselves retain the capacity to sue for damages for their injured fama collectively or individuality."

The Supreme Court further buttressed that for a Trust, only Trustees can either be sued or sue collectively. This was pronounced in the case of *Trustees of Leonard Chesire Homes Zimbabwe Central Trust* v *Chite & 7 Ors* SC 24/15 the court in regard to the interpretation of r 8 A of the High Court Rules, 1971 held that:

> "A proper reading of the Provisions of the High Court Rules establishes that it is not a requirement for names of the Trustees to be listed when they bring an action on behalf of the Trust. The only place where the issue of the listing of names of Trustees when an action has been instituted on behalf of the trust is where a defendant to a suit by the Trustees on behalf of the Trust, has requested from the Trust names and addresses o the individual trustees."

The court *a quo* correctly observed that the appellants did not allege that the identity

of the trustees and their details were not known. In fact a copy of the list of trustees and their details was alluded to in the Notarial Deed of trust, to that extent therefore the trustees were sufficiently identified. Failure to cite all trustees individually did not render the proceedings a nullity, as clearly the trustees of Harare Home Industries Association Trust, registered a Notarial Deed of trust. The trustees have the capacity to sue and be sued in a similar manner that a deceased estate can only sue and be sued through the executor. The first ground of appeal on trustees not having been properly cited cannot be sustained. The second ground of appeal equally cannot stand. It is common cause clause 12:18 of the Memorandum of Agreement entered into between City of Harare and Harare Home Industry Association Trust provided for disputes between the parties to be referred to arbitration. The parties to the Memorandum of Understanding are clearly spelt out as City of Harare, and The Harare Home Industry Association Trust. The clause cannot be extended to disputes or differences arising between parties not party to the Memorandum of Agreement. The appellant and respondents *in casu* are now the parties to the agreement since the appellant is not a party to the Memorandum of Agreement the arbitration clause is not binding. This is for the obvious reason a party cannot be bound to terms of a contract they are not privy to. See *PTC Pension Fund* v *Standard Chartered Bank Zimbabwe Ltd* 1993 (1) ZLR 55 where it was held that a person who is not a party to a contract cannot be held liable or claim on it because as it is usually expressed, he is not privy to the contract. In light of the fact that the appellant is not a party to the Memorandum of Understanding the court *a quo*'s jurisdiction was not ousted by the arbitration clause. Thus the second ground of appeal fails.

The appellant also sought to impugn the decision of the court *a quo* on the basis of misjoinder. The City of Harare entered into a Memorandum of Understanding with Harare Home Industry Association Trust. The nature of relief which was being sought before the court *a quo* being an interdict against appellant to bar him from interfering with the respondent's day to day operation would effectively be dealt with without the involvement of the City of Harare. The order sought could effectively be enforced without the involvement of the party not joined, that is City of Harare. Further the non-joinder would not affect the interest of the City of Harare as a party to the Memorandum of Understanding with Harare Home Industry Association. The court *a quo* properly made a finding that in the circumstances of the case the joinder of the City of Harare was not necessary. The remarks by CHAREWA J in *Tel-one Private Limited* v *Capita Insurance Brokers Private Limited* HH 26-16 are pertinent in considering whether or not the non-joinder is fatal or not. She stated:

> "It seems to me, therefore, that what is important in determining whether joinder is necessary is whether the court is still able to determine the questions or issues in dispute in so far as they affect the rights of the parties before it."

In the present case the cause of action and nature of relief sought by the appellant could easily be ascertained without the involvement of the City of Harare whose interest were not at stake.

See also the case of *Amalgamated Engineering* v *Minister of Labour* 1949 (3) SA 637 where it was held that once it is shown that one is a necessary party in the sense that he is directly and substantially interested in the issues raised in proceedings before the court and that his rights may be affected by the judgment of the court, the court will not deal with those issues without such joinder being effected. In the present case the court a quo properly decided on the matter without the City of Harare as the relief sought did not have effect on the rights of the City of Harare. The 4th – 6th grounds of appeal can be synthesised into one ground of appeal. The appellant sought to impugn the decision of the court *a quo* on the basis that all requirements of a final interdict were not met.

The requirements for a final interdict are fairly settled in our law. All the requirements have to be met in order for the relief to be granted.

The requirements can be summarised as follows:

1. A clear right which must be established on facts and law.
2. Irreparable injury or harm actually committed or reasonably apprehended.
3. The absence of a similar protection by any other party.
4. The balance of convenience.

See *Setlogelo* v *Setlogelo* 1914 AD 221, *Flame Lily Investment Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) and Another* 1980 ZLR 378 *Chirenje* v *Vendifin Investment P/L and Other* HH 4/05 and *Airfield Investments (Pvt) Ltd* v *Minister of Lands and Ors* 2004 (1) ZLR 511.

The respondents in this case trustees, were mandated to run the affairs of a trust. The trust business which the trustees were to manage was further sanctioned by a Memorandum of Agreement between the Trust and City of Harare. The trustees were entitled to occupy land on a build operate and transfer basis (BOT). As a result of such agreement the respondent's right are obvious and clear and such right would require intervention by law in the event of them being taken away or frustrated by another party. The appellant, a councillor of the area, certainly not City of Harare or the local authority was said to be always interfering and stopping

the construction and development by the respondents in a manner that amounted to injuring the respondents' rights. The rights of the respondent derived from the memorandum of agreement is clear testimony of existence of clear right warranting redress by way of interdict. The rights of the respondents are clear rights which exists in law and ought to be protected by law. See *Minister of Law and Order Bophuthaswana and Another* v *Commithere of Church Summit of Bophuthatswana and Ors* 1994 (3) SA 89 and also *Niversoul Merchant Bank Zimbabwe Ltd* v *The Zimbabwe Independent and Anor* 2007 (1) ZLR 234.

The respondents' clear right having been established, the second wrung which is clearly linked to the clear right would be an injury has been occasioned or is reasonably apprehended. The court *a quo* made a finding in its judgment that construction and development stopped at the instance of the appellant and that of necessity amounts to interference which was injurious.

The respondents were further barred from collecting subscriptions from their members and were threatened. In the face of clear right capable of legal protection being infringed there is no basis to find fault in the finding of the court *a quo* on the requirement of an interdict. The finding of the court in the case of *Sanpoulus Maplanka* v *S Masomera & Anor* HC 29/03 on the test for injury is instructive. It was held that: "put differently where an applicant for an interdict proves a clear right he merely has to show that an injury has been committed or that there is a reasonable apprehension that an injury will be committed." In the present case the respondent suffered harm as a result of the appellant's interference and given the clear right legally derived from the memorandum of agreement contract, the apprehension of harm being occasioned by the appellant is reasonable. Being barred from performing their duties and responsibilities as trustees in terms of the Memorandum Of Understanding is injury which when viewed in conjunction with the clear right warrant the remedy of an interdict. In the face of the onslaught by the appellant no other satisfactory remedy would be granted in the circumstance. The suggested piece meal approach of averting threats by police report or getting a peace order would not be as effective as a perpetual interdict. The other suggested remedies would not be adequate as they would still leave the respondents unable to carry out their duties and responsibility as lawfully derived from a contract the "MOU" with the City of Harare. Such a clear right capable of protection by law given the infringement clearly called for to a final interdict. In the circumstances of this case, the requirements of a final interdict were all established.

All the grounds of appeal raised by the appellant, a 3rd party who sought to interfere with parties to a contract's agreement could not be sustained. The appeal lacks merit and it ought to fail.

Accordingly it is ordered that

The appeal be and is hereby dismissed with costs.

MUNANGATI MANONGWA J agrees………………………

J. Mambara & Partners, appellant's legal practitioners
Gasa Nyamadzawo & Associates, respondent's legal practitioners