

MAVIS MUZENDA  
versus  
ISAAC MUZENDA N.O  
(In his capacity as Executor of the Estate of  
The late Makurudze Zizhou)  
and  
MARSHALL SAYI  
and  
RICHARD MARWEI  
and  
MWENEZI RURAL DISTRICT COUNCIL

HIGH COURT OF ZIMBABWE  
MWAYERA J  
MUNANGATI-MANONGWA J  
HARARE, 17 and 24 November 2016

### **Civil Appeal**

Mr *W Muzenda*, for the appellant  
Mr *T Masendeke*, for the respondents

MUNANGATI-MANONGWA J: On the 24<sup>th</sup> November 2016, we upheld the appeal in this matter with costs. A request for reasons having been made, these are they,

The appellant in this matter had applied for the following relief in the court *a quo*.

1. That 1<sup>st</sup> respondent be interdicted from claiming rentals from the applicant's tenants in respect of Stand No. 22 and 23, Neshuro Township.
2. That 2<sup>nd</sup> and 3<sup>rd</sup> respondents be interdicted from effecting payment of rentals into the 1<sup>st</sup> respondent's bank accounts.

The first respondent was the only respondent to oppose the application. Due to issues at hand the matter was referred for trial and at the end of trial the court *a quo* not only dismissed the application for an interdict with costs but it also concluded that stands 22 and 23 form part of the estate of the late Makurudze Zizhou among other stands and properties.

Aggrieved by such a ruling appellant appealed to this court on the following grounds:

1. The learned magistrate erred in finding that stands 22 and 23 form part of the Estate of late Makurudze Zizhou among other stands and properties.
2. The learned magistrate erred in dismissing the application for an interdict in *toto* when second, third and fourth respondent did not oppose the application.
3. The court *a quo* erred generally in dismissing the application despite the applicant having established all the elements and requirements for an interdict.
4. The court *a quo* misdirected itself in not awarding applicant costs of suit.
5. The court *a quo* misdirected itself in hearing oral evidence in the absence of an order of court so directing.

In order to appreciate the issues that were before the court *a quo*, it is important to note the background facts. The appellant had been taken to court in 2013 wherein the executor to appellant's father's estate had sought a declaration in case no. 2006/13 that registration of shop numbers 20, 21 and 25 into appellant's name be declared null and void and that the shops be part of the late Makurudze Zizhou's estate. Same was granted by the magistrates court.

When therefore the appellant applied for an interdict there was disagreement as between the parties as to whether stand numbers 22 and 23 were covered by that order of 2013. In that regard when the matter proceeded to trial, the issues before the court *a quo* were as follows:

1. Whether or not first respondent has any legal basis for claiming rentals from the applicant in respect of stands 22 and 23 on the basis of a judgment given under Case No. 2006/13.
2. Whether or not first respondent should be interdicted for claiming rentals in respect of the stand numbers 22 and 23.

The court *a quo* made a finding that stands 22 and 23 form part of the estate of the late Makurudze Zizhou. This was a misdirection on its part. It was never called upon to adjudicate the dispute of the ownership of these stands. The question was whether the order granted in Case No. 2000/13 encompassed stands 22 and 23. The order referred to clearly did not. It was specific in nature. It declared wrongly or rightly that registration of stands 20, 21, 25 into appellant's name was null and void. This order had nothing to do with stands 22 and 23. That the court *a quo* was losing direction in its deliberations is borne by the following statement on page 9 of the record:

“As said above, the court is now faced with the question to determine whether stand numbers 22 and 23 that the plaintiff claims, form part of the estate or not. I have knowledge that this is not the main issue looking at the pre-trial minutes but both the plaintiff and the defendants have clandestinely reverted back to the issue and therefore this court will deliberate on the issues as submitted by both parties during trial – and lastly deliberate the issue of whether plaintiff is entitled to interdict respondent from collecting rentals”

The magistrate acknowledged that this was not the issue before him, it being so the court *a quo* had no business diverting from issues before it. That being so, the court’s finding that stands 22 and 23 form part of the estate of the late Makurudze Zizhou cannot stand and the appellant’s ground of appeal on that issue therefore succeeds.

Further in the absence of any opposition by the second, third and fourth respondents, the second and third being the tenants concerned, the court in the absence of any cogent reasons had no reason to dismiss appellant’s application as against them. The fourth respondent being a Rural District Council with no relief particularly sought against it but only cited as an interested party could have been excused. Thus this appeal ground also has merit.

The question then arises whether it was proper to dismiss applicant’s application for an interdict. The requirements of a prohibitory interdict are as follows: a clear right, an injury actually committed or reasonably apprehended and the absence of a similar protection by any other ordinary remedy. See *Tribac (Pvt) Ltd v Tobacco Board*.<sup>1</sup>

*In casu* the appellant has a lease agreement with the fourth respondent the Rural District Council with respect to the 2 (two) stands now known as stands 503 and 504 and is recognised by the fourth respondent as the legal leaseholder. This is borne not only by the lease agreements that are on record but by an affidavit sworn to by the Chief Executive Officer of Mwenezi Rural District Council on the 15<sup>th</sup> October 2014 <sup>2</sup> wherein he confirms appellant’s rights. The fourth respondent being the responsible authority, their confirmation puts the issue to rest.

By furnishing these documents, appellant established clear a right to the shops. This the first respondent could not challenge through his witnesses. When asked what documents they had to show that stands 22 and 23 belonged to the estate they did not have any. The first

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<sup>1</sup> *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2 ZLR 52 (S)). See Herbstein & Van Winsen Civil Practice of the High Courts in South Africa Vol 5<sup>th</sup> Ed p 145

<sup>2</sup> Affidavit p 66 and lease agreements p 67-72

respondent's witness Rangarirai Zizhou even conceded that on paper the appellant was an owner.<sup>3</sup>

Further, evidence that the first respondent was collecting rentals from tenants by force was before the court by way of an admission by the same Rangarirai Zizhou who in his evidence in chief indicated that "we are the ones collecting rentals by force" and under cross examination he admitted that they are forcibly collecting rentals because the rentals belong to the estate. This evidence clearly shows injury to the appellant who was losing rentals to persons who took the law into their own hands. Nothing more was required to establish appellant's claim. Seeking an interdict became the only option for the appellant in the circumstances and the elements thereof having been satisfied, an interdict should have been granted. In that vein we uphold that ground of appeal.

The determination of whether or not the stands in question formed part of the deceased estate was/is a different question altogether which was not before the court.

That the court heard oral evidence was not a misdirection on its part for the court in applications may in its discretion admit oral evidence. In any event, the matter had been turned into trial proceedings when it was referred for trial with specific issues to be determined as per the pre-trial conference minute.

Despite successfully challenging the court *a quo*'s decision the relief sought by the appellant in clause (a) was incompetent save for the relief in clause (b). Accordingly it is ordered that:

The appeal be and is hereby upheld with costs, the court *a quo*'s judgment is set aside and substituted as follows:

1. The first respondent be and is hereby interdicted from claiming rentals from the applicant's tenant in respect of stand No. 22 and 23, Neshuro Township Mwenezi
2. The second and third respondents be and are hereby interdicted from effecting payment of rentals into the first respondent's bank accounts.
3. The first respondent to pay costs.

MWAYERA J *agrees*

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<sup>3</sup> See p25 and 27 of the record

*Muzenda & Chitsama Attorneys*, appellant's legal practitioners