

REPORTABLE (45)

ROSE NATALIE HEUER
v
(1) TWO FLAGS TRADING (PRIVATE) LIMITED
(2) PROVINCIAL MINING DIRECTOR-MASVINGO
(3) MINISTER OF MINES & MINING DEVELOPMENT N.O

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA JA & MWAYERA JA
BULAWAYO, NOVEMBER 23, 2023 & 30 MAY 2024**

W. Ncube with *M. Tshuma*, for the appellant

T. Mpofu, for the first respondent

No appearance for the second and third respondent

GUVAVA JA:

[1] This is an appeal against the judgment of the High Court of Zimbabwe (‘court *a quo*’) dated 15 June 2023 in which it dismissed an application for a final interdict sought by the appellant against the respondents. The first respondent, which had an obvious interest in the matter, vigorously opposed the application while the second and the third respondents chose to abide by the decision of the court.

FACTUAL BACKGROUND

[2] The facts of this matter serve to highlight the dispute that has been raging between the parties over ownership of mining claims for over a decade. The appellant is a private individual based in Bulawayo. She is in the business of mining. The first respondent is a company, duly incorporated in accordance with the laws of Zimbabwe and operates as a

mining entity. The second and the third respondents are the Provincial Mining Director for Masvingo Province and the Minister responsible for the Ministry of Mines and Mining Development. Both are cited in their official capacities.

[3] On 30 June 2003, a company known as Reedbuck Investments (Private) Limited entered into an agreement of sale with the first respondent in respect of certain mining claims. Reedbuck Investments (Private) Limited was represented by one Robert Michael Mcindoe ('Mcindoe'), in his capacity as a Liquidator of the company. The agreement related to the sale of mining claims, buildings, furniture and fittings, plant, tools and equipment situated on thirty mining locations known as Lennox Mine and Empress Mine.

[4] On 28 November 2006 under Forfeiture Notice No. 4/06 certain mining locations were forfeited in terms of s 260 (1) of the Mines and Minerals Act [*Chapter 21:05*] (the 'Mines and Minerals Act'). The mining claims sold to the first respondent by Reedbuck Investments (Private) Limited were part of the list of mining claims that were forfeited. Although, the mining claims were forfeited in 2006, the appellant subsequently acquired sixteen of the forfeited mining claims, through original acquisition, during the period dating from 2009 to 2013. The sixteen mining claims were: Claims No. 12967; 12968; 12969; 12970; 12971; 12972; 11688; 11689; 11690; 11691; 11359; 11360; 11361; 11479; 11480; and 11481. It is not seriously disputed that these claims constituted part of the mining claims that had been purchased by the first respondent from Mcindoe.

[5] Disgruntled by the order of forfeiture, the first respondent proceeded to make an application under HC 11857/15 for a declaratory order that the agreement of sale, dated 30 June 2003, between it and Reedbuck Investments be declared lawful and binding. The

appellant was not a party to the application. On 27 January 2016, MUREMBA J granted the application and made the following order:

- i. The agreement of sale between the applicant (Two Flags) and the first respondent (Mcindoe) dated 30 June 2003 be and is hereby declared lawful and legally binding. The applicant be and is hereby declared to be the sole lawful owner of the building, furniture and fittings, plant, tools and equipment located at the mining claims listed in Annexure 'A' to this agreement of sale.
- ii. The second respondent be and is hereby ordered to immediately transfer the mining claims described in para 1 of this Court order into the applicant's name.
- iii. The second respondent to pay costs of suit."

[6] The effect of the order granted under HC 11857/15 was to validate the agreement of sale entered into by the first respondent and Mcindoe in relation to the mining claims which had been forfeited on 28 November 2006. Subsequent to the grant of the *declaratur*, the first respondent filed another application under HC 2901/16 for an order compelling the second and the third respondents to transfer the mining claims to it. On 21 November 2016, DUBE J (as she then was) granted the application and made the following order:

- i. The first and second respondent (Ministry of Mines) be and are hereby directed to comply with the order of this Honourable Court in case number HC 11857/15 dated 27 January 2016 not later than 30 working days of granting of this order.
- ii. Failure to comply with para (1) above, applicant (Two Flags) may enroll this application on the unopposed roll.
- iii. There shall be no order as to costs of suit."

[7] Pursuant to the grant of the orders under HC 11857/15 and HC 2901/16 ('the two court orders'), the mining claims subject to the agreement of sale with Mcindoe were transferred to the first respondent by the second and the third respondents. It is uncontroverted that, at the time, the appellant was carrying out mining activities on some of the claims and maintaining inspection certificates over the same claims. The appellant became aware that

the first respondent also possessed mining rights on the same claims she believed to be hers after the two court orders were granted. As the appellant and the first respondent were competing over the same mining claims, a boundary dispute ensued between them.

[8] Armed with the two court orders, the first respondent made an application under HC 6149/21 seeking an order that the second respondent determine the physical boundaries of the mining claims of the appellant and the first respondent. On 8 June 2022, NDLOVU J granted the following order:

- i. The application be and is hereby granted.
- ii. The third and fourth respondents be and are hereby ordered to conduct a beacon verification and inspection to ascertain the extent of applicant's mine relative to that of first and second respondent.
- iii. In the event that the beacon verification and inspection determine that there exists an encroachment by the first and /or second respondent, it be and is hereby ordered that they vacate the applicant's mining claims to the extent of the encroachment.
- iv. In the event of the first and second respondent failing to vacate applicant's mining claims as set out in paragraph 3 of this order the Sheriff or his lawful deputy be and is hereby directed and ordered to eject the first and second and / or second respondent from the applicant's mining claims within five days of the grant of this order.
- v. There be no order as to costs."

Dissatisfied with the findings emanating from the report, the appellant appealed the decision of NDLOVU J under case number SC 250/22. On 15 September 2022, the Supreme Court dismissed the appeal with costs.

[9] The appellant was aggrieved by the dismissal of the appeal and launched an application, which is now the subject of this appeal, in HC 2423/22 seeking an order that she be declared the lawful owner of the sixteen mining claims and an interdict stopping the first

respondent from interfering with her claims. It was the appellant's case, as set out in her founding affidavit that, she was the owner of the claims and that she had property rights that were guaranteed by the Mines and Minerals Act. The appellant averred that, the failure by the second respondent to carry out a boundary verification as mandated by the court, amounted to a failure to comply with a lawful court order and an administrative obligation. The appellant further averred that a failure to have the boundary dispute resolved would result in third parties encroaching into her mining location resulting in irreparable harm occurring as she would lose her mining claims.

[10] It was the appellant's submission that she had no alternative remedy to the dispute other than to seek an interdict. The appellant thus, prayed that the application be allowed and the first respondent be interdicted from interfering in her mining claims.

[11] The first respondent opposed the application and raised preliminary objections to the effect that the appellant had no cause of action against it, that the matter was *res judicata* and that the relief sought was defective. On the merits of the matter, the first respondent averred that it was not aware that the appellant had pegged and acquired the sixteen mining claims. The first respondent maintained that it had ownership over the mining claims in terms of the two court orders granted by the court in HC 1187/15 and HC 2901/16 and the subsequent transfer of the mining claims to it. It further averred that the boundary dispute between the parties had been effectively resolved with a finding, by the first respondent that the appellant had encroached on its mining claims. It further averred that the appellant had to be evicted from those claims in terms of the order granted under HC 6149/21.

[12] In respect to the relief of a final interdict, the first respondent averred that the appellant had no clear right to the claim as it had ownership rights over the same claims and the report of the second respondent stated that she was the one who had encroached into the first respondent's mining claim. The first respondent maintained that the appellant had failed to satisfy the requirements for a final interdict and prayed for the dismissal of the application with costs.

[13] The appellant filed an answering affidavit and in replication averred that the parties did not have contiguous mining locations as the mining claims which the first respondent is alleged to own had been forfeited by an order of second and third respondent. She also stated that the two court orders which the first respondent placed reliance on in claiming ownership of the mining claims, had no effect as they related to the transfer of claims which had been forfeited by the third respondent. She further averred that the judgments upon which the first respondent sought to rely upon were a nullity as they had been obtained through fraud as the appellant was never cited as a party.

[14] The court *a quo* in determining the application dismissed the preliminary objections raised by the first respondent. On the merits, the court noted that the appellant had not challenged or sought to set aside the two court orders either on appeal or through rescission proceedings and as such they remained extant and binding. The court noted that the appellant could not seek an order declaring her the lawful owner of the sixteen mining claims as the court orders had given the first respondent ownership rights over the same mining claims.

[15] The court further found that as long as the court orders remained extant their legal consequences could not be overlooked. It was the court's finding that the relief sought by the appellant, of an interdict, could not be granted as such an order would have the effect of overturning two extant court orders without following due process. With regards to the argument advanced by the appellant that the two orders were fraudulently obtained, the court found that it could not make such a finding in the absence of an application to set them aside. In the final analysis, the court *a quo* thus found that the two court orders remained valid and binding. The court concluded that the appellant had failed to satisfy the requirement of a clear right and that, in the absence of such right, there was no harm or perceived imminent harm against which an interdict could be granted. In the result the court dismissed the application with costs.

[16] It is this decision of the court *a quo*, that the appellant has appealed to this Court on the following grounds:

1. The court *a quo* erred in law and misdirected itself in finding that the Appellant did not have a clear right, this despite its claims having been acquired through original acquisition, being extant and never having been forfeited.
2. The court *a quo* erred in law and misdirected itself in finding that the court orders under case numbers HC 11857/15 and HC 2901/16 were not void *ab initio*, this despite the appellant not being cited in aforementioned matters notwithstanding that she was an interested party, the court not having jurisdiction to revive forfeited claims, which jurisdiction is exclusively vested in the mining commissioner.
3. The court *a quo* erred in law and misdirected itself in failing to find that the orders HC 11857/15 and HC 2901/16 were not *brutum fulmen* as one cannot

lawfully transfer more rights than they have, which is what the aforementioned order attempted to do

4. Even assuming that the court *a quo* was correct in its findings that the court orders under case number HC 1187/15 and HC 2901/16 were valid and extant, the court *a quo* erred and misdirected itself in finding that the appellant does not have a clear right, this despite its title being unimpeachable in terms of the law.
5. Notwithstanding its findings that the court orders under case numbers HC 11857/15 and HC 2901/16 which granted the first respondent's claims, the court *a quo* misdirected itself and erred at law by failing to determine whether the appellant has extant claims, which should have been set the subject matter of the court's enquiry in determining whether the appellant has a clear right. In misdirecting itself the court *a quo* ultimately failed to conduct an enquiry into the rights of the appellant and to determine whether those rights were clear in nature
6. The court *a quo* erred in law in finding that the appellant was not entitled to the relief of a final interdict this despite meeting all the requirements of an interdict.

APPELLANTS' SUBMISSIONS ON APPEAL

[17] Mr. *Ncube*, for the appellant, submitted that the issue for determination, which would have the effect of disposing the appeal, was whether or not the court *a quo* erred in finding that the two orders of the High Court were extant. Further, whether the appellant's rights had been affected, and in particular whether or not, because of those two orders, the appellant had not established a clear right for the granting of a final interdict. Counsel argued that the two orders of the High Court, being a nullity, due to non-citation of the appellant as an interested party, the court *a quo* should not have placed any reliance on them. He reiterated

that the non-citation of the appellant nullified the two orders as it was a clear violation of the appellant's right to be heard as provided for in terms of s 69 of the Constitution Amendment (No. 20) Act 2013.

[18] Counsel also submitted that the appellant acquired mining rights during the period when the first respondent's claims had been forfeited. The appellant also complained that the order granting the first respondent the right to execute and evict her had the effect of extinguishing her rights. Counsel also averred that the report by the second respondent resulted in appellant's claims falling completely within the first respondent's boundaries. On the issue of forfeiture, he averred that in terms of s 271 of the Mines and Minerals Act, once the first respondent's claims had been forfeited by the Mining Commissioner, only the commissioner could reverse the forfeiture hence the court *a quo*, in awarding the claims to the first respondent, had acted without the requisite jurisdiction to deal with a dispute involving forfeited claims.

FIRST RESPONDENT'S SUBMISSIONS ON APPEAL

[19] Mr. *Mpofu* for the first respondent, highlighted that what was sought before the court *a quo* was an interdict stopping the first respondent from interfering with the appellant's claims. He submitted that the appellant, in her founding affidavit, admitted that there was an extant dispute over the claims. It was his submission that, such an admission, meant that she could not thereafter claim an order for a final interdict as this would have the effect of stopping the first respondent from benefitting from its claims. Counsel contended that the two court orders, in first respondents' favour, could not be ignored as long as they were extant. He submitted that the essence of the orders was such that the appellant could not claim the existence of any clear right for a final interdict to be granted.

[20] Counsel further submitted that, on the basis of the doctrine of *stare decisis*, the High Court did not have the luxury of contradicting the judgment of the Supreme Court handed down under SC 250/23. He also averred that the question of the existence of the two court orders was not new to the appellant and that if she was of the view that the court orders were invalid for non-citation, she ought to have approached the High Court with an application in terms of r 29 of the High Court Rules, 2021. Counsel maintained that in the absence of such an order granted in terms of r 29, the court *a quo* could not interdict that which was lawful and extant until and unless set aside. Counsel further contended that the judgment of the court *a quo* correctly found that the two court orders were binding and on this basis the appellant could not establish a clear right, a necessary requirement when seeking an interdict.

[21] Counsel further submitted that the appellant could not raise the issue of forfeiture and fraud as these issues were not part of its case in the founding affidavit but were only raised for the first time in her answering affidavit. He argued that it was a principle of the law that an application stands or falls on its founding affidavit and as such the argument advanced by the appellant that forfeiture rendered the two court orders invalid could not be entertained. Counsel thus prayed for the dismissal of the appeal with costs on a legal practitioner and client scale.

ISSUES FOR DETERMINATION BEFORE THIS COURT

[22] It appears to me that two issues arise for determination from the grounds of appeal and the submissions made by counsel before this Court. These are:

- i. What is the effect of the court orders in HC 11857/15 and HC 2901/16 in establishing a clear right in an application for an interdict; and

- ii. Whether the requirements of an interdict were satisfied.

ANALYSIS

The effect of the court orders HC 11857/15 and HC 2901/16.

[23] Mr *Ncube*, counsel for the appellant motivated the success of the appeal on the main point that the court orders in HC 11857/15 and HC 2901/16 were invalid as they were fraudulently obtained. *Per contra*, Mr *Mpofu*, counsel for the first respondent maintained that in the absence of any challenge to the two court orders, the same, remained extant and binding.

[24] It is common cause that the sixteen mining claims which form the center of the dispute were forfeited on 28 November 2006. The second respondent and the third respondent never revoked the forfeiture orders in respect to the mining claims. However, the first respondent obtained ownership rights of the forfeited mining claims through an order of court under HC 11857/15. The second and third respondents transferred the ownership rights to the first respondent following the order of court in HC 2901/16. The application under HC 11857/15 was not opposed by the second and third respondents whilst the application under HC 2901/16 was granted with the consent of the second and third respondents. The appellant was not cited as a party to these applications.

[25] The issue that begs the court's determination relates to the effect of the two court orders *viz-a-viz* the appellant's right to seek an interdict stopping the first respondent from interfering with the mining claims. The starting point is to determine the extent to which an unchallenged court order remains extant.

[26] A court order is the means by which decisions or judgments of judicial officers are issued from a court. A court order by its very nature is one which is binding upon the parties it is made against and must be one which the parties can enforce. It follows that, every person against or in respect of whom the order is made by the court of competent jurisdiction must obey it, unless and until that order is discharged. In the absence of a challenge against the order through an appeal, review or procedure for rescission, an order of a court of unlimited jurisdiction remains extant and binding (see *Manning v Manning* 1986(2) ZLR 1 (SC) & *Mkize v Swemmer & Anor* 1967 (1) SA 186 (D) at 197 C-D)

[27] *In casu*, the two orders were granted by the High Court which is a court of unlimited jurisdiction. The orders were clear and enforceable, hence the second and third respondents acted upon them. The orders were thus valid and remained extant. The court *a quo* correctly found that the court orders remained extant and binding upon the parties including the appellant and such finding is unassailable.

[28] Counsel for the appellant sought to persuade the Court that, despite the fact that the two orders were extant, they were of no force as they had been fraudulently obtained as the appellant was never served and was not cited as a party in both applications. The argument finds no merit for the following reasons. Firstly, this issue was only raised in the appellants answering affidavit. It is trite that a party's claim stands or falls on its founding affidavit. A party cannot seek to introduce a new cause in the answering affidavit which was never part of the initial claim. The clear rationale behind this principle is that a respondent does not have an opportunity to respond to the averments made in answering papers. Thus, a lot of energy was unnecessarily expended by counsel for the appellant in citing foreign authorities on the effect of fraudulently obtained orders when no factual basis had been established for making such arguments.

[29] In any event, while it was not immediately apparent from the cases cited whether or not a remedy exists for a party who has been so affected by such an order, our law clearly lays out a remedy which the appellant ought to have employed in challenging the court orders in a bid to protect her rights over the mining claims. That the orders had an impact on her rights over the mining claims is not in dispute as the claims also formed part of the first respondent's claims. The appellant's remedy fell squarely in terms of the law and it was incumbent upon her to exercise that remedy.

[30] Rule 29 (1)(a) of the High Court Rules, 2021 ('High Court Rules') which incorporated the old r 449 of the High Court Rules, 1971 provides for a remedy which the appellant ought to have made use of in seeking the rescission of the two orders which were granted in her absence. Rule 29 of the High Court Rules provides as follows:

“Correction, variation and rescission of judgments and orders.

(1) The court or a judge may, in addition to any other powers it or he or she may have, on its own initiative or upon the application of any affected party, correct, rescind or vary—

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; or

....

(2) Any party desiring any relief under this rule may make a court application on notice to all parties whose interests may be affected by any variation sought, within one month after becoming aware of the existence of the order or judgment.

(3) The court or a judge shall not make any order correcting, rescinding or varying an order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed”

[31] In *Munyimi v Tauro* 2013 (2) ZLR 291 (S) at 294 F-G the court discussed the above procedure to mean:

“It is a general principle of our law that once a final order is made, correctly reflecting the true intention of the court, that order cannot be altered by that court. Rule 449 is an exception to that principle and allows a court to revisit a decision it has previously made but only in a restricted sense. Where a court is empowered to revisit its previous decision, it is not, generally speaking, confined to the record of the proceedings in deciding whether a judgment was erroneously granted. The specific reference in r 449 to a judgment or order granted “in the absence of any party affected thereby” envisages a situation where such a party may be able to place facts before the latter court, which facts would not have been before the court that granted the order in the first place – see *Grantully (Pvt) Ltd & Anor v UDC Ltd* 2000 (1) ZLR 361(S), 364 H – 365 A-B”

[32] The appellant failed to utilise the remedy available to her as provided for in the rules of the court and as such she was bound by the court orders. In making this finding the remarks made in *Magauzi & Anor v Jekera* SC 54/22 are instructive in that:

“When a court grants an order all subsequent acts affecting the dispute between the parties rely on the court’s order and not the reason or facts the court based its judgment on...Therefore a party or the parties cannot disregard a court order as they are bound by it. In the case of *Chiwenga v Chiwenga* SC 2/14, it was stated that: The law is clear that an extant order of this Court must be obeyed or given effect to unless it has been varied or set aside by this Court and not even by consent can parties vary or depart therefrom. See also *CFU v Mhuriro & Ors* 2000 (2) ZLR 405 (S).”

The two court orders have the effect of diluting the appellant’s rights to the claims as they give the first respondent ownership rights over the same mining claims. Thus, unless and until they are set aside by a court of competent jurisdiction, they remain extant and binding upon the parties. Clearly the court *a quo* was correct in making this finding.

Whether the requirements of an interdict were satisfied.

[33] The appellant approached the court *a quo* with an application for a final interdict, seeking an order that the respondents be stopped from interfering with her exclusive rights to the ownership of the said mining claims. The court *a quo* found that the court orders in HC 11857/15 and HC 2901/16 remained extant and binding. The court further found that the appellant, faced with such extant court orders, could not seek the said relief as she failed to establish a clear right.

[34] It is a settled principle of law that a party, to be entitled to a final interdict, has to satisfy specific requirements. The requirements for a final interdict are settled in this jurisdiction and these are:

- (a) a clear right;
- (b) an injury actually committed or reasonably apprehended; and
- (c) the absence of a similar protection by any other remedy.

See *Econet Wireless Holdings & Ors v Minister of Finance & Ors* 2001 (1) ZLR 373 (S) at p 374 B, *Setlogelo v Setlogelo* 914 AD 221 at 227; *Charuma Blasting & Earthmoving Svcs (Pvt) Ltd v Njanjai & Ors* 2000 (1) ZLR 85 (S) at 89 D *Blue Rangers Estates (Pvt) Ltd v Muduviri & Anor* 2009 (1) ZLR 368 (S).

[35] The existence of a clear right in an application of this nature is a prerequisite to the consideration of other requirements for the interdict. A clear right, as suggested by its name, is a right that is not open to doubt. The authors Cilliers AC, Loots C and Nel HC in their text *Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa* (5th edition, Juta and Co. Ltd, Cape Town 2009) at p 1459 - 60 define the meaning of clear right as they relate to interdicts as:

“...the word ‘clear’ relates to the degree of proof required to establish the right and should strictly not be used to qualify ‘right’ at all. ...a clear right must be established on a balance of probabilities”

In *Movement for Democratic Change (Tsvangirai) & Ors v Lilian Timveos & Ors* SC 9/22 the Court defined a clear right as follows:

“... where a final interdict is sought, the right must be established clearly as opposed to it being *prima facie* established. Thus, the word clear in the context of rights in an interdict does not qualify the right but rather expresses the scope to which the right has been established by evidence on a balance of probabilities.”

[36] A clear right must be established on a balance of probabilities through facts and evidence which prove the right. In *Milner v Minister of Pensions* 1947 2 All ER 372 at p 374 the court noted that proof on a balance of probabilities can be interpreted to mean that:

“It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal, it is not”.

The appellant had the duty to overcome this hurdle of establishing a clear right on a balance of probabilities before satisfying the remaining requirements for seeking an interdict. In order to prove her claim the appellant produced inspection certificates as evidence to show that she had been carrying out mining activities on the mining claims. The first respondent on the other hand challenged the appellant’s rights over the mining claims on the basis that it, too, holds mining rights over the same claims. Therefore, there were two conflicting claims on the same properties by the appellant and the first respondent. Both parties had documentation proving their right over the mining claims.

[37] The court *a quo*, faced with the two conflicting claims determined that, for as long as the court orders in HC 11857/15 and HC 2901/16 remained extant and binding, the appellant could not claim a clear right over the mining claims as the first respondent similarly enjoyed similar rights over the same mining claims. The finding by the court *a quo* was correct. Once there were two conflicting claims the appellant could not establish that she had a clear right over the mining claims allowing her to stop the first respondent from

executing a lawful court order. As the appellant failed to establish a clear right which is the very first requirement to be fulfilled before one can obtain a permanent interdict, it is unnecessary to delve into the question of whether or not the other requirements were satisfied.

DISPOSITION

[38] The appellant approached the court *a quo* seeking a final interdict. It was incumbent upon her to satisfy the requirements of an interdict. She failed to satisfy the first requirement which is that she had a clear right to the mining claims. She thus failed to satisfy the very first hurdle that she was obliged to overcome in order to obtain the relief she sought. In the absence of a clear right there could be no harm or imminent harm against which she could seek protection from the court. The court *a quo* correctly found that the appellant failed to satisfy the requirements for a final interdict and in the circumstances the appeal must fail.

[39] With regards to costs, counsel for the first respondent prayed that the appeal be dismissed with costs on a higher scale. In seeking the prayer, counsel argued that the appellant was alive to the fact that the appeal was frivolous as she had not done anything to set aside the two court orders and that therefore she had unnecessarily put the first respondent out of pocket. Costs on a higher scale are generally awarded in circumstances where the following aspects are detected; dishonest or malicious conduct, and vexatious, reckless or frivolous proceedings by and on the part of the litigant concerned. (See *Dongo v Joytindra Natverial Naik & Ors* SC 52/20)

[40] The facts of the present case show that the appellant's appeal was not frivolous or vexatious. The appellant genuinely believed that the two court orders were a nullity and

as such had no effect on her mining rights. The appellant cannot in these circumstances be punished for pursuing legal remedies in order to protect her perceived claims. Such an order of costs would have the effect of undermining a litigant's rights to access of justice. The court finds that the first respondent has not advanced sufficient reason to *mulct* the appellant with costs on a legal practitioner and client scale. In this regard, the first respondent, having successfully defended the appeal, is entitled to costs on the ordinary scale.

[41] In the result, it is ordered that:

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

MAVANGIRA JA : I agree

MWAYERA JA : I agree

Webb, Low & Barry Inc Ben Baron & Partners, appellant's legal practitioners

Tabana & Marwa, 1st respondent's legal practitioners